**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 72 OF 2012**

**PETER KARURI THEURI.....1ST APPELLANT**

**JOSEPH NJIRE KARURI.....2ND APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Original Appeal from conviction and sentence in Nyeri Chief Magistrates Court Criminal Case No. 21 of 2012 (Hon. D.O. Ogembo (Senior Principal Magistrate) on 3rd April, 2012)***

**JUDGMENT**

The appellants were charged with 6 counts of robbery with violence contrary to **section 296(2)** of the **Penal Code, Cap.63**. In the 1st count, it was stated that on the night of 26th and 27th December 2009 at Ngangarithi estate in Nyeri District within the central province, jointly with others not before court, while armed with dangerous weapons namely, pistols, iron bars, *pangas*, swords, *rungus* and an imitation of a firearm robbed Pauline Wanjiku Muteru of cash, a mobile phone make Nokia 5800 serial number 3541820255372 and cash of Kshs 11,000/= all valued at Kshs. 41,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Pauline Wanjiku Muteru.

Except for the names of victims of the robbery and the items stolen from them, the particulars of offence in the rest of the 5 counts were similar to those in the 1st count in every other respect.

Each of the appellants was also charged with an alternative count of handling stolen property contrary **to section 322(2)** of the **Penal Code**.

As far as the 1st appellant is concerned, it was alleged that on the 28th day of December 2009 at Chania estate in Nyeri district within the central province otherwise than in the course of stealing dishonestly handled one mobile phone make Nokia N33 serial number 355668222 668186 valued at Kshs 4,300/=, the property of Daniel Theuri Mthuguri knowing or having reasons to believe it to be stolen or unlawfully obtained.

With respect to the 2nd appellant, it was alleged that on the 28th day of December, 2009 at Asian quarters dumping site in Nyeri district within the central province otherwise than in the course of stealing, he dishonestly handled one mobile phone make Nokia 31200 serial number 355723029967773 valued at Kshs 12,000/= the property of Edward Muteru Nderitu knowing or having reasons to believe it to be stolen or unlawfully obtained.

Although the appellants entered a plea of not guilty on each of the counts, they were convicted of all the principle counts and sentenced to death as by law provided. It is as a result of this conviction and sentence that they have now appealed to this honourable court seeking to have them respectively quashed and set aside. The 1st appellant's grounds of appeal which he set out as supplementary grounds are as follows:

1. The learned trial magistrate erred in law and in fact in convicting the 1st appellant on the 5th count despite the fact that there was no evidence adduced with regard to the particulars of the offence as set out in the particulars of the offence;

2. The learned trial magistrate erred in law and in fact in convicting the 1st appellant on the 1st and 4th counts without considering that the witnesses' evidence was that of dock identification;

3. The learned trial magistrate erred in law and in fact in convicting the appellant on the 6th counts without sufficient evidence that the appellant was among those who robbed the complainant in the said count;

4. The learned trial magistrate erred in law and in fact in convicting the appellant on the 2nd and 3rd counts despite the fact that the evidentiary value of the identification parade had already been watered down by the fact that the witnesses to the particulars of the offence set out in the specific charges had seen the faces of the appellant prior to the parade;

5. The learned trial magistrate of the trial court erred in law and in fact in heavily relying on the identification parade evidence yet the parade was not properly conducted;

6. The learned trial magistrate erred in law and in fact in failing to consider the 1st appellant's defence, more particularly his explanation as to why and how he came into possession of the phone that formed the subject of the 5th count;

7. The learned trial magistrate erred in law and in fact in convicting the 1st appellant based on the evidence of recovery of a phone on the appellant yet the appellant had given a satisfactory explanation of how he came to be in possession of the phone; and,

8. The learned trial magistrate erred in law and in fact in dismissing the appellant's defence and that of his witnesses without giving any reasonable grounds for the dismissal.

The 2nd appellant raised more or less similar grounds faulting the learned magistrate's judgment for, among other things, lack of sufficient evidence with regard to his identification; lack of proof of possession of the stolen items; irregular trial process; and dismissal of the appellant's defence without any reasons.

