REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 51 OF 2016

APPELLATE SIDE

(Coram: Odunga, J)

ANTHONY MUTUA NZUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 1800 of 2010, **M K Mwangi, Ag. SPM** on 26th March, 2014)

JUDGEMENT

1. The appellant herein **Anthony Mutua Nzuki** was charged with two other accused persons before the Chief Magistrate's Court Mombasa in Criminal Case No. 1800 of 2010 with the offence of Robbery with Violence Contrary to Section 296(2) of the ***Penal Code***. The particulars of Count I were that the said accused persons together with his said 2 co-accused on the 31st day of July, 2010 at Kalusya Village, Lukenya Location of Machakos District within Eastern Province, they jointly with others not before court, while armed with dangerous weapons namely Pistol, Pangas and Iron bars, robbed **Aaron Kieti Muia** cash Kshs 4,500/=, Two mobile phones make Nokia 2600, One Motor Cycle Reg. No. KMCG 824Z make Sanya all valued at Kshs 95,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Aaron Kieti Muia**.

2. In Count II the particulars were that the same persons, on 31st July, 2010 at the same place while similarly armed robbed **Mrs Doronicah Ndanu Kieti** one mobile phone make Mantrix valued at Kshs4,500/=, a wedding ring valued at Kshs 7,000/=, cash Kshs 750/=, all valued at Kshs 12,250/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Mrs Doronicah Ndanu Kieti.**

3. In Count III, it was stated that those same persons o the same date at the same place while similarly armed robbed **Jacob Katana Mukuu** one motor cycle registration number KMCG 824Z make Sanya valued at Kshs 81,000/= and cash all valued at Kshs 83,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Jacob Katana Mukuu.**

4. The particulars of Count IV were that the same persons on the same day at the same place similarly armed robbed **Lawrence Wambua Mbithi** one mobile phone make Motorola 168 valued at Kshs 3,000/= and cash Kshs 200/= all valued at Kshs 3,200/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Lawrence Wambua Mbithi.**

5. The case as initially heard by **Munguti, J M, SRM** who heard all the prosecution witnesses and delivered a ruling on 24th February, 2012 by which he found that there was no evidence to place the 2nd and 3rd accused persons on their defence. He however found that a *prima facie* case had been made against the appellant herein who was the 1st accused and consequently placed him on his defence Thereafter the matter was taken over by **M K Mwangi**, **PM** and pursuant to section 200 of the ***Criminal Procedure Code***, the Court directed that the case start *de novo*.

6. In support of its case at the *de novo* hearing which proceeded only against the appellant herein, 11 witnesses were called by the prosecution. According to PW1, **Aaron Michael Muia**, on 31st July, 2010 at about 8.20 pm he drove from his shop at Lukenya Market to his home. Upon his gate being opened for him by his guard, he was accosted by four men on each side of his vehicle who opened the doors of his vehicle, pointed a pistol and a knife at him and his wife, beat him up with metal bars and cut him on the forehead before binding him with ropes. After that the said attackers left with his wife saying that they would take her to the shop in order for her to give them money. Since the houseboy and the *shamba* boy were not tied, they unbound PW1 and their screams attracted the neighbours and made the said attackers to release his wife and ran away. Thereafter PW1 reported the matter to the police and after a few hours got information that some suspects had been arrested.

7. PW1 averred that he was taken to Shalom Hospital and while along Lukenya-Mombasa Road junction, he saw police officers with a stolen motor cycle that had been seized from his worker. He however proceeded to the Hospital where he was admitted for five days.

8. It was PW1's evidence that during the said robbery he was able to see the attackers clearly due to the fact that his vehicle had headlights on and the parking lot had bright security lights that sufficiently illuminated the place. In his evidence the appellant was the person who was wielding a pistol and the one who spoke to him and said that they had been looking for PW1 for a long time. He further disclosed that the police later recovered his Nokia phone that had been stolen from him, the red motor cycle seized from his worker, the ropes used to bring him and the metal bar used to beat him up all of which he identified. He further identified the documents relating to the said motor vehicle and averred that h had since sold the same after earlier producing it in court. The witness further identified the P3 Form issued to him by the police and filled in by the doctor.

