REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J.

CRIMINAL APPEAL NO. s 31 - 34 OF 2011

DAVID MOTERE ONCHARI...1ST APPELLANT

DAWIN MACHUKI RIOBA..2ND APPELLANT

SAMUEL OGENDI ONGARO..3RD APPELLANT

DOREEN NYABOKE AIGA... 4TH APPELLANT

VERSUS

REPUBLIC through ODPP...RESPONDENT

(Appeal from the original conviction and sentence of Hon. J. Were – SRM

dated 1st September, 2011 at the Senior Resident Magistrate's Court

at Keroka in Criminal Case No. 461 of 2011)

JUDGMENT

1. The appellants were charged before the Senior Resident Magistrate's Court at Keroka on 6th May, 2011 with three (3) counts of robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code**. The 1st appellant also faced an alternative charge of **handling stolen property** contrary to **Section 322 (2)** of the **Penal Code**. The particulars of the first count were that, on the 4th day of May, 2011 at Kijauri Market in Borabu District within Nyanza Province, the appellants jointly with others not before court while armed with dangerous weapons namely, metal bars robbed Francis Mbugua Nguri of 2 mobile phones, make Nokia N5182 and 6303, Nokia charger, a pair of shoe and cash in the sum of Ksh. 27,400.00 all valued at Ksh. 36,400.00 the property of Francis Mbugua Nguri and immediately before the time of such robbery used actual violence on the said Francis Mbugua Nguri. The particulars of the second count were that, on the same date at the same place, the appellants jointly with others who were not before court while armed with dangerous weapons namely, metal bars robbed Rose Kemunto Onsongo of cash amounting to Ksh. 1500.00 and immediately before the time of such robbery threatened to use violence on the said Rose Lemunto Onsongo. The particulars of the third count were that, on the same date and at the same place, the appellants jointly with others who were not before court while armed with dangerous weapons namely, metal bars robbed Linet Orina Moraa of cash amounting to Ksh. 6,670, 6 red bull, 1 mango juice, 5 Napoleon beer, 3 Alvaros, 1 Tusker malt, 5 Tusker beer, 3 White cap, 5 Summit Larger, 5 big soda and 1 wire connecting DSTV all valued at Kshs. 12,190.00 the property of Linet Orina Moraa and immediately before the time of such robbery threatened to use actual violence on the said Linet Orina Moraa. The particulars of the alternative charge were that on 5th day of May, 2011 at Kijauri market in Borabu District within Nyanza Province, the 1st appellant otherwise than in the course of stealing, dishonestly retained one pair of shoe and one cable wire for DSTV knowing them to be stolen property.

2. The appellants were tried and convicted as charged of all the three counts of robbery with violence on 1st September 2011 by Hon. J. Were, SRM. The appellants have now brought these appeals against their conviction and sentence. The appellants' appeals were filed as follows;

The 1st appellant's appeal was filed as Criminal Appeal No. 32 of 2011, the 2nd appellant's appeal as Criminal Appeal No. 31 of 2011, 3rd appellant's appeal as Criminal Appeal No. 34 of 2011 and the 4th appellant's appeal as Criminal Appeal No. 33 of 2011. The four appeals were heard together and as such I would consider the same together and render a consolidated judgment. The

appellants have through their respective petitions of appeal challenged the decision of learned Senior Resident Magistrate (*herein referred to only as "**the trial magistrate**"*) on various grounds some of which are common. The 1st appellant challenged the trial court's decision of the following grounds;

a. That the learned trial magistrate erred in fact and in law in finding and holding that the prosecution had proved the offence charged as against the 1st appellant to the requisite standard of beyond reasonable doubt.

b. That the learned trial magistrate erred in law in entering and returning a conviction against the 1st appellant based on evidence of identification which was wrought, replete and/or fraught with material contradictions, which thereby negated the probative value of the evidence relied upon by the trial magistrate.

c. That the learned trial magistrate erred in fact and in law failing to consider, the nature, extent and intensity of the lighting available and hence arrived at an erroneous conclusion that the 1st appellant was sufficiently and/or appropriately identified by the prosecution witness whatsoever.

