



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 23 & 24 OF 2017 [CONSOLIDATED]

WALTER OTIENO ONYANGO.....1ST APPELLANT

JOSEPH OTIENO ABURA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Bondo Principal Magistrates' Court

Criminal Case No 1156 of 2015 by Hon M. Obiero, principal Magistrate delivered on 13/2/2017)

JUDGMENT VIA SKYPE

1. The appellants herein **WALTER OTIENO ONYANGO and JOSEPH OTIENO ABURA** were jointly charged and convicted and sentence for the offence of robbery contrary to section 296(1) of the Penal Code. Particulars of the offence are that on the night of 23.12.2015 and 24.12.2015 at around 2100 hrs., at Ndori sub-location in Gem Sub-county within Siaya County they jointly robbed one Caroline Adhiambo Otieno one Itel mobile phone, Kshs. 3,000/- all valued at Kshs. 4,800/= and or immediately before or immediately after the time of such robbery used actual violence to the said Caroline Adhiambo Otieno.

2. The two appellants were arraigned on 11.01.2016 and denied the charge. They were subsequently tried and *vide* the judgment delivered 13.02.2017 the two appellants were convicted of the offence of robbery and subsequently sentenced to life imprisonment.

3. Aggrieved by the conviction and sentence, the Appellants herein instituted their respective appeals *vide* separate petitions. Walter Otieno Onyango filed his petition dated 15.02.2017 in Siaya High Court's Criminal Appeal Number 23 of 2017 where he raised the following grounds of appeal:

- a. That vital witnesses were not called by the prosecution thereby hiding the true facts
- b. That he could not recall all that transverse during the trial hence prayed for trial proceedings to adduce more grounds.

4. He prayed that the Court do allow the appeal and quash the life sentence and set him at liberty and further prayed for habeas corpus.

5. On his part, Joseph Otieno Obura filed his petition dated 15.02.2017 being Siaya High Court Criminal Appeal No. 24 of 2017 where he raised the following as his grounds of Appeal:

- a. That the learned trial magistrate erred in law and fact by failing to observe that there was gross misidentification of the appellant hence misled during the trial process.
- b. That the learned trial magistrate erred in law and fact by observing that the prosecution had proved his case beyond a shadow of doubt hence failed to consider the defence witnesses' evidence and further shifted the burden of proof.
- c. That the trial magistrate concluded the hearing process without considering that the prosecution hid justice by not producing the vital witnesses to ascertain the true facts of the case.
- d. That he could not recall all that transverse during the trial hence pray for trial proceedings to adduce sufficient grounds.

6. He prayed that the Court do allow his appeal, quash the harsh life sentence and set him at liberty and further for habeas corpus.
7. Vide the orders of 20.02.2019 the two appeals were consolidated on the grounds that the two accused persons were jointly charged in the lower court. When the appeal came up for hearing, the appellants agreed to canvass the same by way of written submissions.
8. In his written submissions, **Walter Otieno Onyango** submitted that the alleged offence occurred at night (21hrs), therefore, that the conditions of aforesaid scene of crime were unfavourable to support a positive identification of the assailants as the moonlight was the only source of light during the alleged time of the offence and further that he was not known to the complainant prior to the date of the alleged offence and further that when PW3 testified, he did not say whether PW1 gave him any descriptions of the assailants and that the Investigating Officer did not tell the court whether PW1 gave him any description of the assailant during the time she reported the matter at Akala Police Station. He relied on **Kioko Kilonzo & Others –vs- R (1952) EACA**.
9. The first appellant further submitted that “Daddy” was the prime witness to the case as he knew the person who escorted PW1 on the fateful night and that failure to call the said Daddy as a witness prejudiced the trial process. Further that the omission of the names of Erick Odhiambo Sijenga in the witness list rendered the charge sheet defective as per Section 214 Penal Code he also submitted that PW2 did not make a report to the police. Further submission was that he never boarded the motor cycle and further that the evidence on the same was not corroborated. The 1st appellant further submitted that that the trial court failed in law to consider his alibi defense and shifted the burden of proof on him despite the fact the recoveries were never made on him.
10. On sentence it was submitted that the trial court handed him a harsh sentence without considering that the same was not commensurate with the offence allegedly committed and further that he was a first offender. He relied on the Supreme Court’s judgment in **FRANCIS KORIOKO MURUATEU & ANOTHER V REPUBLIC [2017] e KLR** to the effect that life sentence should not be imposed as a mandatory sentence.
11. On his part, Joseph Otieno Abura the second appellant herein submitted that the ingredients of the offence were never proved beyond any reasonable doubt as is required under Section 107 of the Evidence Act. He further submitted that the sentence was ‘manifestly harsh and excessive and that the procedure for sentencing was not duly followed as regards the sentencing policy guidelines. That the sentence for robbery under section 296(1) of the Penal Code was not life sentence and that the life imprisonment was prejudicial. It was his further submissions that he was prejudiced on his right to a fair trial which was a fundamental right as the evidence by the prosecution was weak since the evidence of possession was never proved. He added that the vital witness (Annah Adhiambo) recorded statements with the police but was not availed in court to state how she came to possess the alleged handset as relied upon by both the prosecution and the trial magistrate.
12. It was submitted by the second appellant that the trial magistrate’s judgment was not in tandem with the provisions of section 169 of the Criminal Procedure Code and that the trial magistrate in the said judgment shifted the blame to the appellant and which was a fatal remiss by the prosecution as regards the provisions of section 134 of the Criminal Procedure Code. Further, that the trial magistrate erred in both fact and law by convicting him on non-existing count of attempted rape which offence he did not take plea on. He further submitted that his conviction was based on evidence acquired through shambolic investigations as PW4 CPL John Turunya (the Investigating Officer) gave hearsay evidence in that he did not produce the OB Number, in which PW2 was registered and in regard to his basic evidence and that there was no evidence that the said PW2 was indeed in police custody on the 28.12.2015.
13. The duty of this court (1st appellate court) was set out as stated by the court of Appeal in **Okeno v. Republic [1972] E.A. 32** and restated in **Kiilu and another vs. R (2005) 1 KLR 174** that:
- “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 v. R., [1957] E.A. 336**) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (**Shantilal M. Ruwala v. R., [1957] E.A. 570**). **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 court’s findings 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 v. Sunday Post, [1958] E.A. 424.**”***
14. Therefore, it is the duty of this court to submit the evidence which was tendered before the trial court to fresh and exhaustive examination and arrive at its own independent decision after weighing the conflicting evidence as to whether the prosecution was able to prove the offence of robbery beyond any reasonable doubt and in doing so consider the other grounds of appeal and whether they indeed ought to have changed the course the trial court took. This should be done, appreciating that it is trite law that the prosecution in any criminal case has the burden of proving every element of the offence an accused is charged with (as was held in the locus classicus case of **Woolmington –Vs- DPP (1935) AC 462**) and further that the said elements must be proved beyond any reasonable doubt (as was defined by Lord Denning in **Miller vs. Ministry of Pensions, [1947] 2 All ER 372**). Further the court ought to remember that the trial court had the advantage of hearing and seeing the witnesses.
15. In **Donald Atemia Sipendi v Republic [2019] eKLR** citing with approval the Supreme Court of India’s decision in **K. Anbazhagan vs. State of Karnataka and Others, Criminal Appeal No. 637 of 2015**, it was stated:

“The appellate Court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,...The appellate Court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be

resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.”

16. Revisiting the evidence before the trial court, PW1 (**Caroline Adhiambo Otieno**) testified that she was a casual labourer and that on 23.12.2015 at 9.00 p.m she was in Kambare where she had gone to visit her sister. That on her way back to Akala, she agreed with the boda boda operator that she would pay Kshs. 100 but since she had no loose money (she had Kshs. 3,500), she went to an Mpesa shop to get change after which she told the boda boda operator to take her to Akala but the operator said that he needed someone to accompany him and took his colleague. That when they were approaching the tarmac, they saw another motorcycle ahead and the boda boda rider told her that he was suspicious of the motorcycle. That he then branched to another road but after a short distance, he stopped the motorcycle and the person who had accompanied him alighted and told her to alight and he told her to go away but she resisted as they had not yet arrived at Akala and she requested the rider to take her to Akala but the two persons told her to go away. That his (rider's) colleague held her jacket from the front and the rider came from behind and caught her on the neck. That the rider's colleague removed her pant and the bicker which she was wearing while the rider continued struggling with her while closing/ covering her mouth and they then pushed her onto the ground. That the rider closed her mouth and the other person removed his trouser and lay on her and he wanted to insert his penis into her vagina but he was unable because he did not erect. That the rider inserted his hand into her pocket and took her money and phone (Make Itel) and they then left her lying on the ground. She testified that the incident took about 15 minutes. That she screamed for help and one of them removed a panga and threatened to cut her with it but she ran away while screaming and he pursued her but she ran towards a nearby home. That the person was carrying her clothes and when he ran away, she followed him to get her clothes (skirt, biker and pant) and he threw the clothes to her and went away.

17. PW1 stated that some people came and she explained to them what had transpired and one of them had a motor bike so they went to the stage but they did not find the two people. That there was somebody at the stage who knew the two people and who was present when the two people took her onto the motorcycle and after that she went to her home at Akala. That the person told her that the two people were Walter Onyango and Apollo but she did not know the name of the person.

18. She stated that the following day, she went to Akala police station where she made a report and the suspects were looked for and they were traced and arrested and that she was at the stage when they were arrested. She stated that she saw Walter and his co accused very well during the incident and that the rider was brown and was wearing a brown jacket and a muffin while the other person was black and was wearing a black jacket and a black pair of trouser. That the rider was shorter than his colleague and that there was bright moonlight during the incident. She testified that the phone was make Itel and black in colour and was a button phone and there was a piece of paper at the back of the batteries and she had also written her initials C.A at the place of the batteries. She identified the phone in court and the phone was produced as an exhibit by the investigating officer. PW1 stated that her friend had bought the phone for her and she did not have the receipt but she had memorized the serial number which she read out to the court as 352159070455322. She stated that she was injured on the mouth but did not go to the hospital.

19. During cross examination by the 1st appellant (**Walter Otieno Onyango**), she testified that the appellants were the people who robbed her and that there was somebody who knew the 1st appellant at the stage.

20. When cross examined by the 2nd appellant (**Joseph Otieno Abura**), she testified that she knew the appellant and that he was the one who attempted to have sex with her during the incident and that it was her first time to see him. That she gave the police officer his description and how he was dressed but she did not know his name. That she saw his face during the incident and that there was moonlight. Further that it was his sister who told her that his name was Apollo. That it was the boda boda operators who arrested him and that the person who told them their names recorded statements but she did not know whether he was a witness.

