**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HCCRA NO. 373 OF 2007**

**CONSOLIDATED WITH HCCRA NO. 372 OF 2007**

**DUNCAN MWANGI NGATIA.......1ST APPELLANT**

**PETER MURIITHI WARUI .........2ND APPELLANT**

**-VERSUS-**

**REPUBLIC...........................................RESPONDENT**

(Being an appeal from the judgment of the Senior Resident Magistrate Hon. M. K.K Hon. Serem dated 13/11/2007 in Nyeri SRM Criminal Case No. 1213 of 2007.)

**JUDGMENT**

1. **Duncan Mwangi Ngatia and Peter Murithi Warui** hereinafter referred to as the 1st and 2nd Appellants were charged with two counts of robbery with violence. The particulars on the two counts were as follows:

> **Count I:** On the 8th day of April 2007 at Mathaithi village in Nyeri district within Central province, jointly with others not before court being armed with dangerous or offensive weapons namely axes and bows robbed **Nancy Wanjiru Mwangi** of Kshs.10,000/= and one mobile phone make Nokia 3310 and at or immediately before or immediately after the time of such robbery used or threatened to use actual violence to the said **Nancy Wanjiru Mwangi**.
>
> **Count II:** On the 8th day of April 2007 at Mathaithi village in Nyeri district within Central province jointly with others not before court being armed with dangerous or offensive weapons namely axes and bows robbed **Purity Wairimu Mwangi** of Kshs.1,300/= and at or immediately before or immediately after the time of such robbery used or threatened to use actual violence to the said **Purity Wairimu Mwangi**.

2. After a full hearing both Appellants were found guilty, convicted and sentenced to suffer death. Being aggrieved by the judgment they filed separate appeals including that of Elijah Gichine Githinji who later voluntarily withdrew his appeal (*HCCRA NO. 376/2017*) on 2nd June 2020.

3. The 1st Appellant raised the following grounds in the appeal filed on 21st November 2007:

> **a. That,** the trial Magistrate erred in law and facts in his reliance on contradictory inconsistent evidence.
>
> **b. That,** the trial Magistrate erred in law and facts in not finding that conditions favouring a correct identification were not conducive.
>
> **c. That,** the trial Magistrate erred in law and facts in being impressed by the alleged mode of his arrest.
>
> **d. That,** the trial Magistrate erred in law and facts in his failing to find that some essential witnesses were not called hence a grave contravention of section 150 of the Criminal Procedure Code.
>
> **e. That,** the trial Magistrate erred in law and facts in his reliance on evidence of a witness who was unable to show how she was able to identify the article in question.

**f. That,** the trial Magistrate erred in law and facts in his reliance on insufficient evidence.

**g. That,** the trial Magistrate erred in law and facts in failing to find that it was the onus of the prosecution to prove their case against the Appellant and not hope to rely on his defence or evidence to achieve a conviction.

**h. That,** the trial Magistrate erred in law and facts in his ejection of his defence without giving cogent reasons for doing so.

4. The 2nd Appellant filed the following grounds in the appeal filed on 21st November 2007.

**a. That,** the learned trial Magistrate erred in both points of law and facts by not finding that conditions at the scene of crime were not favouring a correct identification.

**b. That,** the learned trial Magistrate erred greatly in both points of law and facts by failing to find that essential witnesses were not summoned to testify hence the grave flautation of section 150 CPC.

**c. That,** the learned trial Magistrate greatly erred in both points of law and facts in his reliance on contradictory and inconsistent evidence, failing to resolve the same in favour of the Appellant.

**d. That,** the learned trial Magistrate greatly erred in both points of law and facts by being impressed by his alleged mode of arrest.

**e. That,** the learned trial Magistrate greatly erred in both points of law and facts by failing to find that it was the onus of the prosecution to prove their case against the Appellant and not hope to rely on his defence or evidence to achieve a conviction.

**f. That,** the learned Magistrate erred in both points of law and facts by peremptorily dismissing alibi defence, considering the same the wrong way, occasioning an injustice on the Appellant.