d. That the learned trial magistrate misapprehended and/or misconceived the circumstances obtaining during and after the commission of the alleged offences and hence the learned trial magistrate failed to treat the evidence of the prosecution witnesses with the necessary caution and circumspection.

e. That the learned trial magistrate erred in ignoring, disregarding and/or failing to sufficiently consider and take into account the evidence tendered by the 1st appellant more particularly the evidence founded on alibi. Consequently, the learned trial magistrate occasioned a miscarriage of justice.

f. That the learned trial magistrate erred in law in shifting the burden of proof, in respect of the defence of alibi to the appellant contrary to the established principle that such burden lays on the prosecution and not otherwise.

g. That the learned trial magistrate failed to properly evaluate and/or analyze the evidence on record and thereby arrived at an erroneous conclusion, which was at variance with and/or contrary to the evidence on record.

h. That the sentence meted out by the trial magistrate was/is illegal, unlawful and/or void.

3. The 2nd appellant challenged the decision of the trial court on the following grounds;

a. That the trial magistrate erred in law and facts by arriving at a decision against the weight of evidence on record.

b. That the trial magistrate erred in law and fact by passing out judgment in total disregard of the 2nd appellant's case.

c. That the trial magistrate erred in law and fact by passing a judgment without giving reasons for his decision.

d. That the trial magistrate erred in law and fact in totally disregarding the fact that the 2nd appellant was not properly identified.

4. The 3rd appellant challenged the decision of the trial court on the following grounds;

a. That the trial magistrate erred in both law and fact in not laying emphasis on the 3rd appellant's innocence since the 3rd appellant had pleaded not guilty.

b. That the trial magistrate erred in law and fact in convicting the 3rd appellant while there was no proper identification, the prosecution having failed to conduct an identification parade.

c. That the trial magistrate erred in convicting the 3rd appellant on conflicting evidence of the prosecution witnesses which created doubt on the prosecution's case which should have been resolved in favour of the 3rd appellant.

d. That the trial magistrate erred in not considering the 3rd appellant's defence of alibi and in shifting the burden of proof to the 3rd appellant.

e. That the trial magistrate erred in convicting the 3rd appellant on the sole evidence of the prosecution witnesses while the investigation done by the prosecution was below the required standard.

f. That the sentence of life imprisonment meted out against the 3rd appellant was excessive, harsh and illegal in the circumstances.

g. That the trial magistrate erred by convicting and sentencing the 3rd appellant to life imprisonment on three counts of robbery with violence instead of convicting and sentencing him only on one count and leaving the other counts in abeyance.

h. That the 3rd appellant was not informed promptly of the ground or true reason of arrest as per Article 49(1)(a)(i) of the Constitution of Kenya 2010 when he was arrested by PW 8.

5. The 4th appellant challenged the trial magistrate's decision on the following grounds;

a. That the trial magistrate erred in not considering the fact that the 4th appellant was not present at the scene of crime.

b. That the trial magistrate erred in law in failing to consider the plight of the 4th appellant as the sole bread winner of her young family.

c. That the 4th appellant's child stands to suffer irreparably if the 4th appellant serves the life imprisonment imposed on her.

d. That the 4th appellant is only 22 years and as such the sentence that was passed against her was overly harsh and excessive in the circumstances.

e. That the trial magistrate erred in both law and fact in failing to consider that the evidence by the prosecution was full of contradictions and inconsistencies.

f. That the trial magistrate totally misunderstood or failed to appreciate the defence by the 4th appellant thereby arriving at a wrong conclusion.