21. **PW 2 (Nick Odhiambo Sijenga)** testified that he was a boda boda rider and that on 28.12.2015, at 8.00a.m. he was in the cell at Akala police station where he had been on allegations that he had assaulted his wife and that they were three people in the cells (him and the appellants herein) and that he heard the 2nd accused (2nd appellant) telling the 1st accused (1st appellant) how they had stolen from a lady and they were discussing how they had shared what they had stolen. That the 2nd appellant was telling the 1st appellant that they should not admit when taken to court. That the 2nd appellant said that he had taken the phone and Kshs. 1,000 while the 1st appellant had taken Kshs. 2,000. That in the morning, a relative of the 2nd appellant brought for him some food and he overheard the 2nd appellant telling the relative to go to his house and look for a phone in the box and keep (it safe) for him and later they were brought to court. That on 5.1.2016 he explained this to the chairman by the name Barack on what he heard while in the cells and that he went with the said chairman to Akala police station and they went to the 1st appellant relative's home at a place known as Kabworo where they found the relative who was a boy and who led them to a home and gave them the phone which was Itel make and black in colour. That they took the boy and the phone to Akala police station and the boy also recorded his statement. He identified the two appellants and the phone and stated that they were the people he was with at the police station and that he did not know them prior to the day they met in cells.

22. In cross examination by the 1st appellant, PW2 testified that he did not know his name and that he recorded the statement with the police which was similar to what he told the court. When cross examined by the 2nd appellant, he testified that he did not know him prior to the date but he saw him in the police cell.

23. **PW3 (Barack Ombogo)** testified that he was a boda boda rider and lived in Akala market and further that he was the security chairman and Community Policing chairman. He testified that on 24.12.2015 at 7.00 a.m., he received a report from Caroline Adhiambo to the effect that on 2.3.2015 she was robbed by two boda boda operators who she could identify physically and the incident occurred at Kambare junction and the people robbed her of Kshs. 3,000 and a mobile phone make Itel and that she had made a report. That on 26.12.2015 he received information that the people who had robbed the lady were available and they were in Seme. That the lady told him that it was "Daddy" who gave her the people who took her on a boda boda and robbed her and he went and asked Daddy who told him that one of the boda boda riders was Walter Otieno also known as Ogwanjo (1st appellant) and they traced Walter at the stage and when he talked to him, he admitted that he had carried a lady on his motorcycle and they were with Joseph Abura (2nd appellant).

24. **That PW3** called the OCS of Akala police station who came and arrested Walter and took his motor cycle registration number KMCP 624H blue in colour and they later went to look for the 2nd appellant whom they found in Seme and when they interrogated him, he said that he was with Walter Abura (1st appellant) when they escorted the lady on a motorcycle. That they then arrested him and took him to Akala police station but they did not recover anything from him. That later between 28th December and January, 2016 he received information from Erick Oginga (PW2) who told him that he overheard the two discussing the issue of robbery in the cells and further that he heard the 2nd appellant telling his nephew that there was a phone in his house and that the phone should be taken to his sister. That they went to look for the boy and went to the 2nd appellant sister's home and found the boy's mother at home. That PW3 tricked the sister to the 2nd appellant that the 2nd appellant had sent them for the phone and the said sister told them that the phone was there and that her son had given her the phone. That they went to look for the boy and when they found him, he told them that the 2nd appellant had told him to take the phone to their home. That they then went to the police station together with the mother to the boy who is the sister to the 2nd appellant together with the boy and handed over the phone to the police officer and he subsequently recorded his statement. That the phone was make ITEL and black in colour. He identified the phone in court, the two appellants and the motor cycle TVS black in colour registration is KMCP 624H. The motor cycle was later produced as exhibit.

25. When cross examined by the 1st appellant, he testified that when the 1st appellant was arrested, he was found with the motor cycle and that "Daddy" was a witness in the case but he could not see him in court. On being cross examined by the 2nd appellant, he testified that they were about 10 people when the second appellant was arrested and that they found him in the house and that when he was asked about the 23.12.2015, he led them to his home but they did not conduct a search in his house.

26. **PW4 (CPL John Turunya)** gave sworn evidence and testified that he was the investigating officer in the case and that on 24.12.2015 at 8.30 a.m he was at Akala police station when he met Caroline Adhiambo Otieno the complainant who had lodged a complaint of robbery and attempted rape. That she alleged that she had been robbed of Kshs. 3,000 and a mobile phone.

27. **PW4** stated that on 26.12.2015, one Barrack Ombogo called the police station and informed them that they had arrested one suspect after which he proceeded to Akala market in the company of the OCS and on arrival, they found the 1st appellant who had been arrested together with a motorcycle registration number KMCP 624H and they took him together with the motor cycle to Akala police station and when they reached the police station, the complainant (who was at the police station) identified the 1st appellant as one of the people who took her on a boda boda and robbed her and that they later arrested the 2nd appellant who was suspected to have accompanied the 1st appellant on the material night and that when he received the 2nd appellant, he also received a number plate KMDP 680A which was alleged to be the real number plate of the motorcycle and that he recorded the statement and proceeded to charge him.

28. He stated that on 28.12.2015 in the evening, one Barrack called him and told him that Erick Odhiambo who had come from court had informed him that the 2nd appellant had sent his nephew by the name Samuel Omondi to go and get a mobile phone which he had kept in his box and take to his sister that is the mother of Samuel and he advised Barrack to trace the home of Annah Adhiambo who was the said sister to the 2nd appellant. That on 5.1.2016, Barack called him and reported that he had found the sister to the 2nd appellant and that they had recovered a phone but he advised Barack to trace Samuel (the boy who had been sent) and take them to the police station and later he received Samuel, Barack and Ann (Samuel's mother) and Samuel handed over the phone to him and the phone was serial number 352159070455322 and the complainant identified the phone as that which had been stolen from her and that the memory card had the same songs.