Being the first appellate court, this honourable Court has the obligation to evaluate the evidence at the trial afresh and come to its own conclusions which may or may not be consistent with those which the trial court came to. However, as much as it is open for this court to come to factual conclusions that are at variance with those of the trial court, I am cautious that the trial court had the advantage of seeing and hearing the witnesses first hand and therefore was suitably placed to assess such aspects of evidence as the disposition of the witnesses, their candour, credibility and such other similar aspects that can be deduced only when the court has the opportunity to hear and see the witnesses. (**See Okeno versus Republic (1972) E.A 32).**

At about 2.30 AM on 27th December, 2009, **Mr Edward Muteru Nderitu (PW1)** and his wife (PW2) were in their house together with their two sons and a granddaughter when his daughters drove into the compound. The latter had been partying at Outspan hotel within Nyeri town. Two of the daughters, **Anne Wairimu Motoro (PW5)** and Nancy, entered the house while the third one, **Pauline Wanjiku Macharia (PW3),** who had been driving their car, remained behind to close the gate. Nderitu noticed that she had delayed entering the house; he also got concerned because he could hear murmurs coming from outside the house. When he peeped through the window he saw stranger talking to his daughter. It is then that he ventured outside only to find that Pauline had been pinned on the driver's seat of their car by this stranger.

Before he could reach his daughter he was confronted by another man at the veranda; this particular stranger was armed with a pistol. He demanded money and also told Nderitu that they (the robbers) were killers. He ordered yet another stranger to ransack Nderitu. He removed Kshs 8,000/= from his trouser pocket. The robbers huddled him together with his daughter Pauline as they demanded for more money. He told them that he had no more money but Pauline told them that her money was in the purse which was then in the custody of her sister.

The armed man entered the house leaving Nderitu and Pauline under the guard of three other men. After a short while, he came from the house with Nderitu's son, Stephen Muguku. He ordered his colleagues to guard him also. He went to the house and this time round, he returned with Anne and Nancy. Finally he brought Nderitu's wife (PW2) who was holding a 6 month old baby.

They demanded for more money; Nderitu's daughters told them their money was in their bags which they (the robbers) were then holding. After they were convinced that they had taken everything, they ordered Nderitu and his family to get back to the house as they escaped with their loot including the bags which they had snatched from Nderitu's daughters.

All this while, there was sufficient electricity in the house and at the veranda where Nderitu and his family were huddled together. Nderitu noticed that apart from the one who was armed with a pistol the other three robbers were armed with metal bars and swords.

The robber who entered the house took Nderitu's two phones which he described as Nokia 1100 and Nokia 3120 classic. He retained the box in which this latter phone had been packed when it was purchased. It was serialised as IMEI 355723029967773. His wife's phone was also taken. His daughter's phones were in the bags which the robbers carried away.

It was Nderitu's evidence that having spent close to 15 minutes with the robbers, he could identify them well; he was not only in close proximity with them but also there was sufficient light and therefore he had a good impression of their faces.

Nderitu also testified that a day after the robbery, that is on 28th December, 2009 he and his wife were watching the 7 o'clock news, in the evening, when he saw the central provincial police officer displaying some electronic items on television and urging their owners to come forward and identify them. These items which included cell phones had apparently been recovered from robbers who also appeared on the television screen. Nderitu quickly identified his classic Nokia phone and his daughter's BlackBerry. He also identified the faces of the people on the screen as those of the same people who had robbed them the previous day. He called his family to come and see them.

On 29th of December, 2009 he went to the provincial police officer accompanied by his family to identify their phones. He was able to pick out his phone and those of his daughters. He identified his own phone through the serial number.

Apart from identifying the phones, Nderitu also attended identification parades in which he identified 3 of the robbers who robbed them. Of those he identified, 2 of them were the appellants. He identified the 1st appellant because he is the one who ransacked his pockets. The 2nd

appellant was one of those robbers who guarded them; he stood directly opposite them and therefore he could see his face clearly.

Nderitu's wife, **Alice Njoki Muteru (PW2)** testified that her husband was watching television while she held her granddaughter when the robbers struck. He went outside when he noticed that a stranger was talking to one of their daughters. While he was still outside another stranger entered the house with a bag on his left shoulder. He was armed with a pistol. He took one of their sons outside and came back for her and her two daughters. He took them to the veranda. He struck one of the daughters on the face when she sought to know what was happening. The man emptied the contents of their daughter's bags. He also ransacked her bags but could not find any money. He took her phone though. The robbers then left and locked the gate from the outside.