5. It is important to note that this appeal was heard and determined by a two judge bench on 13th February 2014. The Appellants moved to the Court of Appeal challenging the High court judgment. The Court of Appeal in its judgment delivered on 13th February 2019 set aside the High court judgment and remitted the appeal back to the High court for hearing.

6. The prosecution case was premised on the evidence of five (5) witnesses. A summary of the case will suffice. **Pw1 Purity Wanjiru Mwangi** the complainant in count II testified that she was asleep in the house with her parents (Pw2 and Pw3) at Mathaithi village. This was on 8th April 2007 1:30 – 2:00 am. She heard a bang on the sitting room window and woke up. She went to one of the rooms and peeped outside. It was dark but there were already people wearing masks in the house. She opened the kitchen window and screamed for help. There were already people in the house and she heard them asking her mother for money.

7. The people entered the room where her father (Pw3) was and then to her room and they were ordered to sit down and produce money. Kshs.1,300/= was taken from a purse and a box in her bedroom. The three people then left her bedroom. A neighbor called Karithi arrived with the police and many people also came to the scene. The house was surrounded by people as the thieves were still inside.

8. She was asked by the police to open the door for them to enter. Tear gas was thrown into the ceiling and the thieves came out and were arrested. The Appellants were among the thieves who had hidden in the ceiling. The police had torches at the scene and she was able to identify the Appellants.

9. In cross examination by the 2nd Appellant the witness said that he was hit on the head by a member of the public before the police rescued him. She said the thieves were armed with axes and bows which were recovered in the ceiling.

**10. Pw2 Nancy Wanjiru Mwangi** is Pw1's mother. She testified that on 7th April 2007 she had been with many people at her home preparing for a function the next day. The visitors left at 11:00 pm. On 8th April 2007 between 1:30 – 2:00 am she was asleep at home with Pw1 and Pw3 (*her husband*). She heard a loud bang on the window and door. On peeping through the kitchen she saw a man inside the sitting room. Pw1 screamed for help. She then saw a man holding an axe and there were two other people. The three men had torches which were very bright.

11. The man with the axe attempted to cut her as he demanded for money. She gave one of them the Kshs.10,000/= she had for the function. He demanded for more money as they continued ransacking the house. Doors were opened as demanded by them. Her phone Nokia 3310 with a mark 'N.P' S/NO 351475/80/87 – 9869/7 was taken from her. She was able to identify it in court. Pw3 opened the doors and the thieves ransacked the entire house.

12. A neighbour Mr. Karithi called the police who came and Pw1 opened the door for them. The thieves went and hid in the ceiling of her house. They then went outside the house as the police fired teargas inside the ceiling. The thieves came out of the ceiling and were arrested. She identified them after the arrest. She identified the weapons which were recovered at the scene.

13. In cross examination she said the person who demanded for money from her and whom she gave Kshs.10,000/= is not among the Appellants but she was able to identify the Appellants at the scene.

**14. Pw3 Peter Mwangi** heard Pw1 scream on the night of 7th April 2007 at 1:00 am – 2:00 am and he woke up but Pw2 advised him not to go out. Pw2 went towards the kitchen and returned and told him that thieves had entered the house and they wanted money. The thieves

entered his bedroom with torches and demanded for money. He said the window and door of the house had been broken. All the rooms in the house were ransacked as he saw Pw2 take money. The thieves went to Pw1's room and returned to his room demanding for money. He did not identify the thieves as they flashed the torches at him and took his cigarettes.

15. He suddenly heard gunshots after the thieves left his bedroom. Police had arrived and surrounded the house together with members of the public. Pw1, Pw2 and him joined them outside. The thieves came out of the ceiling after the police fired teargas there. He was able to identify the thieves with use of light from the torches of the police. He identified the weapons recovered. It was his evidence that money was recovered from the suspects.

16. In cross examination he said he was able to identify the Appellants after they alighted from the ceiling. He said the teargas was used when the thieves refused to surrender.

**17. Pw4 No. 62263 Christopher Ndegwa** from Karatina police station testified that he was on patrol duty on 7th April 2007 with I.P Aden Kir. At 1:30 am of 8th April 2007 he got a call from an informer of entry into a house at Mathaithi by robbers. The informer led them to the scene. They saw a broken window of the subject house. Electricity had already been disconnected. The thieves who were outside the house ran away on seeing them. They called for reinforcement and officers came in from Karatina with teargas. Members of the public also came and surrounded the house.

