REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CRIMINAL APPEAL NO. 57 OF 2016

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 58 OF 2016

SIMON KAMAU MWANGI.....1ST APPELLANT

DANIEL MWATHA NGIMA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Senior Resident Magistrate's Court, Nyeri (Hon.K.Onesmus) delivered on 19th July, 2016 in Criminal Case No. 149 of 2013)

JUDGMENT

FACTS

1. The appellants, **Simon Kamau Mwangi and Daniel Mwatha Ngima** were charged with the offence of Robbery with Violence contrary to **Section 296(2)** of the **Penal Code** and an alternate count of Handling Stolen Goods contrary to **Section 322(2)** of the **Penal Code.**

2. The particulars of the main charge were that on the 26th day of February, 2014 at Dedan Kimathi University area within Nyeri County, the appellants jointly with others not before the court while armed with dangerous weapons namely a knife robbed Maurine Mumbi Theuri (**PW1**) of the items listed in the particulars section all valued in the total sum of Kshs.73,000/- and immediately before or immediately after such robbery threatened to use actual violence on the said complainant;

3. In the alternative, the appellants were charged with handling stolen goods and the particulars of the offence were that on the 1st day of March, 2014 at Kanyagia Area in Nyeri County otherwise than in the course of stealing dishonestly received or retained one Toshiba laptop serial number 2A203430K valued at Kshs.68,000/- knowing or having reason to believe it to be stolen goods.

4. The prosecution called nine (9) prosecution witnesses to prove its case; the appellants were tried and found guilty and were both convicted and sentenced on Count I, to the only prescribed sentence, which was the death sentence.

5. Being aggrieved by the conviction and sentence, the appellants filed their respective appeals and also filed their respective appeals; hereunder are their respective Amended Grounds of Appeal;

1st APPELLANT

(i) The identification was full of inconsistencies and contradictions and hence was not positive;

(ii) The identification parade was not conducted in conformity with the Forces Standing Orders;

(iii) **PW4** never provided evidence linking the appellant to the exhibit in issue;

(iv) The trial court erred in convicting the appellant based on the confessionary statement produced by **PW5** contrary to Section 25 of the Evidence Act;

(v) The trial court failed to comply with the provisions of Section 200 of the Criminal Procedure Code;

(vi) The trial court failed to consider the appellant's credible defence;

2nd APPELLANT

(i) No first report was made and the trial court erred in relying on the evidence of **PW1** and **PW2** as a basis for convicting the appellant;

(ii) No documentary evidence was provided by **PW4** linking the appellant to the motor cycle that was recovered at the scene of crime;

(iii) The charges were not adequately proved to the desired threshold;

(iv) The trial court erred in relying on evidence on the mode of arrest; the appellant had not confessed to participating in the alleged offence;

(vi) The trial court rejected the appellant's defence without giving it due consideration;

6. At the hearing hereof the 1st appellant was represented by Mr. Gekonga and Ms. Mukuha, the 2nd appellant was represented by Mr. Theuri whereas Prosecuting Counsel Mrs Gicheha represented the State; a brief summary of their rival submissions are as follows;

1st APPELLANT's SUBMISSIONS

(i) Counsel submitted that the trial court contravened the provisions of Section 200(3) of the Criminal Procedure Code rendering the proceedings a nullity; the case was handled by Hon.C.Wekesa SRM in April, 2016 and when the court went on transfer Hon. K.Onesmus SRM took over but failed to comply with the section; it was incumbent upon the incoming trial court to explain to the accused his rights in clear terms which must be recorded; there was nothing on the record indicating that the section was complied with; it is a mandatory requirement as the accused was faced with a new trial magistrate who was not conversant with the proceedings;

(ii) That the appellant wanted to proceed from where the case had reached and asked the court to recall **PW1** to **PW8** but an objection was raised by the prosecution; the trial court delivered its ruling and stated that it would be sitting as an appellate court; the effect of the ruling was to deny the 1st appellant the right to recall the witness; recalling a witness would enable the incoming trial magistrate to see the demeanour of the witnesses and to understand the case;

(iii) The trial court was wrong as it did not have discretion; this right was only available to the accused; it was the courts duty to explain to the accused his rights under the section; this mandatory requirement was not complied with; and the only remedy is to render the whole process a nullity from the 23/05/2016 when Hon.K.Onesmus took over; caselaw relied on **Kariuki vs Republic** where it was held that failure to comply rendered the trial a nullity; **Jonathan Muhatia Ndoto vs Republic** – where the appeal was allowed for failure to comply; **George Irungu Wanyoike vs Republic** held non-compliance left a fatal vacuum; and the section needed to be observed as it was for the protection of an accused person; **Catherine Mueni Makau vs Republic**- held that the decision to proceed from where previous magistrate left does not lie with the incoming magistrate;