29. The witness further testified that Samuel told him that the 1st appellant had also given him his phone which had ITEL battery and Samuel brought the said phone which was make Nokia. That he recorded the statement from Samuel, Annah and Lawrence Okoth and that Lawrence told him that he was the one who gave the lady to the accused person. He produced the motor cycle which had the number plate attached using a rubber band and being registration number KMCP 624 H as P Exhibit 2 and number plate KMDP 860A (which he testified that he later received) P Exhibit 3.

30. He further testified that on 25.5.2016, he went to KRA office in Kisumu to confirm the ownership of the motorcycle and the number plates and discovered that number plate KMDP 860A belongs to the motorcycle which had the number KMCP 624H and the number KMCP 624H belonged to another motorcycle make Tiger and Green in colour. He produced a copy of the said records as P Exhibits 4(a) and (b) and the ITEL phone serial number 352159070455322 as P Exhibit 1.

31. When cross examined by the 1st appellant herein, he testified that the PW1 (Caroline) reported that she was robbed by two people and they were on the same motorcycle and that when they arrested the 1st appellant, he had a phone make Nokia.

32. When cross examined by the 2nd appellant, he testified that he did not recover anything from him and further that Lawrence said that he got him the passenger to transport using a motorcycle. He further testified that he did not conduct an identification parade and neither did he recover anything at the scene.

33. PW5 (Samuel Omondi) testified that he was a student aged 17 years and that on 28.12.2015 at 7.00 a.m., he was sent to the police station by his mother and he went to Akala police station to take food to his uncle by the name Joseph Otieno (2nd appellant) and that the uncle told him to go to his house in Usenge and take his bag and keep for him but that he did not tell PW5 the contents of the bag and so, PW5 went there with his mother and removed the uncle's (2nd appellant's) items which was a suit case containing clothes but he did not check the contents of the bag. That he took the suit case to their house and kept it. That after one week, three boda boda riders went but they did not find him at home but found his wife and they later went to where he was and they had a phone and were in the company of his mother but he did not know the origin of the phone and when they asked him about the origin of the said phone, he said that did not know the origin. The phone was make ITEL and was black in colour. That after that, they went to Akala police station where the police officers talked to his mother and took the phone after which he recorded a statement at the police station. He stated that the boda boda riders went with the phone and further that he did not know its origin and further he did not check the contents of the bag.

34. During cross examination by the 2nd appellant, he testified that the 2nd appellant sent him to go and keep the bag but he did not send him to go and keep the phone.

35. The prosecution then closed their case and vide a ruling delivered on 10.01.2017, both the appellants' were found to have a case to answer and were subsequently placed on their defense.

36. In his sworn statement of defence, the 1st appellant testified that on 23.12.2015, at around 9.00 pm, he was at Akala when some people went and arrested him and escorted him to Akala police station and that he was told that he had stolen a phone, an allegation which he denied.

37. In cross examination by the prosecution, he testified that he sold charcoal and also rode motor cycles but he was not a boda boda operator and that when he was arrested, he had a motorcycle but he was not operating a boda boda and that his motorcycle was TVS blue in colour number KMCP 624H but belonged to James Ochieng. That the number plate was not recovered from him but that some boda boda people went with the number plate. He further testified that the number plate on his motorcycle had been tied using a rubber band and was produced as an exhibit but he was not aware that the motorcycle was a stolen property. He further testified that he did not see the complainant on the 23.12.2015 and neither did he know her and he did not transport her.

38. He stated that he heard the evidence of the witness who said that he overheard them discussing the issue while in the cells but that that evidence was false. He however conceded that he was with the said witness in the police cells at Akala police station and he did not know him prior to the incident. He denied having been at Kambare on the 23.12.2015 at 9.00 p.m. He further testified that he knew the 2nd appellant as they used to work together and that he used to burn charcoal.

39. The 2nd appellant on his part testified that he was a mixer operator and he used to work in Mombasa. That on 23.12.2015 at 9.00 p.m. he was at home and he could not remember what happened on that day. That on 26.10.2015 at 4.00 p.m. he was at his brother's home when boda boda riders went and asked him about a phone and he told them that he did not have a phone. That they conducted a search on him but they did not recover anything and they started beating him and he led them to his house where they conducted a search but did not find anything and they escorted him to Akala police station where he was detained in the cells and on 28.12.2015 he was charged with the offence before court. He denied having committed the alleged offence.

40. In cross examination by the prosecution, he testified that he knew Samuel Omondi (PW5) who was his nephew and that the said Samuel went to see the 2nd appellant at Akala police station. He admitted that he sent Samuel to go and take his (2nd appellant's) belongings to their home as he was living alone in the house. That he could remember that he saw somebody in the cells at Akala, who had testified against him in court and said that he heard DW2 sending his nephew to go and keep a phone. He further testified that his nephew testified that he told him to take the bag only and that he did not tell the nephew to change his statement. That in his first statement the nephew stated that the 2nd appellant told him to keep a phone which was in the bag. That the phone which was produced was not his phone and neither did he keep it in the bag and further that he was not at Kambare on 23.12.2015. That he knew the 1st appellant as they lived with him in the same village but he did not see him riding a motorcycle on the 23.12.2015.