6. This being a 1st appeal, I am aware of the onerous task bestowed on this court to re evaluate the evidence on record and to make my own independent findings/conclusions thereon, all the while alive to the fact that I neither saw nor heard the witnesses and give due allowance in that regard. This legal principle is well enunciated in the case of **Okeno –vs- R [1972] EA 32** where the court stated;

> "*An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –vs- R [1975]E.A 336). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –vs- Sunday Post (1958)E.A 424."*

7. In his submissions, the 1st appellant maintained that he is innocent. He asserted that on the material day he was busy at his place of work. He faulted the prosecution's evidence for being contradictory. The incident was at 9.30 p.m and the conditions were not favourable for identification and recognition of the attackers. It is submitted that while PW 1 and PW 2 stated there was light, PW 3 was categorical that all the bulbs were off.

8. The 1st appellant further submitted that the black trouser produced in court was an afterthought as it was not recorded in his statement. He denied that any money or shoes was taken from his house. According to him, the long trouser and T shirt belonged to PW 1 and PW 2. He refers the court to page 21 middle line of the record. He adds that PW 7, Jonathan Chepkonge states clearly that the clothes belonged to the complainant.

9. The 1st appellant challenges the alleged recovery made stating that no inventory was taken. He adds that from the evidence there was no certainty of the money stolen. It is urged that for someone to be convicted of robbery with violence, concrete evidence is needed and in this case the police rushed to a conclusion without doing a proper investigation.

10. It is added that the prosecution failed to notice the alignment of the suspects in the dock during trials (sic) and hearing because the court can be surprised to find the charge sheet indicates that the 1st, 2nd, 3rd and 4th accused are David Montere Onchari as the 1st accused, Dawin Machuka Rioba as the 3rd accused, Samuel Ongendi Ongaro as the 2nd accused and Doreen Nyaboke as the 4th accused. It is said this is a contradiction.

11. The 3rd appellant submitted that his alibi defence was never taken seriously. He spent his day in a farm in the morning. In the afternoon he went to herd cattle till late. He went home and his mother and young sister were present. He adds that he was surprised to be arrested as one of the perpetrators of the crime. It is his case that PW 1 said he did not know him and gave no eye witness evidence against him in respect of that night. PW 3 also contradicted the other witnesses on the source of light. He urges that the source of light in a robbery case and especially at night is very important for both identification and recognition.

12. It is the 3rd appellant's case that PW 7 contradicted PW 8's evidence on recovery of items. He asserts the items were never recovered from his house or their home. He added that his mother was not interrogated yet she could have told about his whereabouts on that night. He has a young sister who could tell the truth and who was not interviewed to confirm if at all the 3rd appellant was at home that night.

13. It is submitted that the 3rd appellant did not know the co-accused persons. He raises what he describes as a strong contradiction in the alignment of all the accused persons in the dock during the hearing of the case. He states that when they entered the dock, the arrangement was changed apart from the charge sheet(sic).

In the charge sheet it read;

David Onchari 1st Accused

Dawin Machuki 2nd Accused

Samwel Ogendi 3rd Accused

Doreen Nyaboke 4th Accused

It is stated that at the hearing the order changed to

David Onchari 1st Accused

Samwel Ogendi Ongaro 2nd Accused

Dawin Machuki Rioba 3rd Accused

Doreen Nyaboke 4th Accused

14. He adds that this can be seen from their defence where he is listed as DW 2 and DW 3 is Dawin Machuki (Bob). This arrangement created confusion in judgement of their case whereby Dawin Machuki was released instead of the 3rd appellant. It is stated that the court relied on the charge sheet arrangement instead of the dock arrangement.

15. The 4th appellant submitted that she just went out to buy chips for her child when she met a friend who invited her for a soda in a bar whose name she did not know. She then returned home where she spent the night with her cousin. She was surprised the next day to be arrested and accused of committing a crime. She added that PW 2 testified that the bulbs were off as they were watching a movie. Others talked of a football match. She denied being a wife or friend of the 1st appellant.

16. In response Mr. Otieno for the DPP conceded to the appeal by the 4th appellant on the ground that the conviction was not safe. The evidence against her was that she was with the victims of the robbery and she later left and the victims were robbed. The evidence against her was majorly suspicion. It was unsafe to convict her for the robbery.