(iv) The appellant sought to recall witnesses; this was rejected; he made a second application which was also rejected; which shows that the trial court was unfair; all parties are expected to be given a fair trial; there-fore failure to comply with this section renders the proceedings a nullity; this appellate court may order a re-trial but this would be prejudicial to the appellant as he had served one (1) year and two (2) months having been convicted on 19/07/2016;

(v) The trial court denied the appellant the opportunity to cross-examine the prosecution witnesses; this was his right; and this opportunity is there until parties close the case; he was denied a fair hearing as he was forced to proceed with the case when he had applied for an adjournment as he was un-well; and the trial court did not make an order for treatment; caselaw relied on **Republic vs Salim Mohamed;**

(vi) Counsel prayed the appeal be allowed as the trial court was unfair; and prayed that the appellant be set free;

2nd APPELLANT's SUBMISSIONS

(i) Counsel submitted that the identification of the 2nd appellant was not fool-proof; **PW1** told the court that she did not know the 2nd appellant; that she couldn't recall when the incident took place because she was confused; that no description was given to the police of the two young men; no description of their clothes was given; and no evidence was given on the duration of the incident and length of time taken by **PW1** to observe the 2nd appellant;

(ii) The trial court erred in its judgment by finding that the same description was given to the police before the arrests were made; that the trial court misunderstood and misconstrued the evidence on record as **PW1** and **PW2** never gave any description to the police; **PW1** stated that she wrote her statement after the identification parade;

(iii) The identification parade was not conducted as per the Forces Standing Orders; PC Moseti **(PW8)** was the Investigating Officer stated that he conducted the Identification Parade which was contrary to Order 6(4)(B) which states that the police officer in charge although present should not conduct the parade; the investigating officer in this instance ought not to have been involved in the parade because he would interfere with the proper conduct of the parade;

(iv) The trial court should not have relied on the evidence of the identification parade; the identification was not free from error and the conviction based on such identification evidence was unsafe;

(v) The appellant is said to have sold the laptop to **PW3**; that it was **PW3** who was found in possession and not the appellant; the doctrine of recent possession did not apply in this instance; that **PW3** also signed the Sale Agreement; in his defence the appellant denied entering into an agreement for the sale of the laptop and stated that the agreement was drawn at the police station; the trial court dismissed the appellants defence but gave no reasons why it chose to believe **PW3's** evidence over the appellant's;

(vi) That it was erroneous for the trial court to conclude that based on the recovery of the lap top that the appellant had knowledge of the attackers;

(vii) That a crucial witness called Angelina Runa ought to have been called to testify as a witness to confirm the genuiness of the Agreement because the 2nd appellant denied ever entering into it;

(viii) The trial court erred in failing to comply with Section 200 (3) of the Criminal Procedure Code; it also failed to record whether it informed the appellant of his right under this section; the proceedings were a nullity; that no re-trial should be ordered as it would not be in the interest of justice and it would also be prejudicial to the 2nd appellant;

(ix) The trial court did not consider the 2nd appellants alibi defence; that on the material date when the offence was committed he had been given a job by Jackline Waithera Mumbi; and he worked there from 8.00am and left her place at 4.30pm and arrived at his house at 6.30pm; he called Mumbi as his witness and she confirmed that he started work at 8.00pm and left at 6.00pm; that he was not at the scene of crime; the trial court dismissed his defence but did not give reasons why the defence was not plausible and it arrived at its conclusion by considering irrelevant matters;

(x) The offence of robbery not proved to the required standard; there were lots of gaps and doubts which should be resolved in favour of the 2nd appellant;

(xi) The appellant prayed that the conviction be quashed and the sentence be set aside;

RESPONDENT's SUBMISSIONS

(i) In a joint response prosecuting counsel submitted on the contravention of Section 200(3) of the Criminal Procedure Code that; the trial court informed the appellants of their rights but concurred that it was not recorded; that it may have been a typing omission as the proceedings demonstrate that the two appellants responded and the prosecution submitted and then a ruling based on compliance of this section was delivered;