41. The appellants then closed their case.

Determination

42. Having considered the evidence which was tendered in the trial court by both the appellant and the prosecution (in compliance with the duty of this court as was laid down in *Okeno v. Republic (supra)* and re-stated in *Kiilu and another vs. R (supra)*), the amended grounds of appeal, the oral and written submissions by the appellant and the oral submissions by the state in opposing the appeal, in my humble view, the following issues flow for determination:

1. Whether the elements of the offences each of the appellant was charged with were proved to the required standards?

2. Whether the sentence imposed was proper?

3. Whether the appeal ought to succeed/ what orders can the court give in the circumstances?

43. **On whether the elements of the offences each of the appellant was charged with were proved to the required standards, as stated above, the appellants were charged with the offence of robbery contrary to section 296(1) of the Penal Code. The said section provides:**

“Any person who commits the felony of robbery is liable to imprisonment for fourteen years”

44. Section 295 defines robbery as:

“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”

45. Thus from the above definition, the elements of the offence of robbery are:

i. Stealing by the person charged

ii. At, or immediately before or immediately after the time of stealing, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained

46. The above elements were appreciated in **Anthony Mutua Nzuki v Republic 2018jKLR** where the High Court in Machakos (G.V Odunga J) in defining the offence of robbery with violence held that (paragraph 38):

“Therefore for the offence of robbery to be proved there must be evidence of theft by the person charged. A person cannot be guilty of the offence of robbery unless he is guilty of theft. The theft must however be accompanied by the use or threat of use of actual violence to a person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained. If all these ingredients are present and the offender was armed with any dangerous or offensive weapon or instrument, or was in company with one or more other person or persons, or at or immediately before or immediately after the time of the robbery, he wounded, beat, struck or used any other personal violence to any person, he would have committed robbery with violence and would be liable to be sentenced to death.”

47. Therefore, on whether the prosecution was able to prove the above elements to the required standards (that of beyond any reasonable doubt) as was set in **Woolmington –vs- DPP** (supra), the elements of robbery must be analyzed.

48. **On whether there was stealing**, *stealing* is defined under section 268 of the Penal Code as:

“A person who fraudulently and without claim of right takes anything capable of being stolen on fraudulent converts to use of any person, other than the general or special owner thereof any property, is said to steal that thing or property.”

49. *The prosecution has to establish that there was taking of anything capable of being stolen and the said taking being fraudulent and without claim of right or there was fraudulent conversion for use of any person, other than the general or special owner thereof any property (in this case the money and the phones) and further that the person who did so was the appellant.*

50. **On whether taking was proved, and if so, whether the thing taken as capable of being stolen?** PW1 (the complainant) testified that when the appellants turned on her, and in the course of the struggle, the rider inserted his hand into her pocket and took her money and phone (Make Itel) and they then left her lying on the ground. She testified that the phone was make Itel and black in colour and was a button phone and there was a piece of paper at the back of the batteries and she had also written her initials C.A at the place of the batteries. She further testified that her friend had bought the phone for her and she did not have the receipt but she had memorized the serial number and it was 352159070455322. When the phone was produced in court, she was able to identify the same. PW3 testified how on receiving information from PW2 on what he overheard when he (PW2) was in the police cells with the appellants (that he heard them discussing about how to share the proceeds of theft from a lady and further) and that how the nephew to the 2nd appellant was directed to go and pick the said phone from his house and take it to his mother, they went to look for the boy and went to the 2nd appellant sister's home and found the boy's mother at home and after he tricked the sister that the 2nd appellant had sent them for the phone and the said sister told them that the phone was there and that she told him that her son had given her the phone.

51. Analysis of the above evidence clearly shows that the phone Itel black was indeed taken from the complainant. She was able to identify the same and even could memorize its serial number. It's my opinion that the phone which was produced in court clearly belonged to the complainant. There was no contrary evidence to this strong and concrete evidence. Accordingly, I find and hold that the prosecution proved that there was taking (which is an element of the offence of stealing being part of the elements of robbery). A phone is a property capable of being stolen as defined under section 267(1) of the Penal Code, which section defines “things capable of being stolen.” The prosecution proved that there was the taking of the complainant's Itel phone and which was something capable of being stolen.

52. **On whether the taking was fraudulent**, the evidence tendered before the trial court clearly show that the taking was fraudulent. The circumstances under which the said Phone was taken does not show any goodwill in the said taking. The taking was indeed forceful. The complainant testified that she was held by the jacket by one of the appellants and that the other inserted his hands in her pocket and took the phone and some money she was carrying. That one of the appellants even tried to rape her but he was unable to erect. In my humble view, therefore, the circumstances surrounding the taking the Itel Phone indeed show that it was fraudulent as defined under section 286 (2) of the Penal Code. This section defines fraudulent taking where the taking is with, amongst other intentions, intent to permanently deprive the general or special owner of the thing of it. The circumstances of the taking of the phone clearly show that it was taken with the intentions to deprive the complainant of the use of the phone. From where the same was recovered, it is clear that the same would have been lost had it not been for the hint given to the police by PW2 and the assistance by PW5.

53. **On whether the appellants (persons charged) were the ones who did take the phone**, this question brings in the issue of identification. PW1 (the complainant)'s testimony was that she the offence happened around 9p.m (she testified that on the material day, at 9.00 p.m. she was coming from her sister's home when she took the boda boda to take her home- Akala- and it's when the appellants robbed her and even tried to rape her). That when they left, some people went where she was and she explained to them what had transpired. That one of them had a motor bike and they went to the stage but they did not find the two people (who had robbed her). However that there was somebody at the stage who knew the two people and who was present when the two people took her onto the motorcycle. The said person told her that the two people were Walter Onyango and Apollo. However, she did not know the name of that person. She testified that she saw the appellants very well during the incident and the rider was brown and was wearing a brown jacket and a muffin. The other person was black and was wearing a black jacket and a black pair of trouser. That the rider was shorter than his colleague and that there was moonlight during the incident and was bright moonlight. When cross examined by the 2nd appellant, she testified that she saw him and that he was the one who attempted to have sex with her during the incident and that it was her first time to see her and that she saw his face during the incident and that there was moonlight. Further that it was his sister who told her that his name was Apollo.