17. Mr. Otieno submitted that the 1st and 3rd appellants were identified by the victims and other witnesses as people they knew. Their conviction was safe. In line with the Muruatetu Case, they can be resentenced as they were sentenced to life imprisonment. Counsel had no objection to the sentence being reduced. The sentence is not supported by the circumstances.

18. I need to point out that the 2nd appellant did not prosecute his appeal being HCCRA 32 of 2011 before this court. He was as per the record herein, released vide a judgement of two judge bench dated 13th July 2011. This judgement was quashed by the Court of Appeal in its judgement dated 27/11/2019. By then, the 2nd appellant had long been released. There appears to have been no efforts to apprehend him once his release was quashed.

19. I have reviewed the impugned judgement of the trial court, the grounds of appeal and the written and oral submissions on record. As demanded of this court by law, I have re evaluated the evidence adduced at trial. For determination is;

1. **Whether the arrangement of the appellants before the trial court was not as they appear serially in the charge sheet and the effect thereof.**

2. **Whether the identification/recognition of the appellants at the scene of crime was satisfactory.**

3. **Whether the prosecution’s evidence was contradictory.**

4. **Whether the trial court properly addressed itself to the alibi defences by the respective appellants.**

5. **Whether the prosecution proved its case against the appellants to the required standards.**

6. **Whether the sentence imposed was legal and whether the same should be reduced.**

20. I propose to answer the issues as they flow seriatim. As to whether the arrangement of the appellants at the dock before the trial court was not as they appeared in the charge sheet, I note this is a serious issue with far reaching ramifications with a potential to occasion a monumental miscarriage of justice if it were confirmed true.

21. I hasten to add, however, that this complaint that is raised by Samuel Ogendi Ongaro who is the 3rd accused as per the charge sheet at the trial court and the 3rd appellant in this file, is rearing its head for the first time in the 3rd appellant’s submission.

There is no indication at all from the lower court record that such an anomaly did occur. Assuming for a moment that it did happen, it was

the duty of the 3rd appellant to raise the issue at the earliest stage. Even in his grounds of appeal the 3rd appellant does not raise this issue.

22. The court record shows that the trial court record and the appearance and presence of all accused meticulously and in full without abbreviations. All the corams read;

> **1st Accused Present**
>
> **2nd Accused Present**
>
> **3rd Accused Present**
>
> **4th Accused Present**

Certainly for the court to indicate any of the accused as present, the name of such an accused must have been called out and answered to and it will take more than a mere statement in submissions to prove this was not done. Am not persuaded that there was any improper arrangement of the appellants in the dock.

23. As correctly put by Mr. Otieno in his submission, accused persons are lined up in the dock as they appear in the charge sheet. It is not possible to confirm the 3rd appellant's contention at this stage. The trial lasted from 6/5/2011 to the 1st of September 2011. During this time the appellants appeared before court 13 times for hearing/mentions. It is incomprehensible that in all these times the anomaly, if at all existed, did not come up. At all material times the record is clear that the magistrate would note the appearance and presence of each and every accused on record as they flowed from the charge sheet.

24. In any event as stated earlier, it would be the duty of the 3rd appellant to notify the court, if at all the anomaly arose. The 3rd appellant like all other appellants knew his position in the charge sheet. How then would he take another position in the dock other than his rightful position? Even the top cover of the trial court file lists the appellants clearly. The 3rd appellant is the 3rd accused thereon.

25. On the material before me and at this late stage that the matter is raised, I find no reliable evidence of the anomaly alleged.

26. On whether the identification or recognition of the appellants at the scene was satisfactory, I note all the appellants' contention is that it was not. Identification or recognition of the appellants was key in determining the guilt or lack of it of the appellants.

The court was enjoined to test the evidence with the greatest care to ensure that it was free from error.