(ii) The 1st appellant requested to recall witnesses **PW1** to **PW8** whereas the 2nd appellant requested to recall **PW1** to **PW4** and then proceed from where the matter had reached by previous magistrate; the prosecution opposed the recall as the 1st appellant had forfeited his right to cross-examine when he declined to cross-examine the witnesses on the grounds that he couldn't talk because he was unwell;

(iii) **On unfair hearing;** the witnesses used to attend court faithfully and the trial court noted that the appellants kept applying for adjournments and had made numerous applications for adjournments; from the beginning of the trial the appellants refused to participate and when given the opportunity to cross-examine the prosecution witnesses they remained mum; that when it came to **PW5**'s turn to testify the appellants walked out on their own volition;

(iv) That during one of the hearings the appellants caused a commotion by engaging the orderlies in a struggle forcing the court to dispense with their presence due to their difficult conduct; the matter proceeded up-to the defence hearing;

(v) The expeditious disposal of matters is a Constitution right and the appellants were bent on bending this right as they had no intention of allowing the proceedings to continue;

(vi) Counsel submitted that the appellants were given a fair hearing; their right to re-call the prosecution witnesses was calculated to delay the proceedings as they had no justifiable reasons given that they had forfeited their rights;

(vii) **On identification;** it was not in doubt that the identification parade was conducted on the 5/03/2014; the 2nd appellant was identified at the identification parade which were conducted by Inspector Maroro; **PW1** and **PW2** were called to attend and both of them identified the 2nd appellant; under cross-examination **PW1** stated that the 1st appellant was not in the parade line-out; in question was whether the identification parade for the 1st appellant was conducted on the 27/06/2014; but **PW1** and **PW2** stated they never attended any identification parade on the 27/06/2014 but confirmed attending the one of 5/03/2014; but this did not exonerate the 1st appellant as there were other prosecution witnesses who testified;

(viii) The evidence of **PW8** was that the OCS and the deputy OCS conducted the identification parades and Moseti arrested the appellants on the 2nd March, 2014;

(ix) **PW1** and **PW2** did not lead the police in the arresting of the appellants; the 1st appellant was arrested because he was employed by **PW4** who was the owner of the motor-cycle used by the robbers to escape; it was abandoned at the scene of crime as they were unable to use it; the police took it away and the owner went for it at the police station and he informed the police that the 1st appellant was the rider and this led

to his arrest; the 1st appellant led the police to his accomplice, the 2nd appellant, who then led them to **PW3** to whom he had sold the lap-top that had been stolen from **PW1**; **PW3** produced a Sale Agreement made between him and the 2nd appellant which was produced in evidence;

(x) The trial court applied the doctrine of recent possession as the 2nd appellant failed to explain how he came into possession of the stolen lap-top; and it was not only identification of the 1st and 2nd appellants but a chain of events that led to their arrest; there was no error in the identification of the 2nd appellant by **PW1** and **PW2** and it was not in doubt; the robbery took place at 4.00pm in broad daylight and both witnesses mentioned that the 2nd appellant had a scar and this helped in identification; and it was **PW1** who directed the police to the 2nd appellant leading to the recovery of the lap-top; this showed that they were working together; the appellants were properly convicted for the offence of robbery with violence;

(xi) **Crucial witnesses**; the prosecution has the discretion to call any number of witnesses to prove its case; the failure to call the person who witnessed the sale agreement does not water down the evidence adduced by the prosecution witnesses; there is no doubt as to the 2nd appellant's participation in the robbery and no explanation was given by him; the evidence tendered by the prosecution was to the desired threshold;

(xii) **Defences disregarded**; the 1st appellant stated that he was at home doing cleaning on the material date and that he never left the house; that he was unable to talk due to a tooth-ache; his defence never overturned the prosecution evidence; the trial court was not convinced and disregarded the defence as a mere denial;

(xiii) As for the 2nd appellant his defence alibi was that he was working at Janet's place and he left in the evening at 4,00pm; DW3 the appellants witness stated her name as Jacqueline Mumbi Waithera; she could not recall the date she had given the appellant casual work but stated that it was the day he was arrested; he was arrested on the 4/03/2013 but never stated where he was on the 26/02/2014 when the robbery took place; the trial court disregarded the defence as there was no truth in it;

(xiv) Counsel submitted that the two appellants were properly convicted and sentenced; and prayed that the lower court's findings be upheld; and the appeals be dismissed.