18. Pw1 opened the door for them and they entered. He arrested the 1st Appellant from the bathroom. The 2nd Appellant and another had entered the ceiling of the house. They threw teargas in the ceiling and the 2nd Appellant and his friend came out and the three thieves were arrested. He recovered Kshs.600/= (EXB6a and b) from the other accused and a phone (EXB5) was recovered from the ceiling.

19. At Karatina police station the suspects were searched and cash Kshs.3,600/= (EXB7a-c) was recovered from the 1st Appellant. Also recovered were: arrows, a bow and 2 axes (EXB 2, 3 and 4) plus a toy gun (EXB8) and a Panasonic phone (EXB9) which was related to another robbery case at Karatina law courts.

20. In cross examination he said he did not search the 1st Appellant at the scene because of members of the public who wanted to lynch him. He said he arrested the 1st Appellant from the bathroom. He also stated that the other robbers who were outside the house took off on seeing the police who fired at them. He denied arresting the 2nd Appellant from his house.

**21. Pw5 No.44221 Pc Daniel Njuguna** of CID Karatina was on patrol on the night of 7th and 8th April 2007 at 2:00 am when he and other officers were called to a scene of crime by I.P Aden Kir and Pw4. They rushed to the scene and surrounded the house. Pw4 and I.P Aden Kir had taken cover. The rest of his evidence is similar to that of Pw4.

22. In cross examination he said the 1st Appellant was arrested from the kitchen. He is the one who threw the teargas canister in the ceiling. He denied arresting the 2nd Appellant at his home.

23. When placed on their defence the 1st Appellant elected to give a sworn statement. He said he was a saw miller and stayed in Karatina. He denied knowing the 2nd Appellant and their co-accused. He stated that on 8th April 2007 12:00 midnight he was from Karatina catholic church when he was arrested by the police on patrol. They removed his wallet which contained his voters card, identity card, personal effects and Kshs.3,600/= in denominations of Kshs.1,000/=, 500/= and 100/=. They demanded for this money from him but he declined. Those who arrested him were two and one of them was called Nzioka.

24. He was taken to Karatina police station in a police vehicle and locked up in the cells. The money was booked in the O.B. He was taken to court on 17th April 2007 and charged with this offence which he denied.

25. The 2nd Appellant also sworn testified that he was a farmer and denied knowing his co-accused. He said he was at home on 8th April 2007 and went to sleep at 9:00 pm. On 8th April 2007 morning he woke up. He had been arrested on 7th April 2007. He said he had been charged before Karatina court with a different offence where he was sentenced to five years for the offence of burglary and stealing. He was sentenced on 26th April 2007 and for this offence he was arrested on the night of 7th and 8th April 2007. He said he had no grudge with Pw1-Pw3. He however said Pw4 had framed him.

26. This appeal was canvassed by way of written submissions. Learned counsel M/s Wangechi for the 1st Appellant while submitting on the ground of the existence of contradictory and inconsistent evidence argues that Pw1 and Pw2 said the house had three rooms while Pw3 said it had four rooms. That Pw1 and Pw2 did not at all make mention of the existence of a bathroom but Pw3 did.

27. She also questions the manner Pw1 was moving around with ease yet she said they had been under attack. Counsel contends that the point of arrest of the 1st Appellant was not clear from the evidence of Pw1-Pw5 and its also not clear whether he was armed or not. She submits that the inconsistencies lead to doubt as to whether the 1st Appellant was part of the robbers.

28. Counsel raises issue with the kind of identification that was carried out in respect to the 1st Appellant. She submits that from Pw1's narrative the conditions were such that one could not easily identify a person. There is no evidence of there having been any form of lighting. There is also evidence of the thugs having worn masks. The thugs were whisked away by the police since the members of the public were irate and wanted to lynch them. Her conclusion is that there was no time for identification of the thugs by the witnesses.