27. The principle set in **<u>Anjonini v R [1980] KLR 59</u>** is a useful guidance. The court stated;

> "*The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in the possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or the other.*"

28. The need of the court to exercise care when considering evidence of visual identification is also emphasized in **<u>Wamunga v R [1989] KLR 424</u>** where the court at page 430 stated;

> "*Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever a case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.*"

29. Was the evidence at the trial court on identification satisfactory to secure a conviction? Having considered the evidence it is clear that the court largely relied on evidence of recognition of the 1st, 3rd and 4th appellants since the appellants were said to have been known to the witnesses before. For the 2nd appellant, the court relied on visual identification. Am aware that even where identification is by recognition, the court's duty to carefully consider such evidence remains Lord Widgery C.J in **<u>R –vs- Turnbull</u>** stated;

> "*Recognition may be more reliable than identification of a stranger, but even when a witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.*"

30. In his evidence PW 1 stated that he was able to identify the 1st and 2nd appellants at the scene of crime. He did not see the 3rd appellant and added that the 4th appellant who had been in the bar before had left 40 minutes before the incident. Lighting was from a bulb in the bar and TV.

Further evidence of identification is found in the testimony of PW 2 who stated that he knew the 1st appellant before and that the 1st appellant ran a barber shop and had actually shaved him before. The 1st appellant had come to the bar, the scene of crime, and requested PW 2 to buy him beer. PW 2 declined since he did not have money. It is after this that the 1st appellant came back and ordered all to lie down. PW 2 also

saw the 2nd and 3rd appellants among the persons who assaulted him. He knew the 3rd appellant who used to work with the 1st appellant as a barber. The 2nd appellant was not known to PW 2. PW 2 stated that there was light from a bulb that remained on.

31. The watchman at the place (PW 3) stated that he knew 1st, 3rd and 4th appellants. He stated that the 1st appellant owned a barber shop where the 3rd appellant worked. The 1st appellant had shaved him before. PW 3 corroborated the evidence of PW 2 stating that on the material day the 1st appellant came to the bar briefly earlier on before the incident and left. He confirmed that there was a light bulb on. It is the 1st appellant who found him closing the door of the bar and ordered him back inside and further ordering him to sit down.