REJOINDER

7. The trial court did not comply with Section 200(3); he may have recorded but he took away their rights under the section; the trial court misinterpreted the section in that he had discretion to allow; considering the ruling of the previous trial magistrate the scenarios were different; it was taking over and it was a new trial court; the 1st appellant had forfeited his rights previously but with a new court he was entitled; and submitted that this ground would succeed and then the other issues would become irrelevant;

ISSUES FOR DETERMINATION

8. After taking into consideration the forgoing rival submissions these are the issues framed for determination;

(i) Whether the appellants were positively identified;

(ii) Whether the proceedings were rendered a nullity for failure to comply with Section 200(3) of the Criminal Procedure Code;

(iii) Whether the offence of robbery with violence was proved to the desired threshold;

(iv) Whether the trial court disregarded the appellants defence without giving good reasons;

ANALYSIS

9. This being the first appellate court it is incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Refer to the case of **Okeno vs Rep (1972) EA.**

Whether the appellants were positively identified;

10. The appellants' submission was that no description of the robber(s) was made in the initial report made to the police; and also the identification parade was flawed as it was in breach of the Forces Standing Orders.

11. The issue of identification herein is three-fold; the first report, the visual identification and the identification parade; on the issue relating to the first report; it was the 2nd appellant's contention that **PW1** and **PW2** gave no features to the police when making their first report; which would mean there was no basis for the identification parade;

12. In the case of **Nathan Kamau Mugwe Cr. Appeal No. 63 of 2008** the Court of Appeal expressed itself by holding that the ideal position would be for the witness to give a first description of the assailants for purposes of organizing an identification parade; and that an identification parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect;

13. The above notwithstanding this court has re-analyzed the evidence of **PW1** and **PW2** and it is noted on record that **PW1** testified that she

had noted a scar around the 2nd appellant's face; **PW2** evidence was that in her statement to the police she described one of the attackers as having a scar on his face;

14. In this instance the trial court in its judgment stated as follows;

> **"PW1 and PW2 in their cross-examination reiterated that they had marked and recognized the accused at the scene of the robbery. The same description they gave to the police even before the arrest was made."**

15. This court is satisfied that at least one of the prosecution witnesses gave a description of one of the robbers in her initial report; this court is also guided by the forgoing decision where it was held that the identification parade is not invalidated merely because of failure to give a description in the first report; the important factor is to examine the conditions and circumstances of the visual identification and whether the trial court considered the same; which leads to the second leg;

16. The second leg is whether the trial court tested the circumstances and conditions for identification; since the crucial evidence was based on identification the trial court was enjoined to treat the evidence with great care and to test it whether it was free from error; refer to the case of **Matianyi vs Republic**- where the court held that the evidence must be carefully tested on whether it was free from error;

17. **PW1** testified that the incident occurred at 4.00pm and stated that she was able to see the 2nd appellant clearly as it was during the day; and **PW2** corroborated her evidence on the time; the trial court in its decision was satisfied that there was sufficient day light to enable the witnesses to identify the appellants and it made the following findings;

> **"I find that PW1 and PW2 had properly marked the images of their attackers. They identified them with ease in the conducted parade. I find that there was sufficient daylight which assisted them in identifying Accused 1 and Accused 2."**

18. This court is satisfied with the trial court's finding on the quality of light and that the conditions and circumstances for visual identification of the 2nd appellant was favorable; this evidence was complimented by the identification parade; which then leads to the third leg on the identification parade and whether it was properly conducted;

19. It is clear from the evidence on record that the 1st appellant was apprehended by the Investigating Officer (**PW8**) on information received from **PW4** who was the owner of the motor cycle that the robbers abandoned at the scene of crime as they fled; the 1st appellant then led the police to the 2nd appellant who was his accomplice; **PW1** and **PW2** were invited to attend an identification parade; and it is noted that **PW1** and **PW2** were both able to pick out identify the 2nd appellant from his scars that they had duly observed during the robbery incident;

20. It was the contention of the 2nd appellant that PC Mosoti **(PW8)** who was the Investigating Officer conducted the Identification Parade which was contrary to Order 6(4)(B) which provides that the police officer in charge although present should not conduct the parade; that the investigating officer in this instance ought not to have been involved in the parade because he would interfere with the proper conduct of the parade;

21. This court notes from the evidence of **PW8** that the identification parades were conducted by Chief Inspector Maina Ndei and Inspector George Madoli; and **PW8's** evidence on the officers who conducted the parade was corroborated by PC Godfrey Otieno Oloo (**PW**) and Inspector Kennedy Otieno (**PW**);