54. The above evidence clearly shows that the only persons who would have seen the appellants commit the offence was the complainant. It is clear that they were only three of them at the scene. The Court of Appeal in **Kiilu & another v Republic, (2005) 1 KLR 174**, held:

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.”

55. At the time of commission of the offence, PW1 testified that it was at around 9pm and that there was bright moonlight. She described the appellants from how they appeared and how they were dressed. However, she testified that it was her first time to see them. She further testified that one person who was at the stage told them that he knew the two people and who was present when the two people took her onto the motorcycle. The said person told her that the two people were Walter Onyango and Apollo. Considering these facts all together, it is my opinion that the complainant cannot be said to have positively identified the appellants at the time of commission of the offence. The offence occurred in the moonlight and further, it was the first time for her to see the appellants. In my humble view, at the time of commission of the offence, the complainant could not have positively identified the appellants. The conditions and circumstances were difficult for such identification.

56. The Court of Appeal in ***Cleophas Otieno Wamunga vs Republic*** Court of Appeal Criminal Appeal No. 20 of 1989 cited with approval in a differently constituted bench in ***Karanja & another V Republic*** (2004) 2 KLR 140, 147, held that:

“We now turn to the more troublesome part of this appeal, namely the appellant’s conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude(PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them... What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged 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...”

57. Further, the High Court at Machakos (Kimei J) in ***Hassan Abdallah Mohammed v Republic*** [2017] eKLR, in holding that the circumstances of the case did not favour positive identification, made reference to the Court of Appeal’s decision in ***Nzaro v. Republic*** (1991) KAR 212, where it was held that ***evidence of identification by recognition at night must be absolutely watertight to justify conviction.***

58. The factors to be considered with respect to recognition (while dealing with the question of identification) were set out in ***R vs Turnbull & Others*** (1976) 3 ALL ER 549. These factors were well recognized and applied by Mumbi Ngugi J in ***Leonard Kipkemoi v Republic*** [2018] eKLR, where the learned judge held as follows (paragraph 46):-

‘The factors to be considered with respect to recognition as set out in R vs Turnbull & Others (1976) 3 ALL ER 549 must always be borne in mind when a court is dealing with the question of identification. The court in that case stated as follows:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made...”

59. Applying the above principles to the facts before in the instant appeal, I find and hold that the conditions that night did not favour positive identification of the appellants. The fact that it was at night and the fact that the complainant had never seen the appellants before that night buttresses finding. Despite the complainant testifying that there was a person at the stage who saw the complainant being carried by the appellants and who gave her the names of the appellants, the said person was never called to testify on the issue. That being the case, this the court cannot rely on the said testimony to find that the appellants were the ones who committed the offence, in the absence of an identification parade being conducted.

60. For that reason, the trial court was right in finding that there was no positive identification given the circumstances under which the complainant saw the robbers., and that as a matter of fact, moonlight however strong cannot be a basis of identification especially where the robbers are strangers to the victim as was the case herein.

61. However, that issue of the identification of the appellants (whether they are the ones who committed the offence) can be decided not only based on direct evidence but can be determined based on circumstantial evidence.

62. The conditions for circumstantial evidence to sustain a conviction were laid down in ***Abanga alias Onyango –vs- R CR. A NO.32 of 1990(UR)*** where the Court of Appeal held:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the

crime was committed by the accused and none else.” In Sawe vs Republic [2003] KLR 364, the Court of Appeal stated that “In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

63. As earlier stated, the evidence of the complainant was very clear that the circumstances could not make positive identification possible. However, it is my opinion that the evidence by PW2 and PW5 clearly places the appellants at the scene of the crime and clearly show that they indeed committed the offence. PW2 testified that when he was in the cells at Akala Police Station where he had been placed on suspicion of assaulting his wife, he heard the 2nd accused (2nd appellant) telling the 1st accused (1st appellant) how they had stolen from a lady and they were discussing how they had shared what they had stolen and in the morning, a relative of the 2nd appellant brought for him some food and he overheard the 2nd appellant telling the relative to go to his house and look for a phone in the box and keep (it safe) for him and later they were brought to court and that he explained the same to PW3 who helped in recovering the said phone from the 2nd appellant’s sister (the mother to the boy who had brought food). This testimony was corroborated by that of PW3 who testified that after PW2 told him of what he heard the appellants discuss in the police cells and how he heard the 2nd appellant telling his nephew that there was a phone in his house and that the phone should be taken to his sister, he went to look for the boy (the said nephew) and he was able to recover the phone from the boy’s mother. The said nephew (PW5) testified and confirmed that he indeed had gone to take food to his uncle by the name Joseph Otieno (2nd appellant) and that the uncle told him to go to his house in Usenge and take his bag and keep for him but that he did not tell him the contents of the bag and he went there with his mother and took the suit case to their house and kept it.

64. Considering the above evidence, it is clear that the appellants were indeed in police cells together with PW2. The 1st appellant during cross examination in his defense testified that they were with PW2 in the police cells at Akala police station and he did not know PW2 prior to the incident. The 2nd appellant further testified that he could remember that he saw somebody in the cells at Akala and that that person came to court and testified and said that he heard the 2nd appellant sending his nephew to go and keep a phone.