29. Referring to the cases of **Hassan Abdallah Mohammed –vs- Republic (2017) eKLR; Wamunga –vs- Republic (1989) KLR 424;**

**Nzaro –vs- Republic (1991) KAR 212** counsel submits that identification in unclear circumstances cannot be relied on.

30. Counsel further submits that there was need to prove possession by production of key items e.g. each Kshs.11,300/=, torches since the Appellants were arrested at the scene. This was not done and yet the 1st Appellant gave a detailed defence on how he was arrested. She makes mention of the failure by the prosecution to produce the masks that the Appellants were allegedly wearing. Even the photos that were allegedly taken at the scene were not produced.

31. Counsel submits that Mr. Karithi and I.P Aden Kir were very crucial independent witnesses who were not called by the prosecution. It's her contention that even though the prosecution is not required to call a particular number of witnesses the East African Court of Appeal in the case of **Bukenya –vs- Uganda 1972 E.A 549** held that the prosecution must make available all witnesses necessary to establish the truth even though their evidence maybe inconsistent.

32. It's her submission that the alibi defence of the 1st Appellant was never considered by the trial court. Referring to the cases of **Michael Mumo Nzioka –vs- Republic (2019) eKLR; Victor Mulinge –vs- Republic (1980) KLR 149** she contends that the prosecution has a duty to challenge the alibi defence. She refers to section 309 of the Criminal Procedure Code which provides:

> "If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."

It's her contention that the prosecution has all the means of rebutting a defence of alibi yet in this case it did not and so the said defence remained put. The Appellant had no duty to call witnesses to support the defence of alibi, as held by the trial court.

33. Lastly counsel made mention of supplementary grounds of appeal and written submissions filed by the 1st Appellant on 4th September 2018 which she wanted the court to consider. She did not give any hint on what the grounds and submissions were about. I have combed through this huge file but I have not found anything close to that, filed on 4th September 2018.

34. Learned counsel Samuel Gitau Kinuthia filed submissions on behalf of the 2nd Appellant. He has raised issue with the conditions that were prevailing which could not allow for a positive identification. He relies on the case of **Wamunga –vs- Republic (1989) KLR** restated in the case of **John Nduati Ngure –vs- Republic Criminal Appeal No. 121 of 2014**. He points out the evidence of Pw1 wearing of masks and the bright torches as there was no electricity. That Pw1, Pw2 and Pw3 were only able to identify the 2nd Appellant after his arrest.

35. Counsel has referred to the observations of the learned trial Magistrate at page 59 and 61 of the proceedings and states that the conditions were not conducive for a positive identification. Secondly that the proper procedure would have been for Pw1-Pw3 to record statements at Karatina police station and give a description of the people they had seen. Identification parades would then have been conducted by the police. To support this argument he relies on the case of **Republic vs- Jones Nyatigo Achoki High court Criminal Appeal No. 15 of 2015** and **James Tinega Omwenga –vs- Republic Criminal appeal No. 143 of 2011**. He contends that in the absence of an identification parade, all that the witnesses did was a dock identification which can't be relied on wholly.

36. The next issue counsel has raised is on contradictory and inconsistent evidence. He says there is a disparity on the location in the house where the robbers were arrested. On one hand Pw1, Pw2 and Pw3 said all the three robbers were arrested from the ceiling of the house whereas on the other hand Pw4 and Pw5 said only two were from the ceiling. Pw4 said the 3rd robber was arrested from the bathroom while Pw5 said it was from the kitchen. These inconsistencies were not resolved.

37. He further submitted that there was mention of a toy gun and Panasonic phone having been recovered from the scene yet they were never produced in court as exhibits yet the trial court believed them.

38. Counsel also submits that the prosecution did not prove its case beyond reasonable doubt. He refers to the 2nd Appellant's alibi defence which he says was not discharged by the prosecution. He refers to the case of **Wang'ombe –vs- Republic (1980) KLR 149** cited with approval in **Michael Mumo Nzioka –vs- Republic (2019) eKLR** referring to section 309 Criminal Procedure Code which gives the prosecution an opportunity to rebut any new evidence by the defence.

39. Counsel submits that the prosecution did not make any efforts to prove the falsity of the alibi raised by the 2nd Appellant. He mentions the case at Karatina law courts and the reason for his arrest on the material night being in execution of a warrant of arrest in the said case. The record of the said case should have been produced to confirm or disapprove the 2nd Appellant's alibi.