9. PW2 was **Doronicah Ndanu Kieti**. According to her, on 31st July, 2010 t about 8pm she and her husband (PW1) had closed their shop at Lukenya and drove to their home in PW1's vehicle and arrived home at about 8.30pm. Upon arrival, her husband hooted and the guard opened the gate and they drove towards the parking lot. However at the parking lot they were accosted by two people, one of whom was wielding a gun. They two attackers then flung open the driver's door and two more men appeared on her side, flung the door open and pulled her out. The attackers then brought their watchman, **Muthama**, to where they were , took their keys, and their mobile phones and led them to the sitting room of their house and kicked open their bedroom door, ransacked it and took away cash amounting to Kshs 700/=.

10. PW2 testified that when the attackers demanded for more money, she removed her wedding ring which they took. Thereafter they took her back to the sitting room where they found the other attackers tying PW1 and their guard using ropes At that point, their motor cycle rider arrived with a quarryman and they were similarly seized and bound. It was PW2's evidence that the attackers then threatened that they would kill PW1 unless their demands were met. Two of them then left with her on the motor cycle towards their shop telling her that they were going to get more money.

11. Immediately after they left, there were loud screams from her compound which made the attackers to stop, threw her off and drove off. She then started screaming and running towards the shop as the attackers were in possession of her shop keys and was joined by villagers. However upon arriving at the shop they found it intact and they returned to their house where they found PW1 injured on the head and the leg. They then embarked on a journey to the hospital and upon reaching Lukenya-Mombasa Road junction, they met police officers who informed them that they had arrested a suspect. According to her she had been struck on the forehead and sustained a minor injury and was treated and discharged, but her husband who was in a critical condition was admitted at the hospital.

12. The following day PW2 reported the matter at the police station and thereafter the police conducted an identification parade in which she was able to identify the appellant since she was able to clearly see the robbers when they were seized as the vehicle's head lights were on and the robbers were themselves carrying torches. According to her, after PW1 was discharged, he similarly reported the matter at the police station and informed her that he also identified the suspect through a parade.

13. PW2 stated that the robbers had a pistol, a knife, a *panga* and took a metal bar from their house. It was her evidence that during the robbery, the attackers, upon realising that she had an expensive wedding ring, shone a torch at her finger and pulled out the ring and at that point she able to clearly see her face. Further, it was the appellant who led her to their motor cycle Reg. No. KMCG 824Z and sat behind her. She further testified that it was the appellant who was commanding the rest of the gang. She accordingly identified the photographs of the motor cycle, the ropes, a kitchen knife, a toy gun and a metal bar.

14. **Corporal Johana Lechapati** (PW3) was on 31st July, 2010 on mobile patrol driving motor vehicle Reg. No. GKA 800 with **Inspector Theuri**, **PC Ngeno** and another person and had parked the said vehicle off Mombasa Road at Lukenya Junction when **Inspector Theuri** informed them that he had receive information of a robbery at Lukenya Area and that some of the robbers had escaped on a motor cycle. Five minutes later a motor cycle approached at a very high speed and they waived it down but the motor cycle did not stop. They then pounced on it and grabbed the pillion and arrested the appellant herein though the driver managed to escape on foot.

15. Upon being arrested the appellant alleged that he was an Administrative Police Officer attached to the DC's office Machakos. However **Inspector Theuri** verified the registration number of the motor cycle as that of the stolen bike and then conducted a body search on the appellant and recovered a toy gun and two mobile phones. At that point one of the phones rang and the caller said it was his stolen. The second phone also rang and the caller said they should hurry up as they were being awaited for at Naivas. The Deputy DCIO then arrived and they handed over the appellant to him and the exhibits recovered. The appellant was then driven to the police station and while they were still monitoring the situation, PW1 and PW2 passed on their way to the hospital.

16. PW4, **Inspector Benjamin Rono**, was on 11th August, 2010 asked by **Corporal Samuel Ngomo** to conduct an Identification Parade. Accordingly, he arranged the parade in accordance with the identification parade police rules at which the appellant was positively identified by PW1.