32. He saw about 8 people getting into the bar. PW 3 stated that those people broke both the bulb outside the bar and the one inside after which they started attacking the customers. PW 3 slipped out and raised alarm. He stated that the bar had one bulb. He stated that the 1st appellant wore a black trouser on the fateful evening. He identified the said trouser in court. In cross examination by the 1st appellant, PW 3 reiterated that he saw the 1st appellant at the scene of crime and that there was one light bulb inside the bar and the other outside. He stated that the T.V was also on and that there was a bulb inside the bar and at the counter. PW 3 stated that one of the bulbs was not on as they were watching a movie. He stated that the room got dark during the attack and that he escaped when the 1st appellant began attacking PW 1 and PW 2. In cross examination by the 2nd appellant, PW 3 stated that he did not know the 2nd appellant although he used to see him riding a motorcycle. He reiterated that there was one light each inside the bar and outside. He stated that there was a bulb at the bar counter but the same was off because the T.V was on while the other bulb was broken during the attack. In cross examination by the 3rd appellant, PW 3 stated that he (PW 3) knew him as **Bob** and that the 3rd appellant used to shave him sometimes back and that he was also a patron at the bar. In cross examination by the 4th appellant, PW 3 stated that the 4th appellant was the one who brought PW 1 and PW 2 to the Royal Bar on the fateful evening and that he knew her as the 1st appellant's girlfriend as they were together most of the times. PW 3 stated that he was present when the 4th appellant was arrested. PW 4 was an employee at the Royal bar on the fateful evening when the robbery took place. In her evidence in chief, she stated that she knew the 1st appellant as **David** and that he used to patronize Royal Bar. He also knew the 2nd appellant but not by name. She used to see him riding a motorcycle. The 2nd appellant was not one of their patrons. She stated that she knew the 3rd appellant and that his name was Bob and he used to work with the 1st appellant. PW 4 stated that she used to see the 4th appellant and the she only came to the bar on that day of the attack. PW 4 had only worked at the Royal Bar for one month. On the material evening PW 4 was at Royal Bar counter watching a movie as they waited for PW 1 and PW 2 to finish their drinks before they break for the night. She stated that as PW 3 went to close the bar door, she saw the 1st appellant who ordered them to lie down. PW 4 was with PW 6 at the material time. She stated that the 1st appellant was with a metal rod and he had some people behind him. PW 4 then lied down from where she was carried to the counter by the attackers who took Kshs. 6,670.00 from her. She stated that there was a bulb at the counter and at that the bulb at the bar was hit. PW 4 stated that the person she recognized well was the 1st appellant. She stated that the 4th appellant came to the bar with PW 1 and PW 2 and that the 1st appellant came to the bar before the attack bought a cigarette followed by the 4th appellant after which the attack commenced. She stated that the attackers had taken DSTV wires and the same were recovered from the 1st appellant's house together with a metal rod and one shoe. PW 4 stated that the appellants were all arrested in the 1st appellant's house at 10.00 a.m the following day after the attack. In cross examination by the 2nd appellant, PW 4 stated that she knew the 2nd appellant as he used to ride a motorcycle but the 2nd appellant was not a patron at Royal Bar. She stated that she only recognized the 1st appellant during the attack. In cross examination by the 3rd appellant, PW 4 stated that she knew the 3rd appellant as **Bob** which was his common name. She reiterated that it is the 1st appellant that she recognized clearly during the attack. In cross examination by the 4th appellant, PW 4 testified that she knew the 4th appellant as Maureen and that sometimes, the 4th appellant is known as Doreen and that she was well known in Kijauri which is the area where Royal Bar was situated. PW 6 was a bar waitress at Royal Bar and she was on duty at the said bar on the fateful evening. She stated that she knew the 1st, 3rd and 4th appellants. She knew the 1st appellant as a barber and that he owned a barber shop and that the 3rd appellant worked with the 1st appellant in his said shop. She knew the 4th appellant as Doreen while the 2nd appellant was not known to her. PW 6 stated that on the material day they were seated in the bar at around 9.00 p.m watching T.V. They had customers who had booked rooms and who were still taking alcohol. The said customers were with the 4th appellant. The 4th appellant then left the bar. PW 6 then asked PW 3 to close one of the bar doors. When PW 3 approached the door, he was ordered back to his seat. The 1st appellant then ordered them to lie down. She stated that when the 1st appellant entered the bar, the bulb was on. She stated that the 1st appellant had a light blue T-shirt and black jeans. PW 6 recognized the jeans the 1st appellant was said to have been wearing at the material time in court. PW 6 stated that she only managed to recognize the 1st appellant at the scene of crime. In cross examination by the 1st appellant, she reiterated that she recognized the 1st appellant during the robbery and that the 3rd appellant was behind the 1st appellant. She stated that they went to the house of the 1st appellant and the house of his mother and they did not go to the houses of the other appellants. In cross examination by the 2nd appellant, PW 6 stated that she only recognized two people during the attack. In cross examination by the 3rd appellant, PW 6 stated that she knew the 3rd appellant as Bob and that she saw him at the scene of crime. In cross examination by the 4th appellant, PW 6 stated that the 4th appellant came to the bar with PW 1 and PW 2 and left after taking alcohol and that she was not present during the attack. PW 6 stated that she was present when the 4th appellant was arrested. PW 7 was a police officer based at Manga Police Station. PW 7 stated that on 5th May 2011, he together with administration police officers visited the house of the 1st appellant where all the appellants had been arrested and recovered a shoe belonging to PW 1, DSTV wires that were identified by the bar counter lady, a black trouser said to have been worn by the 1st appellant by the 1st appellant during the robbery and a metal bar that was said to have been used by the 1st appellant to break the bulb during the robber. PW 7 stated that he did not arrest the appellants and that it was not necessary to conduct an identification parade because the appellants were well known. In cross examination by the appellants, PW 7 stated that he came into the scene after the appellants had been arrested. PW 8 was an administration police officer based at the District Commissioner's Office, Kijauri. He was one of the arresting officers. On 5th May 2011, they receive information of some suspects who had stolen money and goods at Royal Bar who were supposed to be arrested. PW 8 stated that he accompanied by 4 other officers went to the scene of crime from where they were led to the home of the suspects by the victims of the crime. PW 8 stated that they were led to the house where the appellants were arrested by the victims who knew the suspects. PW 8 stated that they also recovered a shoe which was said to belong to one of the complainants, cable wires which were identified by the employees of Royal Bar, a metal bar that was identified by one of the victims to have been used to assault him. They also recovered clothes said to have been worn by the suspects during the robbery. PW 8 stated that the house was said to belong to the parents of the 3rd appellant. PW 8 stated that he was the arresting officer. In cross examination by the 1st appellant, PW 8 stated that they went to two houses, one where the 1st appellant's mother was staying and the other where the 1st appellant was staying. He stated that