40. The appeal was opposed by the Respondent through its submissions filed by learned counsel Mr. Duncan Ondimu. He has identified the ingredients in a charge of robbery with violence contrary to section 296 (2) Penal Code to be:

> a. That there was theft of some property;
>
> b. That the accused was not the owner of the property;
>
> c. That the offender was armed with dangerous or offensive weapon or instrument, or is in company with one or more persons, or threat to use actual violence;
>
> d. That the accused took part in the commission of the offence.

41. Counsel submits that the evidence of Pw1 and Pw2 sufficiently proved the 1st and 2nd ingredients in respect to the 1st and 2nd counts. A mobile phone (EXB5) and part of the money were recovered. Pw1 and Pw2 confirmed being the owners and the Appellants did not lay any claim to the items recovered when they testified in their defence.

42. Mr. Ondimu has submitted that ingredient no (iii) was also established by the evidence of Pw1, Pw2 and Pw3. Pw2 saw one of the robbers holding an axe; the robbers were three men according to Pw1 and they had axes and bows. The recovered items included a toy gun. Counsel contends that the evidence confirms that the robbers were more than one and were armed.

43. Citing section **20(1)** of the Penal Code which provides that:

> "When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:-
>
> a. Every person who actually does the act or makes the omission which constitutes the offence.
>
> b. Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence.
>
> c. Every person who aids or abets another person in committing the offence;
>
> d. Any person who counsels or procures any other person to commit the offence.

Counsel submits that there was common intention I nth action by the Appellants. The Appellants were arrested at the scene of crime and that proved their common intention.

44. It's his further submission that Pw1 and Pw2 confirmed that both Appellants were among the robbers who were in their house. They identified them after their arrest. Counsel refers to the evidence of Pw4 and Pw5 who were among the officers who responded to the reports of an on-going robbery. Their evidence about the arrest of the Appellants was corroborative. On the alibi defence counsel argues that the same came late in the day as it was not even raised in cross examination. In any event it did not disturb the prosecution case he contends.

45. On identification of the Appellants, Mr. Ondimu submits that the Appellants were arrested at the scene of crime by Pw4 and Pw5 in the presence of Pw1, Pw2 and Pw3 and there was therefore no need for an identification parade. See **Martin Mwangi Mutei –vs- Republic (2017) eKLR.**

46. On contradictions and inconsistencies counsel submits there were none. The evidence on the number of rooms or whether he was arrested in the bathroom or where they descended from after the teargas to counsel is a small issue. He relies on the case of **Cpt. Nunanyongo Chris Tushabe –vs- Uganda Criminal Appeal Uganda)** where it was held that:

> "… When several people are giving their versions of a transaction seen by them are naturally liable to disagree on immaterial points. The court has to bear in mind that there are contradictions of truth and falsehoods. The duty of court is to consider the broad aspect of the case when weighing the evidence .."

**Analysis and determination**

47. This is a first appeal and this court has a duty to consider the evidence on record a fresh to arrive at its own conclusion.

48. In the case of **Mwangi –vs- Republic (2004) 2 KLR 28** the Court of Appeal stated thus:

> 1. **An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence**
>
> **2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.**
>
> **3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusion. 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 had the advantage of hearing and seeing the witness..**

49. The same was reiterated in the case of **David Njuguna Wairimu –vs- Republic (2010) eKLR** where the Court of Appeal stated:

> **"That the duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."**

50. Upon a careful reconsideration and evaluation of the evidence on record, the grounds of appeal, submissions by all parties and further upon careful consideration of the law, I find the issues falling for determination to be:

i. Whether a charge of robbery with violence contrary to section 296(2) was established.

ii. Whether the prosecution failed to call crucial witnesses.

iii. Whether the Appellants were clearly and positively identified as the complainants' assailants during the robbery.

iv. Whether in the final analysis the prosecution proved the case against the Appellants beyond any reasonable doubt.

v. Whether the sentence meted out on the Appellants was excessive and unconstitutional

