



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 142 OF 2019

CONSOLIDATED WITH HCCRA. NO. 143 & 144 OF 2019

ANTONY KIILU MAINA 1ST APPELLANT

MICHAEL MUTISYA KYENZE.....2ND APPELLANT

ANTONY WEKESA SITUMA3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original Conviction and Sentence of Hon. J.N Mwaniki (SPM) in Makueni Senior Principal Magistrate's Court Criminal Case No. 373 of 2018 delivered on 1st October, 2019)

JUDGMENT

1. **Antony Kiilu Maina, Michael Mutisya Kyenze and Antony Wekesa Situma** hereinafter referred to as the 1st, 2nd and 3rd Appellants respectively were together with others who were acquitted jointly charged with the following offences.

1st count: Robbery with violence contrary to section 296(2) of the Penal Code. The particulars being that the 1st, 2nd and 3rd Appellants on the night of 21st and 22nd day of October 2017, at Kenya pipeline pump station No. 6 Makindu, in Kiundwani area of Nguumo location within Makindu sub-county of Makueni county, jointly with others not before court, stole 33,000 litres of refined petrol value at Kshs.3,431,670/= from Kenya pipeline pump station No.6 sampling point, which is used for conveyance of petroleum products, the property of the Kenya pipeline company, and after the time of robbery, used personal violence by beating **Aden Abdullahi Abdi** to overcome the resistance in order to retain the stolen petroleum products.

Alternative count: Stealing goods in transit contrary to section 279 (c) as read with section 20(1) of the Penal Code. The particulars being that the 1st, 2nd and 3rd Appellants were on the night of 21st and 22nd day of October 2017, at Kenya pipeline pump station No. 6 Makindu, in Kiundwani area of Nguumo location within Makindu sub-county of Makueni county, jointly with others not before court, stole 33,000 litres of refined petrol value at Kshs.3,431,670/= from Kenya pipeline pump station No. 6 sampling point, which is used to convey petroleum products, the property of the Kenya pipeline company.

Count II: Assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars being that the 2nd Appellant on the night of 21st and 22nd day of October 2017, at Kenya pipeline pump station No. 6 Makindu, in Kiundwani area of Nguumo location within Makindu sub-county of Makueni county, unlawfully assaulted **Adan Abdullahi Abdi** thereby occasioning him actual bodily harm.

2. After a full hearing the court found the Appellants guilty and convicted them of the main count of robbery with violence and sentenced each to twelve (12) years imprisonment. The 2nd Appellant was acquitted of the 2nd count under section 215 Criminal Procedure Code.

3. The Appellants were aggrieved with the whole judgment and filed appeals No.s HCCRA No. 142/19/ 143/19 and 144/19 which were later consolidated with HCCRA. No. 142/2019, as the lead file.

4. They raised the following common grounds of appeal through learned counsel Mr. E.K Omenya.

a) That, the learned Magistrate erred in law in failing to take cognizance of the fact that the ingredients and evidence required of robbery with violence were not proved by the prosecution beyond reasonable doubt as by law required.

b) That, the learned Magistrate erred in law by holding that the prosecution had proved its case beyond reasonable doubt contrary to the light weight evidence adduced at the trial and thereby occasioning miscarriage of justice.

c) That, the learned Magistrate erred in law by convicting the Appellants on insufficient evidence but working on assumption without physical evidence.

d) That, the learned Magistrate erred in law by admitting electronic evidence contrary to the Evidence Act Laws of Kenya.

e) That, the learned Magistrate erred in law by admitting statements under inquiry as part of the evidence.

f) That the learned Magistrate erred in law and fact by convicting the Appellants on circumstantial evidence.

g) That, the learned Magistrate erred in law by disregarding the convincing evidence adduced by the Appellants in their respective defences.

5. The prosecution case is premised on the evidence of thirteen (13) witnesses. Pw1, Pw3, Pw7 and Pw8 were all employees of Kenya pipeline company the complainant herein. None of them appeared to have been on duty on the night of 21st/22nd October, 2017 but they in one way or another arrived at the scene which was Kenya pipeline pump station No. 6 Makindu.

6. Pw1 **Aden Abdullahi Abdi** testified that he was a watchman at the said station. On 22nd October 2017, night he handed over his shift to the 2nd Appellant. Later that night he received information through a message on his phone to the effect that a vehicle had been driven to station No. 6. He got concerned because vehicles were not allowed at the said station. He informed Pw2 **Tarus Kibet Boas** and Pw8 **Mr. Jeremiah Kipsang** and they all including Pw7 **Jonathan Naibe** met at the scene.

7. At the scene he was stopped by the 2nd Appellant from going to where the strange vehicle had been parked. He also told him not to call the supervisor. They however proceeded to where the vehicle was parked and found four (4) people. One person was at the restricted area, another on top of the tank, another on the vehicle's cabin while another stood nearby. Pw1 did not identify any of the four (4) people though there was electric light at the scene. The motor vehicle was registration No. KBP 480B a white Scania truck. He saw a pipe drawn from the restricted area to the truck over the barbed wire fence. He even took a photo of the scene.

8. It was his evidence he said that the four (4) intruders were arrested by the duty officer (*David Kaitany*) who also took the vehicle keys. After locking them up he called the 3rd Appellant an AP who was attached to the Kenya pipeline. The 3rd Appellant came and went to where the suspects had been locked up. Pw1 stated that they had also called for reinforcement from station 5.

9. Pw1 further stated that Pw2 **Tarus Kibet Boas** excused himself saying he was going for a jacket. The 3rd Appellant also left saying he was going for handcuffs. He then saw the vehicle leaving slowly while Bernard Kimotho who was supposed to be manning the gate was busy watching television. Pw1 blocked the motor vehicle from leaving by lowering the barrier. The 2nd Appellant told him to let the motor vehicle go. When he refused to comply he was boxed very hard and beaten with an object by the said Appellant and he collapsed. He was later taken to hospital by Pw2.

10. He suffered injuries on the head and other parts and was not able to work for nine (9) months. He identified the diary (EXB1) as the one they used to sign. It was his evidence that the four (4) suspects were in the motor vehicle when it left. He said loading of fuel is not allowed at the said station which is only meant to pump fuel and boost its flow speed. An overflow of fuel may only be onto a company vehicle but under strict procedure.

11. In cross examination he said the strange motor vehicle only used the road with the barrier when exiting. It had been parked outside the plant area adjacent to the fence. On being shown EXB1 (*diary*) he said the same confirmed that all the seals at the pump station were in place. Further that EXB1 was only signed when issues on seals arose. He didn't tell the 3rd Appellant about the lorry as he suspected him, following some rumours that were doing rounds.