22. Upon re-evaluating the evidence this court finds that there is corroborated evidence that **PW8** was not the officer who conducted the parade and that there was compliance of the provisions of the Forces Standing Order 6 (iv) (b); and is satisfied that the identification parade was properly conducted;

23. There were no gaps found in the evidence of **PW1** and **PW2** that could lead to the possibility of mistaken, induced or tainted identification; both of them identified the 2nd appellant as the robber who was armed with the knife; and that the visual identification evidence was complimented by the identification parade; this court is satisfied that the identification of both the appellants was positive and free from error;

24. This ground of appeal is found lacking in merit and is hereby disallowed;

Whether the proceedings were rendered a nullity for failure to comply with Section 200(3) of the Criminal Procedure Code;

25. The appellants both contend that the trial court failed to comply with Section 200(3) of the Criminal Procedure Code; that it also failed to record whether it informed the appellants of this right as provided by the section; and therefore the subsequent proceedings were a nullity;

26. The respondent in its response submitted that the trial court informed the appellants of their rights under the provisions of Section 200(3) but contended that the omission to record the directions could have been a typing omission as the proceedings demonstrate that the two appellants responded to the directions and the prosecution also submitted and then a ruling based on compliance of this section was delivered;

27. The record shows that the matter was initially heard by the Hon. C.Wekesa who took the evidence of **PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW8**; on the 23/05/2016 the Hon.K.Onesmus took over the case and the 1st appellant requested that the matter proceeds from where it had reached by the previous magistrate and requested the recall of prosecution witnesses **PW1** to **PW8;** the 2nd appellant also requested to proceed likewise and to recall **PW1** to **PW4**; the prosecution opposed the recall as this would have amounted to a retrial and

pointed out that the appellants had deliberately refused to participate in the trial and had therefore forfeited their rights to cross-examine; the new trial court then proceeded to make a ruling and declined the order for recall as the appellants wanted to use it as a means to delay the trial;

28. Section 200(3) reads as follows;

> **"200(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused of that right."**

29. The appellants contend that the trial court misinterpreted the above section in that he had discretion to allow or take away their rights under the section; the appellants allude that the trial court has no such discretion to dis-allow the right to recall;

30. Upon perusal of the section the words used are **"shall inform"** which makes it mandatory for the trial court to inform the accused persons of their rights; the record demonstrates that the trial court may not have initially recorded that it had informed the appellants of their rights but it alluded to having informed them in its ruling which was as follows;

> **"I have successfully exercised mandatory duty to inform the accused of their discretionary right.**
>
> **……The provisions of Section 200(3) stops at my duty to informing them and does not further direct me to recall the witnesses and take their evidence afresh."**

31. In considering the section it is indeed a mandatory requirement for the trial to comply with the section by informing the appellants of this right and in doing so it must be reflected on the record; and it is this court's considered view that the submissions of the parties was a reaction to the trial court's directions and the ruling of the trial court demonstrates that indeed the section was complied with; this court concurs that the trial court's mandatory duty stopped at informing the appellants.

32. As the recalling of a witness who has already testified is part and parcel of the right to a fair hearing, it is therefore the duty of this court to consider whether the appellant's were prejudiced when their application for the recalling of the prosecution witnesses was disallowed;

33. The record shows that from the commencement of the trial the appellants made numerous applications for adjournments and also refused to participate when given an opportunity to cross-examine the witnesses; when it came to **PW5**'s turn to testify the appellants walked out on their own volition; that during one of the hearing sessions the appellants caused a commotion by engaging the orderlies in a struggle forcing the court to dispense with their presence due to their difficult conduct;

34. In this instance going by the appellant's difficult conduct and the fact that **PW1** and **PW2** were students who had faithfully attended when summoned this court finds no good reason to interfere with the trial court's finding that the request to re-call the prosecution witnesses would unnecessarily delay justice to the accused and the complainants and that the trial court was not going to be used to perpetuate injustice.