Like her husband, Mutero testified that the entire house was well-lit; there was also sufficient fluorescent light at the veranda and the security lights were also on. She also saw the news on television that several phones had been recovered. The witness accompanied her husband to the police station on the following day to identify their phones. She was able to identify five of the phones as belonging to her husband and their daughters.

Mutero also attended identification parades and identified three of the attackers two of whom were the appellants.

**Pauline Wanjiku Macharia (PW3)** confirmed that indeed she and her sisters arrived at their home at about 2.00 AM and that she was the one who had been driving the vehicle in which they had travelled. She testified that she was confronted by two men as she closed the gate; apparently the strangers jumped over the fence. They identified themselves as policemen demanded for her phone and money. One of them removed her phone from her pocket. Two other men joined them and ordered her to open the car boot. One of them took her bag which had Kshs 11,000/=. He hung it around his shoulder.

When her father emerged from the house and asked them who they were, one of them replied that they were on a mission to kill her. Two of the thugs brandished pistols while the other two were armed with machetes.

They ordered the witness' father to sit down and took his wallet. They also moved everybody from the house including her mother who was holding a baby to the veranda. The robbers took the witness' phone and money. They escaped after they ordered everybody to go back to the house. This witness also testified that there was bright light and she was able to identify the robbers two of whom were the appellants. She identified the 2nd appellant as the one who held her, armed with a Somali sword, while the 1st appellant was the one who was moving all over the place and collecting personal belongings from their victims. She remembered that he was armed with a machete.

Like her parents, she saw the appellants on television the following day; she did not, however, attend the identification parade. She identified her phone at the police station. She still had the box in which it was purchased; it bore serial no. 354182035245372. She was also able to identify the rest of the phones belonging to her sisters and father.

**Daniel Theuri (PW4)** was also a victim of the robbery on the material day. It was his evidence that while driving home he found two cars stuck in the mud on road leading to his house. He opted to park his vehicle besides the road apparently because he could not drive past the immoblised vehicles. As soon as he locked the car doors, four armed men confronted him. He accidentally set off the car alarm. This seems to have infuriated the gangsters who struck him with a club. He lost his consciousness. They then frisked his pocket and took his phone together with Kshs 1000/=. They also took music tapes. He was able to identify his phone because he had stored particular songs in its memory. He also had a receipt for its purchase. He had also retained its box which also bore the phone's serial number that was stated to be 355668222228186. The witness admitted that he could not identify his attackers because it was dark. **Dr Francis Maina (PW8)** confirmed that he examined this witness on 11th January, 2010 and assessed the injury on the chest which he described as 'harm'.

**Ann Wairimu Matoro (PW5)** testified that she opened the gate for **Pauline Wanjiku Macharia (PW3)** and then proceeded to the house together with her other sister Nancy. She suddenly saw a man in the room; he took her bag and ordered her to get out of the house. She saw him remove a phone from her sister's pocket and pick another one from the dressing table. They were ordered to go to the veranda where the rest of her family members were seated. Then she saw other intruders one of whom slapped her. The robbers kept asking for money. According to her, the robbers stayed with them for between 30 minutes to one hour. She was able to identify the robbers when she saw them on television the following day. She was also able to identify her phone.

**Susan Nyambura Mutero (PW6)** also identified her phone when she saw it on television. She had recorded its serial number in a notebook which she carried to the police station where she went to identify it.

The police officer who conducted an identification parade from which the 1st appellant was identified was **Inspector Frank Masaka (PW7).** The parade was conducted at Nyeri police station and from his evidence **Nderitu (PW1)** and **Alice Mutero (PW2)** separately picked him out as one of the people who had robbed them. As for the 2nd appellant, his parade was conducted by inspector **Kadei (PW10)** on 3rd January, 2010 at the same station. He too was identified by the two witnesses

**Inspector Jacob Muriithi (PW9)** investigated the case against the appellants. He confirmed that Nderitu (PW1) reported the robbery at Nyeri police station on 27th December, 2009 at about 3.30 PM. In the course of his investigations, he was able to track down one of the suspects whom he identified as David Simiyu; Simiyu was charged alongside the appellants but he escaped from prison. When he arrested him, he was in possession of several phones which he later came to learn that they belonged to Pauline Wanjiku Mutero and Nancy Wangari.