**Issue (i) Whether a charge of robbery with violence contrary to section 296(2) was established.**

51. For the offence of robbery with violence to be proved the theft must be accompanied by any one of the following as outlined in section 296(2) of the Penal Code:

- The offender must have been armed with any dangerous or offensive weapon or instrument or
- Was in company of one or more other person or persons or
- Immediately before or immediately after the time of the robbery, he beats, wounds or strikes or uses any other personal violence to any person

52. It should be noted that proof of any one of the above ingredients is sufficient proof of the charge. From the evidence of Pw1, Pw2 and Pw3 it is clearly shown that they were attacked on the night of 7th and 8th April 2007. The time was 1:30 – 2:00 am. They were able to show that they were robbed of cash (Kshs.11,300/=) plus a Nokia phone. The phone was produced as EXB5 while part of the cash Kshs.4,200/= was produced as (EXB6a and b; 7a, b and c). Pw2 testified that he was threatened with an axe. Pw1, Pw2 and Pw3 also stated that the attackers were more than one.

53. Pw4 and Pw5 who are the police officers who came to the scene said they found persons outside of the complainants house. The officers had to shoot in the air and the people disappeared. They further stated that inside the house were more than one assailant. My finding is that there was proof of the offence of robbery with violence contrary to section 296(2) Penal Code in both counts 1 and 2.

**Issue (ii) Whether the prosecution failed to call crucial witnesses.**

54. Both Appellants contend that the prosecution should have called I.P Aden Akir and Mr. Karithi as witnesses. Mr. Karithi is the neighbor who heard screams from Pw3's home and alerted the police. I.P Aden Akir was the duty officer and even went to the scene with Pw4. The principles to consider in determining the issue of crucial witnesses was dealt with in the leading case of **Bukenya –vs- Uganda (supra) where Lutta Ag Vice President** held:

> "The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution".

55. In the case of **Republic –vs- Cliff Macharia Njeri (2017) eKLR Justice Lessit** had this to say of such witnesses:

> **29. The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. It is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favourable to the prosecution or not."**

56. Further in the case of **Sahali Omar –vs- Republic (2017) eKLR** the court of Appeal stated as follows:

> "Section 143 of the Evidence Act 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."**

The principle used to determine the consequences of failure to call witnesses was succinctly stated in **Bukenya & Others –vs- Uganda (1972) E.A 549** where the court held that:-

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

ii. That the court has the right and 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 tended to be

adverse to the prosecution.

57. The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. Should the witnesses fail to testify and the hitherto the adduced evidence turns out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubt (see **Keter –vs- Republic (2007) 1 E.A 135**.

58. In the instant case Mr. Karithi was said to be the one who called the police. He never witnessed the robbery nor what went on in the house of the complainants. And the police came after he alerted them and did their work. I.P Aden Kir came to the scene with Pw4 who testified. They were joined by Pw5 among others. Pw4 and Pw5 testified on behalf of the police who came to the scene. Even if (I.P Aden Kir had come to testify he would have repeated what the other officers stated. In this case, I do not find any significant difference that the evidence of the two mentioned persons would have made to the prosecution case.

**Issue (iii) Whether the Appellants were clearly and positively identified as the complainants' assailants during the robbery.**

59. Both counsel have submitted so much on the issue of identification and the conditions prevailing at the time. Its true that in their evidence Pw1, Pw2 and Pw3 explained how they identified the Appellants after torches were flashed at them. They also said how the robber had hidden themselves in the ceiling of Pw3's house. The truth of the matter is that these arguments would only have been helpful if the arrests had been done in the absence of the witnesses.

60. The arrests were done in the presence of Pw1 Pw2 and Pw3 who told the court what they witnessed during the arrest. There would have been no need for any identification parades in the circumstances as the witnesses had already seen the robbers when they were being arrested.

61. It is true Pw4 said the 1st Appellant was arrested in the bathroom while Pw5 said it was from the kitchen that he was arrested. Both the kitchen and bathroom are part of the house where this incident took place. Pw1 and Pw2 said their house has three rooms while the old man (Pw3) said the rooms are four. It is trite law that even where there are inconsistencies not all such inconsistencies amount to rendering the prosecution case as falling below the required standard of proof.