12. He confirmed having taken photos using his phone and that the photos he took were among those produced. He insisted that he witnessed the theft of fuel through a pipe. He denied interfering with the 2nd Appellant's work nor assaulting him.

13. In re-examination he reiterated that the 3rd Appellant was a suspect in this matter as he kept on monitoring his movement, bought him miraa and soda and even gave him his car keys.

14. Pw2 **Tarus Kibet Boas** a technician with Kenya pipeline handed over night duties to the 1st Appellant on 21st October 2017. He was informed by Pw1 of the lorry at the station and he proceeded there and found Pw1. His evidence as to what went on is similar to that of Pw1. He however added that the 1st Appellant is the one who removed the pipe from the truck. He then rushed to his house to get a jacket. When he returned he found Pw1 lying on the ground injured and the lorry had left. He identified the lorry's registration No. as KBP 480B.

15. In cross examination he said the motor vehicle left the station at about 3:15 am. He said the pump at the sampling point has one seal and when they checked it in the morning it was intact. He explained that it was possible to siphon fuel as they had a bolt which can be loosened and the seal is removed. This depended on how the seal had been put. In their case the seal was one and not tamper proof. Their digital system could detect siphoning of fuel through a drop in the pressure.

16. In re-examination, he said his work was only to operate the pump, oversee operations at the station and handle any emergencies. He

further stated that their visit to the scene the next morning revealed a loose bolt on the pipe and on opening it they found the seal intact. He was sure the fuel was stolen but he did not know how much was missing.

17. Pw3 **Mr. Joshua Mutea** is an operations manager with Kenya pipeline which transports fuel from Mombasa - Nairobi - Kisumu - Nakuru - Eldoret with pumping stations along the line among them station No. 6 Makindu. He testified that on the night of 21st/22nd October 2017, he received a report of a problem at Makindu station. He asked the security team in Nairobi to deal. He visited the station the next day. He said from Nairobi it had been noted that there was a drop in the pressure at Makindu at the time the incident was reported. He spoke to the 1st Appellant who was in-charge of station No. 6 but he told him he was not aware of any incident. He was not satisfied with his answer and barred him from entering the station.

18. Upon examining the sampling point, he noted a seal which looked intact but the nut securing it was loose. He removed the nut without interfering with the seal and he was able to access the flow of the fuel. That the seal was not properly put. This was purely the responsibility of the security team to ensure the seal was properly fixed. He explained that if a pipe is opened, the fuel gushes out at high pressure and becomes uncontrollable unless there was some connection from the pipe to another place.

19. Back in Nairobi and on checking the system they realized pressure dropped at station No. 6 at 12:30 am. The pressure had gone down to 13.99 from 29.08. It started rising at 3:02 am. The pipeline was then shut from Nairobi. From the graph, they calculated and found 32,600 litres valued at Kshs.3,431,670/= missing. He produced a graph/chart from the pipeline data scanner (EXB4) though the document did not show it was for station No. 6. This was normal as the chat never shows the station.

20. In cross examination he said the system does not generate the number of the station in question. He confirmed that the seal was not cut though ordinarily a seal would be cut in case of interference. He also said there was no spillage of the fuel. He was of the view that a plastic pipe would withstand any pressure as it was pumping at an open end though he would not know how the pipe was connected. However, he was of the view that if it was inserted into the truck component, the pressure would be sustained.

21. He was not aware of a shutdown at Manyani station at the time of the issue at Makindu. He was not aware if the 1st Appellant was asked to shut down a pipe. He was not also aware of any photo having been taken of the nut/seal at the sampling point. He denied recording any statement with the police saying he was only asked to come to court to testify. He confirmed that the company had issues of concern in regard to fuel siphoning.

22. Pw7 **Jonathan Naibei** was a security guard with the complainant. On this night he followed Pw2 and another whom he saw running to the station. He found Pw1 and 2nd Appellant engaged in a conversation. He also saw a big lorry parked near a fence with a pipe attached to it and the sampling area. The lorry was registration No. KBP 480B. Besides what Pw1 and Pw2 had testified against the 3rd Appellant and Kitany the witness said he saw the 1st Appellant enter the sampling area and assist the suspects disconnect the loose pipe which he handed to the suspect who drove off. He also saw the 2nd Appellant beat up Pw1 for declining to let the lorry leave.

23. He called Mombasa station twice over this matter. He said he suspected their armed security officers over this matter, and these were the 3rd Appellant and Kitany.

24. In cross examination he said he only went to the sampling area on 22nd October, 2017 and he saw no spillage. He again said he saw some little oil spilled where the lorry had been parked. He said the sampling valve had been closed with only one seal though ordinarily it always had two seals. To open the valve one has to break either the two or one seal. He did not see Pw1 assault the 2nd Appellant.

25. Pw8 **Jeremiah Kipsang** was called to the scene by Pw2. He gave similar evidence to that of Pw7, but added that the person he saw on top of the lorry was the 6th accused (*the owner of the lorry*) in the case before the trial court.

26. In cross examination he said he was a mechanical artisan but he could not do an emergency shut down of a pipe unless it had broken or ruptured. He saw dots of spilled oil where the lorry was parked. He said it was possible to open a pump without breaking the seal if the seal was not properly affixed in the first place.

27. Pw9 **Kelvin Kioko** a clinical officer based at Mulatia memorial hospital formerly Makindu nursing home treated Pw1 in 2017. He produced the medical cards and receipts as EXB6.

28. In cross examination he mentioned an error in their system where Pw1 was treated under wrong but similar names. The card he had showed Pw1 had lost two pre-molar teeth on lower jaw which was not the case. He however insisted that Pw1 was treated on 22nd October 2017 at their clinic.

29. Pw10 **Dr. Josephine Muthengi** of Makindu sub-county hospital examined and filled a P3 form for Pw1 on 25th October, 2017. She did not use the card (EXB6) to fill the P3 form. She found Pw1 to have suffered a bruise on the forehead and temple swelling on left cheek with red right eye, bruise on left side of the chest, bruise on upper left arm and lacerations on the right leg. The injuries were classified as harm.

30. Pw11 **Mark Mwangangi** is based at the weighbridge at Mlolongo where he works as an assistant manager with two others. He produced a report (EXB9) showing that on 22nd October, 2017 at 8:31 am the vehicle KBP 480B passed the said weighbridge. It was found to weigh 41 tonnes ~ 966 kilogrammes which was within the range. An empty ruck weighs 10-11 tonnes.

31. In cross examination he said the truck was Nairobi bound, as shown on the print out. He did not personally print out the data but the same was done from his office.