after arresting the appellants, the appellants were handed over to the Kenya Police who PW 8 and other officers who had accompanied him took to the scene of crime. In cross examination by the 2nd appellant, PW 8 stated that the appellants were well known by the complainants and as such it was not necessary to carry out identification parade. In cross examination by the 3rd appellant, PW 8 stated that the information that one of the houses they went to belonged to the 3rd appellant's mother was obtained from one of the complainants. He stated that they went to one house and that they were told that the appellants were staying together. In cross examination by the 4th appellant, PW 8 stated that all the appellants were found in one house and were arrested together.

33. It is clear from the evidence on record that the 1st, 3rd and 4th appellants were persons known to PW 2, PW 3, PW 4 and PW 6 before the incident. These witnesses affirmed that they saw the 1st, 2nd and 3rd appellants at the bar during the robbery. There is evidence that the 1st and 4th appellants were at the bar before the robbery and they left. The 4th appellant did not return. However, the 1st appellant returned at the time of the robbery and he is the one who ordered PW 3 (the watchman) into the bar and attacked PW 1 and PW 2.

34. I have considered the source of light. I am satisfied that though the 1st appellant broke a light bulb, there was light from the bulb at the counter and from the TV. This light was, in my considered view, adequate to recognize someone known to a witness before. Whereas it is the appellants' case that there was contradictions over which bulb was on in the bar, my considered view is that there was no material inconsistency in the evidence of the witnesses.

35. Inconsistencies are common in criminal cases due to lapse of memory among witnesses. The crucial requirement is for the court to satisfy itself that the inconsistency in the evidence is not material such that when the evidence is considered in totality, the inconsistency can be ignored without prejudice to any party.

36. The Court of Appeal in **Philip Nzaka Watu v Republic [2016]eKLR** stated;

> *"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."*

In **Dickson Elia Nsamba Shapwata & Another vs Republic CR. App No. 92 of 2007** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt;

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to consider whether the inconsistencies and contradictions are minor, or whether they go to the root of the matter…."*

37. Did the trial court address itself to the alibi defences put forth by the appellants?

The trial court at page 38 of its judgement delivered itself thus;

> *"I am fortified in my conclusion by the fact that though all the accused persons denied that they participated in the robbery and that they were all at their respective homes, none of them called their kin or persons they were staying with to confirm that at the time the robbery took place the accused were nowhere hear the scene of crime."*

38. It is trite law that the burden of proof in a criminal trial lies on the prosecution. When the accused raises an alibi defence, he does not shift this burden to himself. The Court of Appeal in **Victor Mwendwa Mulinge –vs- Republic [2014] eKLR** stated as follows;

> *"It is trite law that the burden of proving falsity, if at all, of an accused's alibi lies on the prosecution."*

39. From the statement of the trial court captured at para 37 above, the trial magistrate appears to have misapprehended the law and purported to shift the burden to the appellants to prove their alibi.

40. I have however considered the evidence on record and reached my own conclusion on the alibi defences raised. In my considered view the prosecution's evidence in regard to the presence and participation in the robbery of the 1st and 3rd appellant is overwhelming. In light of this evidence, the alibi defences raised cannot possibly be true.