17. Pw5, **Charles Kirui**, was on patrol duties at Lukenya when he received a call at about 9pm that there was a robbery at Lukenya. After a while he received another call from another resident that the said robbers had escaped on a motorcycle. Thereafter two men approached on a motorcycle and defied the orders to stop. One of the officers then pounced on the pillion rider who was arrested but the rider took off leaving the motorcycle behind. Upon searching the appellant they recovered two mobile phones and a toy gun. At that point one of the phones rang and the caller said that that was her stolen phone. Similarly the other phone also rang and the caller disclosed that he was waiting for the accused at Naivas.

18. **Dr Emmanuael Loiposha**, PW6, testified that PW1 was examined by **Dr Awinja** who filled in a P3 Form for him. The examination confirmed that PW1 suffered deep cut to the forehead and lower limbs which injuries were classified as harm. It was the opinion of the doctor who examined PW1 that the injuries were inflicted by blunt and sharp objects and the said P3 Form was produced in evidence as an exhibit.

19. According to PW7, **Inspector Aden Ali**, on 1st August, 2010 he was asked by **Corporal Mumo** to carry out an identification parade which he conducted in accordance with the police rules and the appellant was identified by **Doronicah Ndanu Kieti**, PW2. On his part, PW8, Chief **Inspector Charles Koilege**, testified that he was a ballistic expert and on 30th August, 2010, he received an exhibit from **Corporal Samuel Mumo** which he examined and concluded that it was a homemade device that was an imitation of a pistol measuring 1175mm, with a frame, handle and false trigger and was meant to make loud noise upon the release of trigger but could not fire ammunition. On his part, PW9, **Inspector Mwangi Jillon**, testified that he was a scenes of crime personnel from the CID Headquarters and on 3rd December, 2010 he photographed two motorcycles, KMCG 824Z and KMCJ 344C and presented the photographs to the Court.

20. PW10, **Jacob Katana Mutua**, was on 31st July, 2010 while engaged by PW1 as a rider of his motorcycle registration number KMCG 824Z, he after work rode to his employer's house while carrying one Wamba. Upon his arrival at the house, he entered the sitting room and saw PW1 on the ground bound in ropes being accosted by armed people who ordered them to lie an order which they obeyed. He testified that after taking from PW10 Kshs 2.500/= and the motorcycle's keys and locking in a room with **Wambua**, the said robbers then put PW2 on the motorcycle which he had arrived with telling PW2 to go and give them the money at the shop. It was his evidence that he was scared as the robbers had a gun, a knife and a *panga*.

21. On 31st July, 2010, PW11, Chief Inspector Lawrence Wahome Muchok, received a report of a robbery in Lukenya area at about 9pm as a result of which he in the company of two other officers left for the scene. Upon reaching Lukenya-Machakos Road Junction, they met police officers led by **Inspector Theuri Waruingi** wo had arrested the appellant and recovered a motorcycle, two phones and an imitation firearm. They then took possession of the appellant and the said items and proceeded on patrol. About midnight, he with the help of Administration Police officers gave chase and arrested a motorcyclist at Kyumbi junction and the following day, he visited the scene.

22. Upon being placed on his defence, the appellant stated that he was framed up since on 31st July, 2010 he left Nairobi at about 4pm to go and buy building stones near Daystar University. He however failed to find a building stones transporter and left on a motorcycle to the main road. They however encountered police road block, but the motorcyclist defied the order to stop, dropped the motorcycle and ran away leaving him behind. Though he explained this to the police officers, they did not listen to him and later he was charged.

23. After considering the evidence the Learned Trial Magistrate found that the prosecution had proved their case in respect of counts I, II and III beyond reasonable doubt and convicted him pursuant to section 215 of the Criminal Procedure Code. He however acquitted him of count IV due to the failure by the complainant herein to testify. He then sentenced the appellant to death in respect of count I and held the sentences in respect of the other counts in abeyance.