32. Pw4 No. 225175 **Inspector Peter Langat** who is based at Kenya pipeline Nairobi received a call from Janet a security officer on 22nd October, 2017 morning about 3:00 am. The call was about an incident of theft at Makindu. He left for station No. 6 Makindu in the company of others. He summoned the 3rd Appellant and Kitany to explain to him the occurrence. He learnt that an oil tanker had accessed the station and left under very unclear circumstances. A report was made at Makindu police station and the 3rd Appellant and his colleague Kitany were arrested and booked at Makindu police station.

33. In cross examination, he said from Pw1's statement he believed fuel had been siphoned. He could not access the plant area as it was a restricted area. He could not also see the point at which siphoning was done. He denied that the 3rd Appellant had been injured. He saw injuries on Pw1.

34. Pw5 **Daniel Khamisi** a data analyst from Safaricom Nairobi was requested vide a letter (EXB5(b)) to analyse eight (8) Safaricom accounts involving the Appellants and their co-accused. He did the analysis which he reduced into reports (EXB5c – g). He also produced his certificate dated 7/9/2018. He confirmed that the numbers he analysed did communicate with each other.

35. Pw6 No. 63937 **Corporal Samwel Mbat** is a scene of crimes officer based at Makueni police station. He testified that on 14th November, 2014 the DCIO Makindu (Pw12) asked him to take photos of different views of the scene at pipeline pump No. 6 at Makindu in his presence. He confirmed that he is gazetted vide Notice No. 4562 of 7/7/2003. He produced 35 photos EXB2(a) and his certificate EXB2(b). photos 15-34 whose CD he was given by Pw12 were processed in his presence and supervision. In cross examination he said he only took photos No. 1-14. The rest were taken by Pw12. He pointed out that photos No. 17 and 18 show a tanker siphoning fuel while photos No. 14 shows the sampling point. That there was no spillage and the hose pipe is flexible.

36. Pw12 No.230770 **Jimmy Harlod Kiaru** is the DCIO Makindu. He said he was handed this case by the OCPD and OCS Makindu on 23rd October 2017. He found the 1st, 3rd Appellant and another arrested. Upon being briefed by Pw1 of the occurrence he took prints of photos of the scene which Pw1 had taken. He visited the scene at Kenya pipeline station No. 6 and saw tyre marks (EXB2). The station was well guarded by three (3) sets of security personnel, A.P Police and guards from Lavington securities.

37. He found a sampling point from which the siphoning was done. The area is restricted. He later traced the ownership of the motor vehicle from the NTSA to one **Joseph Theuri Waihw** (A6). He also got the mobile contacts and the owner was tracked at Kayole in Nairobi. The vehicle was found at some petrol station and was brought to Makindu police station. He told A6 to avail the driver which he never did. He also requested for the call data from Safaricom (EXB5(c)). The print out showed accused no. 6 to have been in Kiundwani area where the fuel station was.

38. This witness recorded statements under inquiry from the Appellants and A6. The same were produced as EXB10(a) – (d). He produced the motor vehicle search EXB11(a); report form Mariakani weighbridge showing the motor vehicle had not been there (EXB12 (a) and (b)); letters from Petrocity depot EXB13 (a) and (b) showing the motor vehicle had not been there during the period in question; letters from Kenya pipeline (EXB 3 and 4) showing the amount of fuel stolen and its value.

39. He testified that the 2nd and 3rd Appellants and two others were security officers who were present during the incident but they did nothing. There was communication between the Appellants and co-accused during the time of incident. He produced the seals register (EXB1). It was his evidence that on 22nd October, 2017 the seal was at station No. 6 but it was loose and anyone could run the gate valve. The seal on 22nd October 2017 was shown as 58874. The 1st Appellant as the incharge never reported the incident.

40. He confessed to having had challenges in this case including loss of the phone recovered from accused No. 6 and alteration of documents.

41. In cross examination he said EXB9 shows the weighbridge as Athi river and not what the lorry was carrying. That he saw some marks of oil where the siphoning had been done. He however said there was no spillage, and the seal was loose. The case had initially been handled by the OCS Makindu. He confirmed that both Pw1 and 2nd Appellant had been injured.

42. Pw13 No. 90597 **Peter Mbatha** is based at DCI headquarters cyber and forensic laboratory. He said on 25th May, 2018 the office received an infinix Note 3 Phone IMEI No. 359973072157360 and 359973072157360 from Pc Mark Okoth of DCI Makindu with a request to discern:

- If phone was working
- If it took photos between 21/10/2017 and 22/10/2017
- Help develop the photos taken
- Assert calls and sms sent during that period

43. He confirmed that the phone was in good working condition. He generated a report on his finding which he burnt into a C.D. It was a huge report he made. He confirmed that the phone (EXB7) took photos during the said period. The photos he burnt correspond to those in EXB2 (a) photos 15-18. He produced the report EXB16(b), certificate EXB16(c) and CD EXB16(d).

44. In cross examination he said the phone had an SD card and not a sim card. He retrieved calls and messages but never read them as that was not his assignment.

45. The prosecution applied for a scene visit and the viewing of the motor vehicle at Makindu police station. Mr. Kasyoka for the defence declined the scene visit but said the court could go see the motor vehicle. At that point the prosecution withdrew its request and closed its case.

46. All the Appellants gave sworn defences and called two common witnesses (Dw6 and Dw8). The 1st Appellant testified that he worked as an operations technician with Kenya pipeline. He was to ensure smooth pumping of petroleum products and detecting any trouble and general administration at station No. 6 Makindu. He said their operations were computerized and they could notice any anomalies in the pipeline from the control room. In denying the charges he said on the night of 21st/22nd October 2017 he had reported on duty at 4:00 pm relieving Pw2. They did a handling over and checked to ensure that everything including the pumping area and valves were alright.

47. At 3:00 am he was called by the controller (*Mr. Kimunguti*) from Nairobi to idle one pump (*stop it from pumping but power to remain on*). He told him there was a problem at pump no. 2 at Samburu. He complied with the directive. He had not noticed any problem at his own station. He denied going out of the control room that night nor seeing any lorry with a hose pipe connected to it and a pump. He only learnt of the issue of the lorry from Janet and Duncan who are both security guards. Had there been any siphoning of fuel he would have noticed it very fast from the control room and even other controllers would have noticed the same.

48. He handed over to Pw2 at 10:00 am and they never went to the sampling area. He was arrested together with the 2nd Appellant. They were not told the reason for the arrest. He denied leaving the building on the material night. He said the hosepipe allegedly used to siphon oil could not have worked as alleged due to the dangerously high pressure.

49. In cross examination he explained that any problem at the station would be reflected in Nairobi. He had that night been told of a problem at the Samburu pump. He had drawn his curtains and so could not see or hear anything happening outside. He denied the presence of a lorry at the station on the material night.