65. That being the case, it is my humble view that the evidence of PW2 to the effect that the two appellants were discussing about sharing the loot of the robbery in Akala Police Station Cells is credible and believable. It was pursuant to the links that PW2 gave to PW3 that they indeed recovered the phone.

66. From the evidence of PW2 and PW5, the inculpatory facts (that they discussed the robbery and sharing of the loot and keeping of the complainant’s identified mobile phone at the Akala Police Station cells) are incompatible with the innocence of the appellants and incapable of explanation upon any other reasonable hypothesis than that of their guilt.

67. I find no other co-existing circumstances weakening the chain of circumstances. The said evidence, leads to an irresistible conclusion that the appellants were the persons who indeed were with the complainant on the material night and who stole the phone from the complainant.

68. I find and hold that the prosecution proved that the two appellants were the ones who stole from the complainant her mobile phone as described in the charge sheet and as identified and produced as an exhibit. Even in the absence of positive identification of the appellant by the complainant (as the conditions did not favour the same), I am persuaded beyond reasonable doubt that the appellants indeed took, fraudulently, something which was capable of being stolen (the phone) and which phone belonged to the complainant. Accordingly, I find and hold that the first element of robbery was proved.

69. On whether at, or immediately before or immediately after the time of such robbery (stealing), the appellants used or threatened to use actual violence to the complainant or her property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, having found that the appellants stole (the first element of robbery), the next element is whether at the time of stealing, or immediately before or immediately after the time of stealing, the appellants used or threatened to use actual violence to the complainant or her property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.

70. As earlier stated, the complainant was alone when she was attacked and her phone stolen from her by force. There was no eye witness to corroborate the evidence on what indeed happened at the scene. It is therefore only her testimony which can be used to answer this issue *vis a viz* the defense tendered. The complainant testified that after she had boarded a bodaboda and as they approached the tarmac (when she was being ridden home by the appellants), they saw another motorcycle ahead and the boda boda rider told her that he was suspicious of the motorcycle and they then branched to another road but after a short distance, he stopped the motorcycle and the person who had accompanied him alighted and told her to alight. That he told her to go away but she resisted as they had not yet arrived at Akala and she requested the rider to take her to Akala but the two persons told her to go away. That the person the rider was withheld her on her jacket from the front and the rider came from behind and caught her on the neck. The rider’s colleague removed her pant and biker and at that time the rider was struggling with her while closing/ covering her mouth. The other person tried to rape her but he could not erect. That the rider inserted his hand into her pocket and took her money and phone (Make Itel) and they then left her lying on the ground. She testified that the incident took about 15 minutes.

71. The evidence of PW2 and PW5 pointed to the fact that the appellants stole the phone from the complainant. The fact that the conversation between the appellants and the nephew to the 2nd appellant which was heard and seen by PW2 and which led PW5 and PW3 to where the phone was recovered, taken together with the evidence that the appellants were heard discussing about how they would share their loot, buttressed by the admission by the appellants that they were together in police cells with PW2 clearly proves beyond any reasonable doubt that the appellants stole the phone belonging to the complainant.

72. In my humble view, therefore, the prosecution tendered sufficient evidence to prove the offence of robbery against the appellants beyond any reasonable doubt. The prosecution was able to prove that the appellants stole (fraudulently took) the phone (something capable of being

stolen) and which belonged to the complainant. The evidence further was sufficient to prove that the taking by the appellants was by use of or threatened to use actual violence on the complainant or her property in order to obtain or retain the said phone.

73. In the premises, the learned trial magistrate did not err in finding that the elements of the offence of robbery were proved. It follows that the appellants' claim that the prosecution did not prove the elements of the offence of robbery to the required standards fails and is dismissed.

74. The 1st appellant also submitted that the offence occurred at night (21 hrs.) thus the conditions of aforesaid scene of crime were unfavorable to support a positive identification of the assailants as the moonlight was the only source of light during the alleged time of the offence and further that he was not known to the complainant prior to the date of the alleged offence and further that when PW3 testified, he did not say whether PW1 gave him any descriptions of the assailants and that the Investigating Officer did not tell the court whether PW1 gave him any description of the assailant during the time she reported the matter at Akala Police Station. The 2nd appellant also raised a ground to the effect that there was no positive identification. However, as I have found above, the fact that the two appellants and not any other persons committed the offence and this is inferred from the evidence of PW2 and PW3 on how the complainant's phone was traced following a conversation in the police cells between the two appellants and between the 2nd appellant and his nephew Samuel, instructing the latter to go and secure his belongings with the latter's mother who was the sister to the second appellant.

75. The 1st appellant submitted that the trial court failed in law by failing to consider his alibi defense and that it shifted the burden of proof on him despite the fact the recoveries were never made on him. During the hearing of the case in the trial court, both appellants in their defenses raised the defense of alibi to the effect that they were never present at the scene during the time of the commission of the offence. However, the evidence of PW2 and which evidence led to PW3 recovering the phone and further the evidence of PW5 as to the fact that the 2nd appellant told him to go and get a bag from his house and take it to his mother and the recovery of the complainant's phone clearly places the appellants at the center of commission of the offence. The defense of alibi in my opinion was therefore a sham.

76. The appellants further raised a ground to the effect that the prosecution did not call the vital witnesses. According to the 1st appellant, it was his ground that vital witnesses were not called by the prosecution thereby hiding the true facts. In his submissions he submitted that "Daddy" was the prime witness to the case as he knew the person who escorted PW1 (complainant) on the fateful night and that failure to call the said Daddy as a witness prejudiced the trial process.