41. On the whole, I am satisfied that the recognition of the 1st, 3rd and 4th appellant was free from error and the case against the 1st and 3rd appellant was proved to the required degree.

But something needs to be said about the 4th appellant. Her presence at the scene of crime was before the robbery took place. She was in the bar for some time and left 40 minutes before the robbery. The witnesses are categorical that she was not at the scene during the robbery. Her connection to the robbery is that she was found at the 1st appellant's home when the 1st appellant was arrested.

42. The evidence against the 4th appellant is upon re evaluation insufficient to secure a conviction. Her conviction was unsafe. Indeed, I note that the DPP has conceded her appeal. That is as it should be.

43. The trial court upon convicting the appellants sentenced each of them to Life imprisonment on each count. The principles upon which an appellate court can interfere with the sentence imposed by the trial court are well settled. In **Benard Kimani Gacheru vs Republic Cr. App No. 188 of 2000**, the court stated;

> *"It is now settled law following several authorities by this Court and High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor, or took into account some wrong principle. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."*

44. In sentencing the appellants the court stated;

> *"I note the offences committed by the accused persons are serious. I will sentence each of the accused persons to life imprisonment on each of the 3 counts."*

45. In Kenya life imprisonment is a term of imprisonment to run until the convict's demise. Where the conviction like in the present case is on more than one count, since a convict has only one life it is desirable that the court sentences the offender on one count leaving the other sentences in abeyance to be served only if the count sentenced on ceases to subsist e.g. through a successful appeal.

46. In **Samuel Waithaka Mbugua vs Republic [2011]**, the court stated;

> *"Although it seems to us obvious and a matter of common sense that life sentence cannot run consecutively with another sentence of imprisonment as in Kenya the position is as yet that life sentence means the appellant stays in prison till his demise, once he is dead he cannot start serving another sentence, neither would it be appropriate that one starts with a shorter sentence such as 10 years in this case, and after clearing that, he then starts life imprisonment. However, these notwithstanding, the court should for clarity, specify where more than one sentence of imprisonment are pronounced, whether the same will be served concurrently or consecutively. In this case we order that the sentence of life imprisonment and of ten (10) years imprisonment are to run concurrently."*

47. The trial court in this matter fell into error for meting out 3 sentences of life imprisonment while one would have served the purpose and placing the other two (2) in abeyance and even fell into a more grave error, of failing to indicate, whether the sentences were to run concurrently.

48. A little more needs to be said about the sentence. As at the time the sentence was imposed, the courts were guided by the Court of Appeal decision in **Joseph Njuguna Mwaura & 2 Others –vs- Republic, Criminal Appeal No. 5 of 2008** where a 5 judge bench of the court held that in capital offences like robbery with violence, judicial officers have no discretion in sentencing as there is no alternative sentence apart from the penalty of death. The ground has since shifted. The Supreme Court in **Francis Karioko Muruatetu & Another –vs- Republic SC Pet. No. 16 of 2015** concluded that the mandatory death sentence prescribed for the offence of murder by **S 204** of the **Penal Code** is unconstitutional. The court stated;

> *"Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of a fair trial that accrue to the accused persons under Article 25 of the Constitution; an absolute right."*

49. The sum total of the above is that I am satisfied that the prosecution proved the case against the 1st and 3rd appellant to the required degree on all the 3 counts. Criminal Appeals No.s 32 of 2011 and 34 of 2011 on conviction have no merit and are dismissed.

Criminal Appeal No. 34 of 2011 relating to the 4th appellant is allowed. Her conviction is quashed and the sentence set aside.

50. As regards the sentence and in view of the irregularity in sentencing alluded to above and further after considering circumstances of the offence and guided by the **Muruatetu Case**, I set aside the sentence of life imprisonment imposed against the 1st and 3rd appellant in respect of each count and substitute thereof a sentence of 14 years imprisonment on each count to run concurrently from the date of sentence at the trial court. The 4th accused is to be set free unless otherwise lawfully held.

Dated and **delivered** at **Kisii** this **13th** day of **May 2020**.

A.K NDUNG'U

JUDGE