62. In the case of **Richard Munene –vs- Republic (2018) eKLR** the Court of Appeal at Nyeri held thus:

> "It is a settled principle of law however that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it".

63. It was also submitted that failure to produce the toy gun and photos taken at the scene was fatal to the prosecution case. The toy gun was not the only weapon at the scene. The two axes, a bow, arrows (EXB1,2 3,4) which were weapons were recovered at the scene and produced. These were sufficient proof that the robbers were armed. The toy gun was not used by the attackers. My finding therefore is that the inconsistencies and contradictions are too minor to affect prosecution case.

64. The issue is whether the Appellants were among the men who were found in Pw4's house on the material night. The 1st Appellant in his defence stated that he was arrested by police officers on patrol as he came from church. However when both Pw4 and Pw5 testified the 1st Appellant never cross examined them on their having arrested him while on his way from church and that they were on patrol. He did not also tell them that the Kshs.3,600/= was his money which he retained on himself.

65. From the cross examination by both Appellants Pw5 stated that both Appellants had pending cases at Karatina law courts. Further Pw5 said there was a warrant of arrest pending in respect to the case against the 2nd Appellant. It was a coincidence that even with the pending warrant of arrest he was found committing another offence.

In his defence he admitted having been arrested that night but he does not say from where he was arrested.

66. I have considered all this evidence and I am satisfied that both Appellants were arrested at the scene of crime. There was no reason whatsoever given that would have made all these witnesses (Pw1 – Pw5) to gang up against the Appellants and lie against them.

**Issue (iv) Whether in the final analysis the prosecution proved the case against the Appellants beyond any reasonable doubt.**

67. From my analysis at issues No. (i) – (iii) I am satisfied that the offence of robbery with violence contrary to section 296(2) Penal Code was proved against both Appellants and both counts beyond reasonable doubt. I however wish to add that the learned trial Magistrate did not satisfy which counts he was convicting the Appellants on. I have however clarified that hereinabove.

**Issue no. (v) Whether the sentence meted out on the Appellants was excessive and unconstitutional**

68. First of all the Appellants were convicted and sentenced on 13th November 2007 which was before the pronouncement in the Supreme court case of **Francis Karioko Muruatetu & Another –vs- Republic (2017) eKLR** which has removed the <u>mandatory</u> nature of the death sentence and given room for the exercise of discretion in sentencing after considering all circumstances.

69. The Court of Appeal in **William Okungu Kittiny –vs- Republic (2018) eKLR** applied the decision in a robbery with violence case where it was stated:

> "… The Appellant was sentenced to death for robbery with violence under section 296 (2). The punishment provided for murder under section 203 as read with section 204 and for robbery with violence and attempted robbery with violence under section 296(2) and section 297 (2) is death. By Article 27(1) of the constitution every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, decision broadly considered the constitutionality of the death sentence in general … From the foregoing we hold that the findings and holding of the Supreme Court particularly paragraph 69 applies mutatis mtandis to section 296(2) and section 297(2) of the Penal Code. Thus the sentence is a discretionary".

70. Counsel for the Appellants assured the court that no re-sentencing had been done for the Appellants. Perusal of the court record shows that the prosecutor said the Appellants were first offenders. The Appellants did not say anything in mitigation. Before sentencing them the learned trial Magistrate stated this:

> "…. There is only one sentence availed under section 296 (2) of the Penal Code and that is death. The three accused persons are hereby sentenced to suffer death as provided by the law provided that was the law then.

71. I have in the meantime considered a few factors here:

- They remained in custody until the case was determined on 13th November 2007.
- They have served sentence since 13/11/2007 which is 13 years.
- The stolen items were valued at Kshs.11,300/= plus the Nokia phone which was recovered.

72. The upshot is that the appeal against conviction is dismissed.

a. Each Appellant is convicted on both counts 1 and II.

b. The death sentence is set aside, and substituted with a sentence of 20 years imprisonment on each count for each Appellant, from date of conviction and sentence.

c. The sentences to run concurrently.

Orders accordingly.

**Dated and signed this 10th day of November 2020, in open court at Makueni.**

**.........................**

**H. I. Ong'udi**

***Judge***