Upon interrogation, Simiyu led inspector Muriithi to Chania estate where the 1st appellant lived. He was found in possession of two phones, one belonging to a deceased person and the other one was for Daniel Theuri(PW4). Simiyu and the 1st appellant then led the police officers to the 2nd appellant's house. They found him with Nderitu's (PW1's) phone. The appellants together with Simiyu then led the officers to the house of one of their other colleagues whom they identified as Simon Gwandaru Mwangi and who was also charged with the appellants; he, however, escaped from prison.

After hearing the prosecution evidence, the trial court came to the conclusion that the prosecution had established a prima facie case sufficient to put the appellants on their defence.

The 1st appellant opted to give sworn testimony and testified that on 27th December, 2009, Simon Gwandaru Mwangi, who is also his brother in-law borrowed the sum of Kshs 2,000/= from him and in return offered a phone as security. He produced a written agreement to this effect. On the following day Gwandaru came with the police and asked him to produce the phone. He gave it out and was immediately arrested.

The 1st appellant's mother testified in his defence and said that she had hosted some ceremony at her home on the 27th December, 2009; her son was in attendance and in fact he was the one who saw off the visitors. On 28th December, 2009 at 8.00AM he called her to say that he had been arrested and was at the police station. The appellant's sister, **Mary Murugi Theuri (DW3)** who also testified in defence of the 1st appellant stated that the ceremony her mother alluded to in her evidence was a family gathering which took place on 26th December, 2009 through to 27th December, 2009.

On his part the 2nd appellant also gave sworn evidence and testified that on 27th December, 2009, he was called by David Nandala Simiyu, one of the two fugitives who escaped from prison, and told him that he had scrap metal to sell. They agreed that they would meet on 28th December, 2009 at 6.30 AM. As he waited for him, Simiyu arrived in the company of 10 other people. He was then arrested and taken to the police station. He stated that he attended an identification parade without his consent since he had been shown on television.

With this evidence, the immediate question that a trial court would be concerned with is whether the offence of robbery with violence was established in the first place. The starting point in answer to this question is the law that creates the offence which is section **296(2) of the Penal Code**; however, for better understanding, one has to read **section 296** in its entirety; it is made up of two provisions which state as follows:

> ***296. Punishment of robbery***
>
> ***(1) Any person who commits the felony of robbery is liable to imprisonment for***
>
> ***fourteen years.***
>
> ***(2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.***

As it is apparent from its heading the section prescribes the punishment for the offence of simple robbery and robbery with violence. The offence of robbery is itself defined in the preceding section 295 which states:

> ***295. 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.***

**Section 296(2)** of the Code spells out the ingredients of the offence of robbery with violence. According to this provision of the law, an accused will be convicted of the offence of robbery with violence if the prosecution proves that the robbery victim was not only robbed but also that at the time of the robbery any of the following circumstances were brought to bear:-

> (a) The accused was armed with any weapon or instrument that may deemed to be dangerous or offensive;
>
> (b) The accused was in the company of one or more persons;
>
> (c) Immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to any person.

My appreciation of the evidence of the six complainants together with the evidence of the Dr Francis Maina (PW8) is that the complainant's valuables and money were not only stolen but also that they lost their property to persons who were armed with dangerous or offensive weapons; the attackers were of more than one and at, or immediately before or immediately after the time of theft, they beat or struck or used personal violence against their victims. In short, although the prosecution was bound to prove only one of the three elements, it established the three of them.

I have not found any reason why the learned magistrate should not have believed the testimony of the prosecution witnesses that they were violently robbed in the wee hours of 27th December, 2009. **Nderitu(1),** his **wife(PW2)** and their daughters **(PWs 3,5** and **6)** were all consistent in their evidence on when the robbers struck, how they struck and what they did and said after they invaded their home. The robbers were not only armed but in the course of the robbery they employed violence on at least two members of Nderitu's family. They were armed with a pistol and other crude weapons. To cap it all they robbed the family members of their property.

Apart from the evidence of Nderitu and members of his family, **Daniel Theuri's (PW4's)** evidence that he too was attacked and robbed of his money, a cell phone and music cassettes was not also challenged. He appeals to me to have been a candid, credible and an honest witness to the extent that he even admitted that he could not identify his attackers because they confronted him in darkness. Fortunately, he was able to identify his phone that, according to the investigations officer, was recovered from the appellants. His evidence against the appellants was as a result of this recovery and not necessarily because he could identify them.

I also note that his evidence that he was struck at the time of the robbery by one of the robbers was corroborated by medical evidence which showed that he sustained a bodily injury whose degree was assessed as 'harm'.