24. Before this Court the appellant has raised the following grounds of appeal:

> 1. **THAT his conviction on the identification evidence by PW1 and PW2 was manifestly unsafe as the learned trial magistrate prior to his conviction failed to rule out altogether the existence of mistaken identification on the part of the two witnesses in view of the prevailing circumstances at the scene of crime by the time of attack; neither did he warn himself as to the dangers of convicting in reliance on such identification evidence made under difficult circumstances.**
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> 2. **THAT the learned trial magistrate erred in both law and facts and misdirected himself by convicting the appellant on the identification parade by PW1 (PEX 8) whereas the same was invalid as PW2 the wife of PW1 had already attended the same identification parade on 1-8-2010 hence possibility of describing his physical feature to PW1 so as to identify him on 11-8-2010 hence no fairness in the conduct of PEX 8.**

25. Before dealing with the issues raised in this appeal, as already stated hereinabove, pursuant to section 200 of the Criminal Procedure Code, the case was directed by the Court to start *de novo.* The rationale for the de novo hearing was explained by the Court of Appeal in ***Abdi Adan Mohamed vs. Republic [2017] eKLR*** *in which it was held that:*

> ***"As much as it is practically possible it is highly desirable that the trial magistrate or judge must hear the case to conclusion and ultimately render judgment as it is important for the final arbiter to be in a position to weigh the evidence taken together with his or her observation of the demeanour of witnesses. This was succinctly explained by this Court in Ndegwa v. R (1985) KLR 535 where Madan, (as he then was) Kneller and Nyarangi, JJ.A said that:-***
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> ***'It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case in our opinion. .....for these reasons we have stated, in our view the trial was unsatisfactory.'***
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> ***In other words Section 200, as was emphasised in Ndegwa (supra) will be resorted sparingly and only in cases where the exigencies of the case dictates. Even where the trial magistrate has been transferred, arrangements ought to be made for him or her to return to the former station to complete the trial, unless in cases where only a few witnesses had testified. In such a case the succeeding magistrate may continue with the trial from the stage it had reached. The provision can also be used where the evidence already recorded is more or less formal or largely uncontroverted."***

26. The said section 200 provides as hereunder:

> ***(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the***

succeeding magistrate may -

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

27. According to ***Abdi Adan Mohamed v Republic*** (supra):

"Section 200 envisages two situations in a trial that is incomplete at the time the trial magistrate ceases to exercise jurisdiction. The trial magistrate will have either recorded the whole or part of the evidence. Where judgment has been written and signed by the former magistrate, the succeeding magistrate is only required to deliver it. Where all the witnesses have been heard and the trial magistrate is transferred, no issue arises. The succeeding magistrate may act on the recorded evidence. But the succeeding magistrate may also recommence the trial and resummon witnesses. The transition of criminal cases from a magistrate or judge who has ceased to have jurisdiction to the one succeeding him or her remains a matter of concern. Problems are normally encountered in the last scenario where the succeeding magistrate decides to adopt the evidence recorded by the predecessor or altogether recommence the trial. In that case the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right. As we have said earlier where only a handful of witnesses have testified or where the evidence so far recorded is not contested or is only formal in nature, the hearing need not start de novo. The re-summoning of a witness or witnesses and re-hearing of the case is intended to ensure that the succeeding magistrate is able to assess personally and independently the demeanour and credibility of the particular witness or witnesses and to weigh their evidence accordingly."

28. It is clear that n circumstances falling within section 200 of the ***Criminal Procedure Code***, the accused has the right to demand hearing de novo. Whereas the accused is entitled to be informed of this right the decision as to whether the demand is to be acceded to is purely that of the trial Court based on the guidelines outlines in ***Joseph Kamau Gichuki vs. R CR. Appeal No. 523 of 2010***, *cited in* ***Nyabutu & Another vs. R, (2009) KLR 409*** and these include:

"whether it is convenient to commence the trial de novo, how far has the trial reached, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused."

29. Generally where a trial de novo is ordered, it is as if no trial took place at all. That is my understanding of the position of the Court of Appeal in **Peter Okeyo Ogila vs. Rachuonyo Farmers Co-Operative Union Ltd. Civil Appeal No. 79 of 1992.** In this case however, and this is the reason I have decided to deal with the de novo hearing, by the time of the direction that the trial starts de novo, a ruling on "no case to answer" had been delivered and some of the accused persons had been acquitted under section 210 of the ***Criminal Procedure Code***. The application of the general de novo principle would have meant that even those accused persons who had benefited from the said ruling would have been subjected to the fresh trial. However, *the learned Judges in Ndegwa (supra) emphasised that the court in applying the provisions of section 200 must ensure the accused person is not prejudiced. They said:*

"…No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration…."