50. The 2nd Appellant testified that he worked with Kenya pipeline as a security guard at station no. 6 Makindu. He worked alongside other hired guards and an A.P. He reported on duty on 21st October 2017 at 4:00 pm, replacing Pw1. At 10:00 am he heard a lorry at the fence hooting. He went there and found a driver with another standing outside. They requested to be assisted as they had lost their way and could not reverse due to a nearby trench. He opened for them the gate to enable them access Mombasa road through another gate. He informed A5 who talked to them before arresting and handcuffing them.

51. It was thereafter that the 3rd Appellant who was A5's boss came. He climbed on top of the tanker and opened some compartments. He talked with the two men and A5 and then released the two men. Before the arrival of the 3rd Appellant, he saw Pw1 arrive on a motorcycle while carrying a soda (*sprite*) and miraa. He fell from the motorcycle and started making noise saying he had called the managing director at Mombasa over the presence of the lorry. Pw1 who appeared drunk grabbed him by the shirt and he pushed him and he (Pw1) fell on some ballast. He later handed over to Pw6 at 1:00 am. The lorry was driven back to Mombasa without being loaded with any fuel.

52. He further said the photo (EXB2) did not reflect the lorry he saw which had red and green stripes. He denied seeing any hose pipe. He left for home at 2:00 am. He went to hospital at Makindu after he made a report to the police against Pw1. He was later arrested.

53. He denied assaulting Pw1 claiming it was him who was assaulted by Pw1. He denied preventing Pw1 from closing the barrier. He claimed that in 2013 Pw1's girlfriend had been treated after an accident using his name. Later Pw1 made a claim using his girlfriend's treatment notes. He said everything at the station was okay during the handing over. He denied seeing the 1st Appellant that night.

54. In cross examination he said he was responsible for opening and closing the gate and recording those coming in and out. There were records for this though he never registered the entry of the lorry in question. He confirmed that Pw1 had asked about the lorry and there had been a confrontation between them. He also confirmed not having reported the presence of the lorry on the premises to his seniors.

55. The 3rd Appellant is a former police officer no. 2003056354 (A.P). He denied the charges. He said he was attached to Kenya pipeline pump No. 6 and his duty was to take charge of uniformed security which entailed securing the fuel. On 21st/22nd October, 2017 night he was at Kiundwani town with colleagues as he was not on duty. At 1:45 am he received a call from his colleague (A5) asking him to go to the station. He left for the station on bodaboda. At the station he found Pw1 and the 2nd Appellant. A5 explained to him how Pw1 had detained a stray truck on allegations that it had siphoned fuel.

56. He stated that Pw1 had been with him at Kiundwani and had given him his car keys and Kshs.200/=. He also found a truck No. KBP 480B a tanker at the station. Amidst the counter accusations of siphoning of fuel, he was taken to the seal at the station. The seal was intact and there was no spillage at the scene. He called his senior Mr. Ken Matanga who asked him to check the tanker. He told the four occupants of the lorry to open its compartments and he found no fuel there. He reported back to Mr. Ken Matanga who told him to release the tanker which he did at about 2:00 am.

57. Later at 2:15 am **Inspector Ezekiel Mutua** and other security officers from pump station No. 5 at Mtito Andei came to the station. He informed I.P Mutua what he had done and the I.P told him he had instructions from Mombasa to follow and detain the lorry. At 10:00 am he was asked by I.P Langat to record a statement. Later Mr. Ken Matanga called and informed him that him and A5 were on transfer to Athi River.

58. He was referred to the photo (EXB8) and he tried to draw some distinctions between the vehicle in the said photo and what the one he had seen at the scene looked like. He denied seeing any hosepipe on the material night. He further stated that he had witnessed a scuffle between pw1 and the 2nd Appellant. He said Pw1 had thrown stones at the 2nd Appellant one of which hit him. Pw1 had also hit him. He denied seeing any injuries on Pw1.

59. In cross examination he confirmed that the station was a protected area and no unauthorized motor vehicle can enter it. The tanker was not booked or recorded. He said the prime mover was properly captured by the photographer. He admitted having released the truck but after consultation with his senior Mr. Ken Matanga. In respect to his statement under inquiry he said it

showed he contacted Mr. Matanga and Mutua after the incident and the O.B recorded. In re-examination he said he reported to his seniors as is required.

60. Dw6 **Mr. Meshack Nzioki** a clinical officer from Makindu hospital said he examined the 2nd Appellant on 31st October 2017 and filled his P3 form. He had been treated on 22nd October 2017 at Makindu sub-county hospital. He produced the P3 form and treatment notes as DEXB1 and 1(b) respectively. He said the 2nd Appellant suffered an injury on the right hand with no fractures. He however had a plaster of paris (P.O.P) placed on the hand on 22nd October 2017 and removed on 31st October, 2017.

61. Dw8 **Wilkinson Kithinji Ndwiga** is a security officer form Kenya pipeline. He brought to the court the human resource file in respect to Aden Abdullahi Abdi (Pw1). After a brief examination in chief the defence counsel Mr. Kasyoka applied to have him declared a hostile witness. The request was granted. He tried to explain about the names of Pw1 and another and how the confusion in names came about. Finally, he said Pw1 never made any false claim.

62. In cross examination he said he had been given two (2) files relating to Pw1 by the human resource office. One file related to his recruitment and all other issues relating to his employment. The 2nd one related to compensation for injuries suffered while on duty on 22nd October 2017 and not 3rd February 2013. He denied making any cover up for the company.

63. Directions were taken to the effect that the appeal would be disposed off by way of written submissions. Both counsel filed their submissions.

64. Mr. F.K. Omenya while relying on the case of **Woolmington –vs- DPP (1935) AC 462**, section 107(1) an (2) of the Evidence Act and **Ryde –vs- Bushell (1967) E.A 817** submits that the prosecution always has the burden to prove its case beyond reasonable doubt.

65. On deficiency of the charge sheet he submits that the same was duplex which made it difficult for the Appellants to know what charges they were facing in order to prepare for their defences. That had section 89(5) Criminal Procedure Code been appropriately applied the charge sheet could have been amended, before the case proceeded.

66. On evidence analysis he submits that the same was one sided as the evidence in cross examination was never considered by the trial court. Firstly, he contends that the evidence on fuel siphoning and seals was not sufficient to sustain a conviction. That the seals were said to have been intact and so more independent evidence including a scene visit was required to confirm the siphoning of fuel. Infact he submits that a scene visit would have confirmed several factors which would have enabled the court to arrive at a more concrete decision. He refers to the evidence of Pw2 and other witnesses who said there was no fuel spillage, and that the seals were not broken.