All these witnesses were able to identify their properties at the police station and in court through various means, including production of the necessary documentation in proof of their purchase and also their serial numbers. There is therefore no doubt that they lost their property in the course of the robbery.

In the final analysis, the evidence that the offence of robbery with violence was committed at the place, date and time particularised in the charge sheet was not controverted and to this extent I agree with the learned magistrate that this offence was proved beyond all reasonable doubt.

The next equally important question is whether the appellants perpetrated this crime. As far as I can gather, the answer to this question revolves around two issues the first of which is the identification of the appellants and second, the recovery of the complainant's properties.

Whenever the question whether a suspect was positively identified arises, the burden is normally on the prosecution to demonstrate to the satisfaction of the trial court that the conditions under which the accused was identified were favourable for a positive identification. In this regard, such evidence as relating to the time the attacker is alleged to have spent with his victim; whether the attack was in broad daylight or at night; the condition of the lighting at the time and place of attack; and whether the attacker or attackers were masked are all crucial factors to be considered before the court comes to the conclusion of whether the accused was positively identified or not.

As far as the law on this question is concerned, the Court of Appeal in

**Wamunga versus Republic (1989) KLR424** held at page 426 that:

> ***"…it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

Turning back to the prosecution case with respect to identification of the appellants, Nderitu and members of his family were all consistent that at the time they were attacked, the electricity light was on both in and out of the house; the veranda where they were all huddled was brightly lit. The security lights were on too. According to Nderitu himself, the robbers spent close to 15 minutes with them although one of his daughters suggested that they spent between half an hour to one hour with the robbers. All this while, they interacted with the robbers and had a conversation with them. It is also noteworthy the robbers faces were not masked.

In these circumstances, I agree with the learned magistrate that the conditions were favourable for a positive identification. I note that only the Nderitu and his wife attended the identification parades from which they picked out the appellants. However, failure by their daughters to attend the parades cannot be said to have been fatal to the prosecution case. Indeed it would have been ideal for each of Nderitu's family members to attend the parades, but in my humble view, any of them could attend the parades and his or her evidence would be sufficient as long as the trial court was cautious of the dangers of relying on the evidence of a single identification witness. In the case against the appellants, the witnesses who attended the identification parade were two and the both positively identified the appellants as amongst the four people who attacked and robbed them on the material day.

It is true that the evidence of **Pauline Wanjiku Machari (PW3)** and **Ann Wairimu Mutoro (PW5)** on identification of the appellants was nothing more than dock identification; however, I note that it was consistent with that of their parents who attended the identification parade. In any event, dock identification by itself is not always fatal to the prosecution case; it has been held that a trial court can convict based on this evidence if it is satisfied it is not vitiated in any way. In **Muiruri& Others versus Republic (2002) 1KLR 274** the court had this to say on this evidence:

> ***"…we do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo versus Republic (1953) 20 EACA 166, Roria versus Republic (1967) EA 583 and Charles Maitanyi versus Republic (1986) 2KLR 76 among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases the courts have emphasised the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that the evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if it is satisfied on facts and circumstances of the case the evidence must be true and if prior thereto the court warns itself of the possible danger of mistaken identification." (Underlining mine).***

The appellants raised issue with the identification parades from which they were picked by the Nderitu and his wife; their major bone of contention was that they had been seen on television on the day they had been arrested and therefore, if I understand them correctly, the identification parades were superfluous.

Besides this concern, it was clear from the evidence of inspector **Masaka(PW7)** and inspector **Kadei (PW10)** that the identification parades in which the appellants participated were conducted in accordance with the police standing orders.

While it is true that Nderitu, his wife and their daughters saw the appellants on television before the identification parades were conducted, they were all consistent in their evidence that contrary to the appellants concerns, they identified the appellants together with their accomplices as the people who attacked them immediately they saw them on television. They were categorical that they did not pick them out on the identification parade because they had seen on the television but because they could remember that they were the people who attacked them; in other words they would still have picked the appellants out even if they had not seen their faces on television.

In any event, there was no suggestion that the appellants were paraded on television for purposes of identifying them in the subsequent identification parades. What came out clearly is that it was by sheer coincidence that Nderitu was watching television when the appellants together with the stolen items were splashed on television.