30. It follows that since the said accused persons were not heard before the decision to start the de novo hearing was made, it would have amounted to a violating of the rights to natural justice were they to be subjected to a fresh trial which in itself would have amounted to double jeopardy in so far as they were concerned. It was therefore proper that the *de novo* trial proceeded as against the appellant herein only.

31. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

32. Similarly in **Kiilu & Another vs. Republic [2005]1 KLR 174,** 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 the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

33. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

34. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, thus:

"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:

'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"

35. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC** (as he then was) said:

"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."

36. I have independently re-evaluated and re-examined the evidence which was presented before the Learned Senior Resident Magistrate.

37. Section 296 of the ***Penal Code*** provides as hereunder:

296. (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 the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

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

39. In this case, it is the appellant's submission that the Learned Trial Magistrate erred by heavily relying on the evidence of PW2 without ruling out the possibility of the existence of error or mistake on the part of PW1 and PW2's identification of their attackers. It was submitted that from the circumstances of the attack it was impossible in light of the inadequate lighting for the said witnesses to have identified the attackers. It was submitted that PW1 never gave the duration for the observation of the attackers as could he been expected taking into account the fact that PW1 admitted that he never described he attackers to the police in his statement. Similarly, PW2 admitted that when they were confronted in the car she was scared.

40. It was submitted that from the inconsistent version of PW1 and PW2 as to whether there were torches, it can only show that there was a possibility of error or mistake in identification at the time of the robbery. In this respect the appellant relied on **R vs. Turnbull [1976] All ER 549** as regards reliance on visual identification.

41. It was submitted that since PW2 attended the identification parade before PW2, there was a possibility that PW2 could have described the appellant's physical features to PW1 so as to identify the appellant 7 days thereafter. It was further submitted that even before the identification parade PW1 had already seen the appellant when she met the police at Lukenya Junction and the police showed her the appellant who had been arrested and was placed in the boot of a police vehicle while still in handcuffs. It was therefore the appellant's submissions that the identification parade was an exercise in futility, null and void. It was further submitted that since PW1's evidence was that the appellant was placed tall, short, plump and slim people, the parade was not conducted in accordance with rule 6(iv) letter "d" of the Forces Standing Orders which requires that the suspect be placed among eight persons of as far as possible similar height, age, general appearance and class of life as himself.

42. It was further submitted there was no inventory of what was recovered from the appellant as the law demands hence the circumstantial evidence relied upon did not meet the legal threshold.

43. According to the appellant the judgment of the trial court did not comply with section 169(1) of the ***Criminal Procedure Code***.

44. On the part of the Respondent, it was submitted by **Ms Mogoi** Learned State Counsel that from the evidence adduced, it was clear that PW1 and PW2 were able to identify the appellant at a properly organised identification parade. Further the appellant was found with the mobile phone of the complainant on a motor cycle which had been stolen from the complainants.

45. It was submitted that during the robbery the complainants had ample time to identify the appellant.

46. It was therefore submitted that the prosecution proved its case beyond reasonable doubt.

Determination

47. The main ground in this appeal revolves around the issue of identification of the appellant by PW1 and PW2. According to PW1, as soon as their gate was opened, 4 men appeared wielding a pistol and a knife. He was then bound and a demand for money made after which the attackers left with his wife. The time of the robbery was 8.20PM. It was however his evidence that the headlights were bright and he was able to see the attackers from the reflection from the bright light though he had never seen them before. He however said that the person facing him wore a black jacket and that they were facing each other. He was then kicked and punched and led inside the house which had no lights. It was his evidence that as a result he was bleeding profusely and had to be admitted in Hospital for 5 days. After he was discharged from Hospital he was able to identify the person who was wielding the pistol at an identification parade which was however conducted after PW2 had appeared for the same and similarly identified the appellant.

48. In cross-examination he however stated that he did not give the police the description of the appellant. Though the robbers were four, he was able to identify the appellant as that was the person who pulled him from the vehicle. The question is whether the identification of the appellant by this witness was free from error. The only lights through which he identified the appellant was the reflection of the headlights. That the conditions were terrifying cannot be in doubt because PW1 was confronted as soon as he drove into the compound obviously not expecting an attack. There is no indication as to the amount of time that PW1 kept the appellant under observation and he did not disclose any features that would assist him in identifying the appellant later.