67. Counsel dismissed Pw1's evidence as being inconsistent and contradictory as to the injuries he allegedly suffered. That the evidence of Pw7 and Pw8 did not assist him as it was pure hearsay evidence. Counsel referred to Pw1's treatment notes and P3 form (EXB6 and 8a) saying they were not supporting each other. He points out that by the time of examination by Pw10 the injuries allegedly suffered by Pw1 appear to have increased tremendously. This evidence he argues is the heart of the main charge of robbery with violence.

68. He further submits that in his judgment the learned trial Magistrate keenly analysed the evidence tendered by the Appellants hence shifting the burden of proof to the defence by failing to analyse the evidence by the prosecution. He therefore urged this court to re-examine the evidence that was tendered during the trial.

69. It is counsel's submission that the Appellants were convicted on circumstantial evidence which was not corroborated. He said the trial court concluded that reduction of pressure at a pumping station was conclusive evidence of siphoning of fuel. He argues that the Appellants were convicted for loss of 33,000 litres of fuel when there was no proof of theft, of that amount of fuel. It was not clear how the figure of 33,000 litres was arrived at. That there was no concrete evidence showing how it was possible to siphon fuel through a bolt. He cited the cases of **Erick Odhiambo Okumu –vs- R (2015) eKLR**, **Sawe –vs- R (2003)**; **Jacob Muthee & 8 Others (2013) eKLR** to support his arguments on circumstantial evidence.

70. Counsel has pointed out that even the motor vehicle KBP 408B was not produced as an exhibit by the prosecution. Furthermore, none of the Appellants was identified as one of the occupants of the said motor vehicle or even being remotely connected to them. He further submits that there was no evidence of any form of threats by the Appellants. It was also not shown that the Appellants would benefit from the allegedly siphoned fuel. Counsel submits that the prosecution never arraigned in court any of the truck occupants including the driver on a simple reason that they were never found.

71. Mr. Omenya submits that documents were admitted contrary to the rules on admissibility under the Evidence Act. The said documents were:

- EXB 2 photos from a CD
- EXB4 graph/chart
- EXB10 statements under inquiry

Counsel submits that admission of EXB2 and 4 contravened sections 25A, 78A &106B of the Evidence Act, since the makers of the documents were not the ones who produced them and no certificate was produced as required.

72. He cited the case of **R –vs- Mark Lloyd Steveson (2016) eKLR** where the court held that: -

“For completeness, it is important to refer to the provisions of sections 106B (1), (2) and (3) as well as section 106(1) of the Evidence Act even though neither parties brought them up. The former sections reinforce the admissibility of electronic records including computer print-outs and provide for a straightforward way of automatically authenticating them if certain conditions enumerated in section 106B (2) are met by producing a certificate of authenticity. That certificate needed must satisfy three conditions:

- a) It must identify the electronic records and production process;*
- b) It must show the particulars of the producing device; and*
- c) It must be signed by the responsible person.”*

73. He argues that none of the conditions were adhered to for the admission of EXB1&4. He contends that the trial court referred to the evidence of Pw11 in his judgment when he said at page 70 lines 18-27

“Pw11 Mark Mwangangi said he was based at Mlolongo weighbridge along Nairobi-Mombasa road. That vehicle No. KBP 480B details were captured when it passed through the weighbridge on the morning of 22/10/2017. He said it was found loaded. It had a total weight of 41 tonnes which was not an overload hence there was no need to re-weigh it. He said an empty truck would weigh about 10 tonnes. It was another way of saying the lorry had a load of about 30 tonnes. It was alleged to have been loaded with refined petrol. Roughly, a litre of liquid would transit to a kilogram without much arithmetic calculations and conversions the lorry had about 30 tonnes of such liquid or about 30,000 litres of such liquid”

He interpreted this to mean the trial court had proceeded to rely on the evidence that had been objected to without giving reasons as to why yet he had reserved the same in his brief ruling on admissibility.

74. On the admission of the Appellants statements he has submitted that the statements were more of confessions and were admitted despite their objection to the same. Counsel submits that the admission of the statements was not in line with the provisions of section 25A Evidence Act and the Evidence (out of court confessions) rules 2009, since no trial within trial was conducted.

75. He relied on the case of **Musili Tulo –vs- R (2014) eKLR** to buttress his arguments. Counsel therefore submits that the statements under inquiry were admitted in disregard of the requirements laid down under the law.

76. He raised issue with the evidence of Pw3 who never recorded a statement and so the defence was never prepared for his evidence. He argues that this contravened the requirements for defence preparation under Article 50 of the constitution. He further submits that though represented by counsel, the Appellants were forced by the court to proceed with Pw5 in the absence of their lawyer. This he argues occasioned an injustice to the Appellants.

77. It is counsel’s submission that the Appellants’ sworn defence though not controverted was never considered by the trial court in its judgment. He called on this court to allow the appeal and set aside the judgment on the trial court.

78. Learned counsel for the Respondent Mrs. Monicah Owenga did a summary of the evidence adduced before the trial court. She further did an analysis of the said evidence. She refers to the data analysis by Pw5 of Safaricom and concludes that the Appellants and co-accused communicated with each other on diverse dates between 19th October 2017 and 22nd October 2017 which was the period around the date of theft.

79. She submits that the 2nd Appellant’s admission that the truck driven into station No. 6 Makindu was parked near the fence corroborates the evidence of the prosecution witnesses on where the lorry was parked. It was from there that a pipe was connected into the sampling area for siphoning of the fuel into the lorry registration No. KBP 480B. She submits that the confrontation at the station between Pw1 and 2nd Appellant and the entry of the truck into the station has not been denied by the Appellants. All this she says confirms there was something unusual happening at the station which was siphoning of the fuel.

80. Referring to the ingredients of a charge of robbery with violence, she submits that the same have all been satisfied through the evidence tendered. On grounds no. 1 and 2 of the appeal it is her submission that the evidence by the prosecution witnesses overwhelmingly linked the Appellants to the offence. There were eye witnesses to the happenings.

81. In respect to grounds 3 and 4 she submits that the documents were well admitted under the provisions of the Evidence Act. It is her submission that the evidence of the prosecution was far from circumstantial evidence. It was direct evidence of eye witnesses. Pw1 sustained injuries in the process of trying to prevent the commission of the offence. That if any circumstantial evidence was tendered it was in furtherance of the direct evidence.

82. She finally submits that the Appellants with their co-accused participated in the theft of fuel with each playing a specific role. The sentence for this offence she says is life imprisonment and so the Appellants’ sentence of twelve (12) years imprisonment each is very

lenient. The trial court before sentencing them had considered their mitigation and their social standing and the position they held at Kenya pipeline. She urged the court to dismiss the appeals in their entirety.