77. The 2nd appellant on his part submitted that the trial magistrate concluded the hearing process without considering that the prosecution hid justice by not producing the vital witnesses to ascertain the true facts of the case. He further submitted that a vital witness (Annah Adhiambo) recorded statements with the police but was not availed in court to state on how she came to possess the alleged handset as relied upon by both the prosecution and the trial magistrate.

78. The above arguments by the appellants find support in the locus classicus case of *Bukenya & Others V Uganda [1972] EA 549* which decision has been cited with approval by this court on several occasions in many cases before it, and where the court held:

"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.

79. However, in *Richard Munene v Republic [2018] e KLR*, the Court of Appeal stated the elementary principle of criminal law that although the prosecution must avail all witnesses necessary to establish the truth and whose evidence appear essential to the just decision of the case, no particular number of witnesses is required for the proof of any fact; and that the prosecution is not obliged to call a superfluity of witnesses. This position is further buttressed by **section 143 of Evidence Act** which provides that:

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

80. Primarily, the prosecution has a duty to tender sufficient evidence to prove its case to the required standards. That burden does not shift to the accused persons. However, in my view, the prosecution has no duty to call specific number of witnesses or all witnesses that may have heard about an incident as the defense would desire. The court's duty is to apply the evidence before it and assess it and establish whether that evidence is sufficient to prove the guilt of the accused. In the instant case, the circumstantial evidence adduced was more than sufficient to establish the guilt of the appellants beyond reasonable doubt that they committed the offence charged, despite PW5 attempting to hide part of evidence on the discussions that the second appellant had with him in the police cells concerning the phone, which phone was nonetheless recovered and positively identified by the complainant as hers.

81. In my humble view, it was not necessary to call the so called Daddy who told the complainant that he saw the 1st appellant carry her on a motorcycle and neither is the presence of Vivian Adhiambo necessary to say how she came into possession of the phone as the conversation between the appellants in the police cells as narrated by PW2 and how PW2 led PW3 to the recovery of the phone was in my view, sufficient evidence to link the appellants to the recovery of the said phone and to link them to the offence charged. Failure to call the said two people was not fatal to the prosecution's case.

82. Accordingly, I find and hold that the trial court properly applied the evidence before it and arrived at a correct determination as far as the guilt of the appellants is concerned.

83. I reiterate that the supposed evidence by the said “Daddy” and Adhiambo the sister to the 2nd appellant was not necessary to prove the elements of the offence. As such, failure to have the said witness testify in court was not prejudicial to the appellants as the court did not at all apply the said evidence in convicting the appellants. Had the trial magistrate relied on such evidence, it would have amounted to hearsay.

84. On the whole I find and hold that the conviction of the appellants for the offence of robbery under section 296(1) of the Penal Code was sound. I uphold it and dismiss this appeal against conviction.

85. ***On whether the sentence imposed was proper***, both the appellants submitted that the trial magistrate handed harsh sentence. According to the 1st appellant, the trial court handed him a harsh sentence without considering that the same was not commensurate with offence allegedly committed and further that he was a first offender. He relied on the Supreme Court’s judgment in the **Francis Karioko Muruatetu and another Vs Republic [2017] e KLR** where it was held that death sentence should not be imposed as a mandatory sentence. The 2nd appellant on the other hand submitted that the sentence was ‘manifestly harsh and excessive and that the procedure for sentencing was not duly followed as per the sentencing and policy guidelines. That the sentence for robbery under section 296(1) of the Penal Code was not life sentence as was imposed by the trial hence he had suffered prejudice.

86. This court observes that the trial magistrate after mitigation and after considering the mitigation stated:

“I have considered the mitigation by the accused persons. It is clear that they are first offenders. However, from the circumstances of the case, the accused persons were merciless to the complainant and they do not deserve any leniency. They are lucky that the police decided to charge them with a lesser offence although the facts were so clear. I do sentence the accused persons to serve life imprisonment.”

87. Section 296 (1) of the Penal Code creates the offence of robbery and provides that:

“Any person who commits the felony of robbery is liable to imprisonment for fourteen years.”

88. In my humble view, the learned trial magistrate erred in law by sentencing the appellants to life imprisonment. The only time when the appellants would have been sentenced to a mandatory life sentence is if they were charged with robbery with violence. Despite the trial magistrate noting that the appellants were lucky that the police decided to charge them with a lesser offence though the facts clearly disclosed a more serious offence, it is clear that the magistrate proceeded to sentence the appellants for the “bigger offence.” In my view, this was an error of law which must be corrected by this court.

89. The Court of Appeal in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** stated:

“It is now settled law, following several authorities by this Court and by the 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 material, or acted on a 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 states is shown to exist...”

90. Considering the offence charged, the sentence imposed was manifestly excessive in the circumstances of the case. The appellants ought to have been sentenced to a maximum of 14 years’ imprisonment and not more. Accordingly, the life imprisonment imposed on the appellants is hereby set aside.

91. On what orders this court should make, having found that the appeal against conviction is devoid of merit and that that the sentence imposed on the appellants was unlawful, ***I proceed to uphold the conviction of the appellants for the offence of robbery contrary to section 296(1) of the Penal Code and dismiss the appeal against conviction. As against the appeal against sentence, the same is allowed. I set aside the life imprisonment imposed on the appellants and substitute it with the period already served in prison. Therefore unless otherwise lawfully held, the appellants herein Water Otieno Onyango and Joseph Otieno Abura are hereby released from prison.***

Orders accordingly.

Dated, signed and delivered at Siaya this 5th Day of May 2020 via skype due to the Covid 19 situation.

R.E. ABURILI

JUDGE