I am satisfied, as the trial court was, that the appellants were positively identified as the people who attacked Nderitu and his family members on the 28th day of December, 2009.

The circumstances of their identification were favourable and free from the possibility of any error.

Even if the evidence of identification was to be disregarded, the prosecution presented what in my view is evidence sufficient enough to prove that the appellants were found in possession of the stolen items soon after they had been robbed from the complaints. The appellants would still be culpable for the offence of robbery with violence, at least on two of the six counts, under the doctrine of recent possession. This doctrine of recent possession has been explained in the case of **Chaama Hassan Hasa versus Republic (1976) KLR** at page 10 where the High Court (Trevelyan and Hancox JJ) explained it as follows:

> ***"Where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, a presumption arises that he was either the thief or a handler by way of receiving (though not by way of retaining)."***

On whether a conviction can be sustained on the evidence of possession the thing stolen alone, the court said:

> ***"Whether the accused should or should not be convicted, depends not simply on his possession, but on all the facts since such possession is but one aspect of the circumstantial evidence the sum total of which must be unexplainable upon any reasonable hypothesis other than that of guilt of the person charged, before a conviction can be recorded."***

Inspector **Jacob Muriithi (PW9)** testified that he found the 1st appellant in possession of several phones amongst them a cell phone belonging **Daniel Theuri (PW3)** which was described as Nokia N33. Theuri was able to identify it as his phone because he had stored particular songs in its memory and more importantly he produced the box in which it had been purchased and a receipt for its purchase and they both bore the same serial number as the one indicated on the phone itself. He was also able to point out some particular marks that were unique to his phone.

The 1st appellant did not deny that he was found in possession of the phone; his defence was that he was given this phone by his co-accused, Simon Gwandaru Mwangi, as security for the money he had lent him; the said Mwangi escaped from remand prison in the course of their trial.

The second appellant, on the other hand, was found in possession of the Nderitu's phone which was described as a Nokia Classis 3120. Nderitu was able to identify it because the robbers left behind the box in which it had been packaged; this box bore the same serial number as that on the phone. He neither controverted the prosecution evidence that he was found in possession of the phone nor offered any explanation as to how he came to be in possession of this phone.

According to the inspector Muriithi, except for the phone belonging to Alice Njoki Mutero (PW2), the rest of the phones were found in possession of the other two accused who were charged alongside the appellants but escaped from remand prison and were still at large when at the conclusion of the appellants' trial.

From what I gather though, the robbery in which the appellants participated was a common enterprise; both the appellants and their accomplices who escaped had a common intention and therefore though the appellants were found in possession of some of the phones, they were still culpable for the theft of the other phones despite the fact that they were found to be in possession of their accomplices.

Accordingly, the appellants were properly convicted on the 1st, 2nd, 3rd, 4th and 6th counts, based on the doctrine of recent possession considering that they were found in possession of the stolen items a couple of hours after the robbery.

The learned magistrate properly dismissed the 1st appellant's defence that there was an agreement between him and his accomplice that the phone he was found in possession of was only held as security. He found as a fact the agreement had recently been made. I would dismiss the defence for a different reason; the appellant had been identified as one of the people who participated in the robbery and the phone in issue was one of the items which they robbed their victims. The purported agreement was simply an afterthought.

For the same reason, the second appellant's alibi was not sustainable because the prosecution evidence placed him at the scene of crime when it was committed.

The record shows that **Nancy Wangari Mutero** did not testify and therefore there was no evidence to support the 5th count in which she was named as the complainant. Except for the particular count, I hold that the rest of the counts were proved beyond reasonable doubt and the appellants were properly convicted. Their appeal against conviction on these counts is dismissed.

As far as sentencing is concerned, I note that the learned magistrate sentenced the appellant to death on all the counts. The proper order would have been to sentence them on the 1st count and suspend execution on the rest of the counts. The order on sentence shall be varied accordingly.

For avoidance of doubt, the appellant's appeal against conviction and sentence on the 5th count is allowed; the conviction is quashed and the sentence set aside. Their appeal against conviction on the 1st, 2nd, 3rd, 4th and 6th counts is dismissed. Having been sentenced to death on conviction of the 1st count, their sentences on the 2nd, 3rd, 4th and 6th counts shall be held in abeyance. Orders accordingly.

**Dated, signed and delivered this 2nd day of February, 2018**

**NGAAH JAIRUS**

**JUDGE**