Analysis and determination

83. This is a first appeal and this court has a duty to re-analyze and reconsider the evidence on record and arrive at its own independent conclusion. I have to bear in mind that unlike the trial court, I did not hear nor see the witnesses and must give an allowance for that. See **Okeno –vs- R (1972) E.A 32; Kiilu & Anor –vs- R (2005) I KLR 174, and Simiyu & Anor –vs- R (2005) I KLR 192.**

84. I have carefully considered the evidence on record, the grounds of appeal, the submissions and cited authorities. I find the following issues to be falling for determination.

- i. Whether the charge was duplex.
- ii. Whether EXB2 (a) (photos from CD) and EXB9 (*print out on weight of truck*) and EXB10 (*Appellants' statements under inquiry*) were properly admitted.
- iii. Whether failure to have Pw5 testify in the presence of the defence counsel violated the Appellants' right to fair trial.
- iv. Whether failure to record and avail a statement from Pw3 prior to the hearing or at all violated Article 50 of the constitution
- v. Whether the prosecution proved the charge of robbery with violence against the Appellants.

Issue no. (i) Whether the charge was duplex.

85. The Appellants relied on section 89(5) Criminal Procedure Code to argue this point. The section provides:

“Where the Magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the Magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.”

The record shows that the Appellants and others minus the 6th accused person faced a main charge of robbery with violence. Only the 2nd Appellant faced a 2nd count of assault.

86. The charges were first read to them on 27th October 2017 and they denied them. On 4th July, 2018 the matter (*Makindu Criminal Case No. 889/2017*) was consolidated with (*Makindu Criminal Case No. 1028/2017*) bringing the number of the accused persons to six (6). An amended charge sheet was presented to the court. It contained the main charge of robbery with violence contrary to section 296 (2) Penal Code with an alternative count of stealing goods in transit contrary to section 279(2) Penal Code. These two charges were in respect of all the accused persons. There was a 2nd count of Assault contrary to section 251 of the Penal Code which was against the 2nd Appellant only.

87. The amended charges were read to the then accused persons in Kiswahili language in the presence of their advocates. This is what the court recorded:

Plea of not guilty entered for all the six accused in count 1 and the alternative charge to count 1. Plea of not guilty entered against 2nd accused in count 2.”

88. Section 134 and 135 of the Criminal Procedure Code which deal with the framing of charges and information provide as follows:

(134) Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

135. (1) Any offences, whether felonies or misdemeanors, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.

(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.

(3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of the charge or information.”

89. A charge is duplex where in one charge there is more than one offence. In **Pope –vs- R 1960 E.A 132, 138 Sir Alastair Forbes –vs- P** observed that:

“It is well established that a count which charges two offences is bad for duplicity and that a conviction under it cannot stand”

It is only where there is more than one offence in one count where duplicity can be contemplated. In such a case an accused person would have difficulty as he would not know what to plead to or defend himself against.

90. In **Cherere S/o Gukuli –vs- R (1955) 22 EACA 478** – the Court of Appeal stated thus:

“Where two or more offences are charged to the alternative in one count, the count is bad for duplicity contravening section 135(2) of the Criminal Procedure Code; the defect is not merely formal but substantial. Where an accused is so charged it cannot be said that he is so prejudiced because he does not know exactly with what he is charged, and if he is convicted he does not know exactly of what he had been convicted.”

91. In the present case counsel has submitted that the trial court at the time of delivery of judgment noted the deficiency with the charge and rejected the alternative charge before proceeding to analyse the evidence on record. On that basis he submitted that the charges as framed were duplex and ought to have been rejected at the first instance under section 89(5) Criminal procedure Code. The Respondent did not respond to this submission.

92. I wish to point out that what was rejected by the trial court was not the alternative count but the 2nd count of assault against the 2nd Appellant. The reason given for that was that the alleged offence of assault was committed in furtherance of the offence of robbery with violence and should not have been brought as a distinct count, since it formed an integral part and ingredient of the main count. The trial court only came to that conclusion after the full trial and at the time of writing the judgment.

93. It is clear from the charge that there were no two or more offences charged in one count. Secondly the charge of assault was a distinct count in respect of the 2nd Appellant alone. The complainant in count 2 is the same one whose name appears in count 1 as the person assaulted. The question is whether there was any prejudice caused to the 2nd Appellant by this. **See Peter Sakem Leitu –vs- R Criminal Appeal No. 482 of 2007 UR; Peter Ngure Mwangi –vs- R (2014) eKLR.**

94. The charges had been read to the Appellants more than once. They were each clear on the charges facing them. Their counsel cross examined the witnesses and no issue was raised on any prejudice faced by the Appellants. It was only after hearing the whole evidence that the trial court appreciated that the assault in count 2 was related to the robbery with violence in count 1 of which he convicted the Appellants. He promptly acquitted the 2nd Appellant of it. I therefore find no merit in this issue of duplicity, raised by the Appellants.

Issue no. (ii) Whether EXB2 (a) (photos from CD) and EXB9 print out on weight of truck and EXB10 (Appellants’ statements under inquiry) were properly admitted.

95. The Respondent’s response on this issue is that all documents were admitted under the provisions of the Evidence Act. The bundle of photos EXB2(a) were said to have been taken by Pw1 using his phone. The said phone EXB7 was examined by Pw13 and found to be working and had taken the photos between 21st/22nd October 2017 at 1:38 am. He printed the said photos EXB2 (a) – photos 15-18.

96. He produced a certificate to that effect together with his report (EXB1 6a – c). No objection was raised by the defence to the production of the same. Pw6 who took photos at the scene is a gazetted officer. The photos in the CD were photos no.s 15-18 which were taken by Pw1. The rest were personally taken by Pw6 who issued a certificate for that. No objection was raised to their production. I find no error in the admissibility of EXB2, especially after Pw6, Pw12 and Pw13 explained the steps they took in the whole process.

97. EXB9 is a print out showing the weight of the truck taken at Mlolongo weighbridge. It was produced by Pw11 **Mark Mwangangi**. Counsel for the Appellants submits that the document ought not to have been produced by the witness. An objection was raised on its production but it was not heard nor a ruling made. The court admitted it under section 175 of the Evidence Act and promised to address it in the judgment. I have not seen it addressed in the said judgment but it was clearly relied on.

98. I have seen the document produced as EXB9. It’s a computer print out with a stamp of the KENHA Manager Athi River weighbridge dated 15th November 2017. Pw11 admitted that it is not him who prepared nor printed the said document. It is also not on KENHA’s letterhead. There was no certificate produced to confirm its authenticity. This is in no way saying Pw11 does not work for KENHA, but due process must be followed. Section 78A of the Evidence Act provides:

(3) In estimating the weight, if any to be attached to electronic and digital evidence, under subsection (i), regard shall be had to-

- a) The reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;**
- b) The reliability of the manner in which the integrity of the electronic and digital evidence was maintained;**
- c) The manner in which the originator of the electronic and digital evidence was identified; and**
- d) Any other relevant factor.**

(4) Electronic and digital evidence generated by a person ordinary in course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil criminal, administrative or disciplinary proceedings under any law, the rules of a self-regularly organization or any

other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.”