35. This court is satisfied that the appellants were not prejudiced and were accorded a fair hearing and trial as set out in Article 50(2)(1) of the Constitution of Kenya; the trial court is found to have complied with the provisions of the Section 200(3); and as for the recalling of the witnesses the trial court in its ruling gave justified reasons for disallowing the application for recall; which it found would not have been in the best interest of justice and time and for the expeditious disposal of the matter;

36. This ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the offence of robbery with violence was proved to the desired threshold;

37. The key ingredients of the offence of robbery are as follows;

> (i) The offender is armed with any dangerous and offensive weapon or instrument; or
>
> (ii) The offender is in the company with one or more other person(s); or
>
> (iii) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes, or uses other personal violence to any person;

38. The trial court in its judgment specifically elaborated in detail on two of the key ingredient(s) of Section 296(2) of the Penal Code; on the first ingredient it made the following finding;

> "Accused (2) was armed with a knife and actually used it on **PW1** to rob the laptop which is classified as property capable of being stolen".

39. On the second ingredient the trial court made the following analysis and findings;

> **"….They arrested accused 1 who led them to accused 2 who led them to PW4 and the laptop…..**

How could accused 1 and accused 2 lead the Police to the recovery of the robbed items if they were innocent? The answer is simple. They were and had knowledge and were the attackers on that date.

…..The robbers were two in number at the time of commission. The ingredients of Section 296(2) of the Penal Code are satisfied."

40. In re-evaluating the evidence on record it is noted that the 1st appellant was arrested because he was employed by **PW4** who was the owner of the motor-cycle that was abandoned at the scene of crime;; the police carted it away and when the owner went to claim it at the police station he informed the police that the 1st appellant was his employee and the rider of the motor-cycle which then led to his arrest; the 1st appellant then led the police to his accomplice, the 2nd appellant, who then led them to **PW3** to whom he had sold the lap-top that had been stolen from **PW1**; **PW3** produced a Sale Agreement made between him and the 2nd appellant for the purchase of the lap-top which was produced in evidence; the trial court then applied the doctrine of recent possession and the 2nd appellant and when he failed to explain how he came into possession of the stolen lap-top; the trial court then drew the inference that the 2nd appellant had a role to play in the robbery; his role was corroborated by the evidence on identification which placed him at the scene of crime; and this court's finding was that there was no error in the identification of the 2nd appellant by **PW1** and **PW2;**

41. This court is satisfied that the appellants were not only convicted on the evidence on identification; but on evidence on a chain of events that led to their arrest; this court is satisfied that the offence of robbery was with violence was proved to the desired threshold; the convictions are found to be safe;

42. This ground of appeal is found lacking in merit and is disallowed.

Whether the trial court disregarded the appellants defence without giving good reasons;

43. The appellants last ground of appeal was that their alibi defences were not considered by the trial court; the 1st appellant told the trial court that he was at home on the 27/02/2014 doing cleaning on the material date and that he never left the house; and that he only knew of the robbery incident at the police station; he did not call any witness; the trial court was not convinced and disregarded the defence as a mere denial and found that it never overturned the prosecution evidence;

44. As for the 2nd appellant his defence alibi was that he was working at Jacqueline's place and he left in the evening at 4,00pm; his witness **DW3** Jacqueline Mumbi Waithera could not recall the date she had given the appellant casual work but stated that it was the day he was arrested; and the day of his arrest was on the 3/03/2014; the trial court disregarded the alibi defence as the evidence of **DW3** was at variance with that of the 2nd appellant and there was no truth in it;

45. In conclusion this court is satisfied that the 1st appellant's defence did not displace the prosecution's evidence on recovery of the stolen item; both the circumstantial evidence and the evidence on identification placed the 1st appellant at the scene of the crime; as for the 2nd appellant's alibi defence indeed this court concurs with the trial court's finding that the evidence of his witness **DW3** on the dates was at variance with his evidence; her evidence covered the day of his arrest whereas his date was in relation to the date of the incident; and therefore the trial court correctly found that his alibi evidence did not displace the prosecution's case; that the appellants were positively identified by **PW1** and **PW2**; and that the prosecution evidence placed both the appellants at the scene of crime on that material date;

46. This court is satisfied that the trial court properly arrived at its conclusion; this ground of appeal has no merit and the same is disallowed.

FINDINGS

47. For the forgoing reasons this court makes the following findings;

(i) This court finds that both appellants were positively identified;

(ii) The trial court is found to have complied with the provisions Section 200(3); the subsequent proceedings were not a nullity;

(iii) The prosecution proved its case to the desired threshold; and the convictions are found to be safe;

(iv) The trial court gave good reasons for disregarding and rejecting both of the appellants defences;

DETERMINATION

48. Both appeals are found lacking in merit and both are hereby disallowed.

49. The convictions and sentences for both appellants are both hereby upheld;

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 12th day of September, 2018.

HON. A MSHILA

JUDGE