99. Further section 106B of the Evidence Act provides:

Section 106B(4)

In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following:

- a) *Identifying the electronic record containing the statement and describing the manner in which it was produced;*
- b) *Giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;*
- c) *Dealing with any matters to which conditions mentioned in sub-section (2) relate; and*
- d) *Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate).*

100. I find that EXB9 was not admitted in accordance with the provisions of the Evidence Act and I exclude it as evidence in this case.

101. Pw12 was the investigating officer and he produced statements he recorded from the Appellants and A6, under inquiry. These were again admitted under section 175 of the Evidence Act with a promise to deal with the issue in the judgment. This was despite the objection raised by the defence. The best practice has always been that once an objection of this nature is raised the court must conduct a trial within a trial to determine the admissibility of a disputed statement/statements.

102. In any given scenario, once a suspect appears to be admitting any offence, the best thing for the investigating officer to do is to step aside and refer the suspect to a competent officer for purposes of recording a confession under charge and caution. One cannot be an investigating officer (*who is privy to all the information in the matter*) and also record a suspect's confession as this creates an unnecessary conflict of interest.

103. I am duly guided by the holding in the case of **Musili tulo –vs- R (2014) eKLR** where the Court of Appeal dealt with the issue of confessions and statements under inquiry. It stated thus:

27. “It is evident therefore that there was objection made to the admissibility of the extra judicial statements and it was not accurate for the trial court to state that there was none. Once the objection was raised, it was the duty of the trial court to make an order for a ‘trial within the trial’ and to deliver a ruling to determine such admissibility, even before the statements were marked for identification. The purpose is to determine the voluntariness of the statement intended to be tendered for the prosecution, because a statement by an accused person is not admissible in evidence against him unless it is proved to have been voluntary. It is a matter of law and is for judge alone to decide upon hearing evidence - see Shah v. Republic 1984 [KLR] 674. Indeed, it is an aspect of fair trial. We do not know what decision the trial court would have arrived at had it held a trial within the trial. What we can say for certain is that the court fell into error by failing to determine the issue of admissibility of the two extra-judicial statements.

Section 25A which governed the proceedings in this trial thus provides: -

“(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person’s choice.

(2) The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”

31. Take what happened in this case: On the face of it, the two statements were recorded in a lackadaisical manner. At 4p.m. on 14th July, 2010, Chief Inspector Wafula was recording a ‘Charge and Cautionary statement’. One hour later, IP. Kombo was recording a “statement under Inquiry’. Logically, it is the statement under inquiry which should inform the Charge and cautionary statement! At any rate, IP. Kombo had no business recording the statement as it would be contrary to Section 25A (1) of the Evidence Act (supra). There was no third party as the section requires. None of the officers followed the Confession Rules on language and the various certifications stated therein. In sum, there is considerable doubt that the statements were recorded in accordance with the law and, therefore, they are for exclusion as evidence in the case. We so find.”

104. My finding therefore is that the statements under inquiry (EXB10) were admitted unprocedurally. They are therefore excluded as evidence in this case.

Issue no. (iii) Whether failure to have Pw5 testify in the presence of the defence counsel violated the Appellants' right to fair trial.

105. The record shows that Pw5 testified in the absence of Mr. Kasyoka appearing for the defence. The accused persons were not warned of the matter proceeding in their lawyer's absence. The record further shows that Mr. Kasyoka arrived when Pw5 was still in the witness stand, just in time for re-examination. He never raised any issue and he did not request to be allowed to cross examine the witness later after reading his evidence. I am convinced that the defence was satisfied with that position and they cannot raise it now. They were given a chance to cross examine the witness. I find no violation of their right to a fair trial in this.

Issue no. (iv) Whether failure to record and avail a statement from Pw3 prior to the hearing or at all violated Article 50 of the constitution

106. Pw3 was clear in his evidence that he never recorded any statement with the police but was just called the previous day and told to come to court as an expert witness. The defence counsel was aware that he had not been served with the witness statement of Pw3. Counsel never raised any issue with it. The Appellants and their counsel listened to Pw3's evidence and counsel asked the witness quite a number of questions in cross examination. Again this cannot be blamed on the trial court, as a violation of fair trial.

Issue no. (v) Whether the prosecution proved the charge of robbery with violence against the Appellants.

107. The offence of robbery with violence is proved when the theft is accompanied by any one of the following:

- Being armed with a dangerous or offensive weapon or
- Being in the company of one or more persons
- Use of actual violence before or after the incident.

108. The court had to first of all establish that there was theft of 33,000 litres of fuel valued at Kshs.3,431,670/= from Kenya pipeline pump station no. 6 sampling point. There is no dispute that a truck registration No. KBP 480B entered station No. 6 Makindu on the night of 21st/22nd October 2017 contrary to the laid down procedures and regulations. It is also not disputed that the said entry of the truck was not recorded/registered as per the procedures and regulations.

109. The person who allowed the truck in and did not indicate the entry in the books was the 2nd Appellant. The reason for adherence to the regulations and procedures is because the station is a restricted area for obvious reasons. Why was the entry of the truck not recorded? The 2nd Appellant did not give any sound explanation for that. Secondly his reason for allowing the truck in and what happened thereafter is very suspicious.

110. The workers who responded to the sighting of the truck at the station were Pw1, Pw2, Pw7 and Pw8. They said they found the lorry parked near the fence with four (4) strangers in and out of it. All these four (4) witnesses said there was electric light around the sampling area and so they saw what was going on. They all stated that they saw a hosepipe running from the truck to the sampling area. Pw1 took photos of the scenario which were later printed by Pw13, (*EXB2a photos 15-18*). They clearly show the hosepipe from the truck to the sampling area.

111. Why would a truck which had allegedly strayed be parked inside the station and have a hosepipe connected from it to the sampling area? Pw1, Pw2, Pw7 and Pw8 who were suspicious of the on goings, asked A5 (*David Kitany*) the security guard on duty to confiscate the truck keys and arrest the four suspects. A5 did so only for the suspects and the truck to be released shortly thereafter by the 3rd Appellant.

112. Pw3's evidence is that from the main nerve centre in Nairobi they were able to detect a serious drop in the pressure at station 6 Makindu. The pressure dropped from 29.08 – 13.99 between 12:30 am – 3:00 am of the material night. He produced a graph/chart EXB9 to explain their observations. To him the drop in the pressure was a clear sign of fuel siphoning.

113. So much has been said about the seals/valves/bolts with the Appellants arguing that no fuel would be siphoned through a hosepipe or without seals being broken.

114. Pw3 explained that on the ground he found a seal that appeared intact and on further scrutiny noted that the nut that was meant to secure the said seal was loose. On removing the nut, he found that he was able to access the flow of the fuel. He said a plastic pipe would withstand any pressure as it was pumping at an open end.

115. Pw7 and Pw8 were categorical that they saw the 1st Appellant come out of his office into the sampling area that night. He helped the suspects to disconnect the hosepipe which he gave to them and they drove off.

116. The 1st Appellant denied the presence of the truck at the station that night. The prosecution witnesses mentioned, as well as the 2nd and 3rd appellants and Dw5 all confirmed the presence of this truck at the station. The 1st Appellant was therefore not sincere when he denied its presence. He was the one incharge of the unit and could not say he never heard or witnessed the activities outside his office when there were a good number of people there. He could also clearly see this from the control room.

117. It was the 3rd Appellant's defence that he released the suspects and the truck on instructions of his senior and after checking the compartments of the truck and being satisfied that there was no fuel in them. His evidence was that he had been called back to the station by

A5. He appears to have been alone when he allegedly did the inspection of the compartments. None of those present appears to have witnessed him do it except the 2nd appellant who says he saw him on top of the tanker.

118. The 1st appellant testified that he was on the material night called from Nairobi by Mr. Kimungut and directed to idle the pump. If this happened, it must have been official communication from their head office. The defence did not seek to have that communication availed as its defence. In cross examination he said he was on the same night told there was a problem at Samburu pump. Again there was no evidence to confirm this.

119. The appearance and presence of the truck KBP 480B at a restricted area for almost three (3) hours on the night of 21st/22nd October 2017 was in itself very suspicious and cause for worry. The security officers who were to guard the property of the complainant did not act with diligence over the matter. There is strong evidence of the presence of a hosepipe connected to the suspicious truck and the sampling area.

120. Pw3 adduced evidence on the loose nut which was meant to secure the seal. On opening it he accessed the fuel. That well explains how the fuel was siphoned without the seal/seals being broken. The application by the prosecutor to have the court visit the scene to see some of these things for itself was opposed by the defence. The prosecution then withdrew the application. The Appellants cannot now hang on that to say the court should have visited the scene. They were opposed to the court visit.

121. The prosecution through the evidence of Pw3 and the graph/ chart was able to show the amount of fuel siphoned plus its value. I am therefore satisfied that fuel worth Kshs.3,431,670/= or thereabout was stolen.

122. The evidence on record shows that the occupants of this suspicious vehicle were more than one. However, the more pronounced ingredient is that of the assault on Pw1. He told the court that he was assaulted by the 2nd Appellant in order for him to allow the suspect truck to leave. He said he suffered injuries on the head and other parts. The treatment notes produced by Pw6 are such a contradiction in themselves. There is one dated 22/10/2018 and another one dated 3/12/2013, both which are not relevant to the matter before court.

123. Pw10 **Dr. Josephine Muthengi** who said she examined Pw1 said she did not use the treatment notes mentioned at paragraph 27 of this judgment. She examined him on 25/10/2017. Would she then be in a position to confirm to the court that without the treatment notes she was certain that the examination related to injuries inflicted on 22/10/2017? Dw6 **Mr. Meshack Nzioki** produced treatment notes DEXB1(a) showing that the 2nd Appellant suffered some injury on his hand and he was treated on 22/10/2017 at Makindu hospital. The evidence is that Pw1 and the 2nd Appellant had a confrontation on that night. Both of them were security officers at Kenya pipeline station No. 6 Makindu.

124. It is not clear whether they had their own scuffle or it was related to the release of the vehicle. Compiled with the contradiction in the treatment of Pw1, I find the evidence in respect to this assault said to be forming an ingredient in count 1 to be abit shaky. That bit of assault has not been proved beyond reasonable doubt.

125. Having evaluated the entire evidence on record, I find that the evidence of robbery with violence was not proved. I however find the alternative count of theft of fuel in transit proved.

126. This theft was committed in the presence of the 1st, 2nd and 3rd Appellants and they took no action. Infact the 3rd Appellant released the suspects plus the motor vehicle on alleged orders from his senior whom he never called as his witness. The 2nd Appellant was the security guard on duty. He is the one who allowed in the truck registration No. KBP 480B with its four occupants. He took no step to stop the theft or even report it. The 1st Appellant was the officer in charge of the station. He was on duty at the station that night. He was aware of the on goings and even assisted in unplugging the hosepipe from the sampling area and the truck. He participated in the theft.

127. As I wind up, I wish to add that there seems to have been a lot of interference in the investigations of this case as stated by the investigating officer (Pw12) and this can be noted from the following:

- To date the four persons who came in the truck KBP 480B have never been arrested and arraigned in court.
- The truck KBP 480B though impounded was never produced in court as an exhibit. It's not even clear why the court issued an order for its release if no appeal is filed within 14 days. It was never the property of the court.
- A6 as the owner of the truck should have been asked to avail all the necessary information in respect to his driver as provided for under section 111 of the Traffic Act. It is not clear if this was ever done. How did his phone disappear at the station?
- This incident occurred on 21st/22nd October, 2017 night, and was reported at Makindu police station most likely to the OCS and OCPD. They did nothing not even tracking the truck that night. Pw12 was only assigned this matter on 23rd October, 2017, day time. Those who received the first report never testified. I am pointing all this out to emphasize on what Pw12 told the court in his testimony.

128. Upon analysis of all that was placed before me, I find that the charge of Robbery with Violence contrary to section 296 (2) Penal Code was not proved. What was proved is the alternative count.

129. I therefore set aside the conviction for robbery with violence and substitute it with a conviction for stealing goods in transit contrary to section 279 (c) as read with section 20(1) of the Penal Code.

130. On sentence I have considered their mitigation before the trial court. Section 279 (c) Penal Code provides for a sentence of upto fourteen (14) years imprisonment. the Appellants have by virtue of this offence lost their jobs. I have at the same time considered the loss the complainant incurred as a result of this offence.

131. The Appellants have already served seven (7) months of their sentence. I hereby set aside the sentence of twelve (12) years imprisonment and substitute it with a fine of Kshs.2,500,000/= (*Two million, five hundred thousand shillings*) in default fifteen (15) months imprisonment from date of sentence (1/10/2019)

Orders accordingly.

Delivered, signed & dated this 8th day of May 2020, in open court at Makueni.

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H. I. Ong'udi

Judge