49. In the case of **R –vs- Turnbull and others (1976) 3 All ER 549**, an English case, **Lord Widgery C.J**. had this to say:-

> **"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?"**

50. The approach on issues of identification was emphasized in the case of **Francis Kariuki Njiru & 7 Others vs. Republic Cr. Appeal No. 6 of 2001 (UR)** where the Court of Appeal stated:

> **"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see *R. v. Turnbull [1976] 63 Cr. App. R. 132*). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported), held that:**
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> **'…….It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.'"**

51. In this case I am however not convinced that the conditions prevailing at the time of the robbery was conducive for proper identification of the appellant by PW1. PW1 did not know the appellant prior to the incident. He only saw him when he confronted him in the car. It is not indicated how long that confrontation took place. PW1 was seriously wounded hence must have been in pain. His means of identifying the appellant was by way of reflection of the headlights on the wall and the cabin lights. It is not indicated that the appellant placed his head into the car at that time. In light of all these circumstances and as the PW1 did not give a description of his attackers, I am not satisfied that the identification by PW1 of the appellant was free from error. The subsequent identification parade in my view was worthless.

52. As regards the evidence of PW2, as they drove to the parking bay, she heard voices from the driver's side and the door was flung open by two men one of whom was wielding a pistol. She was then taken into the house where the attackers kicked open her bedroom, ransacked it and took 700/= and demanded for more money. According to her, they took her ring and took her back to the sitting room where she found PW1 being tied. It was then that a motor cycle came she was ordered to board the same with the appellant and another attacker. The appellant

according to her sat behind her. It was her evidence that the attackers had torches which they used in ransacking her bedroom while there was light from the vehicle's headlight. According to her, it was when the torch was pointed at the appellant's face while removing her ring that she was able to see the appellant's face well. It was her evidence that the appellant was the one commanding the other attackers. She insisted that the light was shown onto the face of the appellant by one of the attackers while removing her ring. She however admitted that when appellant confronted her in the car, she was scared.

53. From the evidence of PW2, it is clear that at one point during the attack, the appellant was very close to her. This must be so, because for the appellant to have removed her ring, they must have been close to each other. It is at this point that PW2 saw the appellant when one of the attackers shown the torch onto the appellant's face who, according to PW2, was their commander. While I do not attach any weight to the period that the appellant and PW2 were on the motor cycle since the appellant was behind PW2, from the evidence of PW2, it is clear that she was close enough to the appellant to have had the opportunity to observe the appellant. That there was sufficient lighting clearly comes from the fact that the appellant was able to see that PW2's ring was an expensive one hence the demand for it.

54. This then leads us to the issue of the identification parade conducted for PW2. Identification of a suspect in any criminal offence is always a pivotal question and whenever it arises the trial court has to satisfy itself, before convicting him, that the question has been disposed of to such threshold as to leave no doubt that the suspect was positively identified. Where an identification parade, as part of the evidence of identification is in issue, it has been held that if the police force standing orders in respect of conduct of identification parades are flouted, the value of evidence of identification depreciates considerably. In Nairobi Criminal Appeal No. 117 of 2005 - **David Mwita Wanja & Others versus Republic (2007) eKLR** the Court of Appeal noted thus:

> **"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor to this Court emphasised that the value of identification as evidence would depreciate considerably unless an identification parade was held within the scrupulous fairness and in accordance with instructions contained in Police Force Standing Orders."**

55. The court proceeded to cite its own decision on this question in **Njihia versus Republic (1986) KLR 422** where it held at page 424:-

> **"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it would be difficult, if not impossible, for the witness to dissociate himself from his identification of the man in the parade, and reach back to his impression of the person who perpetrated the alleged crime."**

56. In such matters, the importance of the first statement to the police cannot be downplayed. If the description of the attackers is not given to the police then the evidential value of the identification parade from which the attackers were purportedly picked would be substantially diminished though the parade itself may not, merely for that reason, have been rendered invalid (see the Court of Appeal decision in **Nairobi Criminal Appeal No. 176 of 2006, Nathan Kamau Mugwe versus Republic (2009) eKLR)**. In **Ajode versus Republic (2004) 2 KLR 81** the same Court held that it is trite law that before an identification parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade. See also **Maitanyi versus Republic (1986) KLR at page 198** where the Court of Appeal held:

> **"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made…if a witness receives a very strong impression of feature of an assailant; the witness will usually be able to give some description."**

57. The court proceeded to hold further that:

> **"In this case J admitted that she did not give the description of the 1st appellant before he was arrested and before she identified him when he was brought into the police station. We are of the considered view that J's evidence on identification ought to have been tested by her first recording her initial statement indicating whether she could identify her attackers and giving their descriptions."**

58. On the validity or otherwise of an identification parade, I rehash the pronouncement in **John Mwangi Kamau v. Republic (2014) eKLR** where the Court of Appeal held as follows:

> **"15. Identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68& 69 of 2008. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DW1, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB. No. 45 of 24/6/2003; the assailants' were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, this Court observed:-**
>
> **"A dock identification is generally worthless and the court should not place much reliance on it unless this has been**

preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."

16. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure" In Nathan Kamau Mugwe –vs- Republic- Criminal Appeal No. 63 of 2008 this Court faced with a similar situation expressed itself as follows:-

"As to the compliant in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

17. Based on the foregoing, we are of the considered view that the failure to give the description did not invalidate the identification parade. We find the issue that falls for our consideration is the weight to be attached to the said identification evidence. On the issue of whether the identification parade was properly conducted we can do no better than to reproduce this Court's observations in David Mwita Wanja& 2 others –vs- Republic- Criminal Appeal No. 117 of 2005:-

"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -

"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

"6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -

……

(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

……

(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"

59. In this case, there were no questions put to PW2 by the appellant as regards the manner in which the parade was conducted and whether PW2 had seen the appellant prior to the parade. The identification parade for PW2 was conducted by PW7. According to him, he got 8 men

of similar height and built and of the same complexion as the appellant and got the appellant who took position between 2 and 3. The appellant was then identified by PW2 by touching him.

60. From the above evidence, there is no material on the basis of which I can find that the parade for PW2 was not properly conducted.

61. Having discounted the evidence of PW1 as regards the proper identification of the appellant, it follows that there was only the evidence of PW2 as regards the appellant's identification. Whereas I have found that the conditions favoured a positive identification by PW2, the prosecution's case was still based on identification by a single witness. In **Maitanyi vs. Republic [1986] KLR 198**, it was held, with respect to the reliability of the evidence of a single identifying witness as follows:

> **"Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with greatest care the evidence of a single witness respecting identification…The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made."**

62. **Wamunga versus Republic (1989) KLR 424** the Court of Appeal spoke of the evidence of identification generally in the following terms:

> **"It is trite law that where the only evidence against a defendant is evidence on 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."**

63. The same court acknowledged in **Ogeto vs. Republic (2004) KLR 19** that a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult; it noted as follows:-

> **"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken."**

64. In **Abdala bin Wendo & Another versus Republic (1953), 20 EACA 166** the East African Court of Appeal it held that:

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

65. The Court of Appeal for East Africa discussed the danger of relying on such evidence without warning in **Roria versus Republic (1967) EA 583 at page 584**. It stated:

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness…That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."**

66. It was therefore held in **Criminal Appeal No. 24 of 2000 Paul Etole & Reuben Ombima vs. Republic**, as follows:

> **"The appeal of the 2nd appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case the danger of mistaken identification is lessened, but the poorer the quality the greater the danger. In the present case, neither of the two courts below demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no enquiry as to the nature of the alleged moonlight or its brightness or whether it was a full moon or not or its intensity. It was essential that there should have been an enquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size and its position the vis-à-vis the accused would be relevant."**

67. In this case however there was other evidence upon which the Learned Senior Resident Magistrate relied in convicting the appellant. PW3 and PW5 testified that while they were on patrol on the material day, they received information regarding the robbery. A motor cycle then approached them and their attempts to flag it down were not heeded compelling them to pounce on it. While the rider managed to escape, they managed to apprehend the appellant whom upon bodily search was found in possession of metallic toy pistol and 2 phones one

of which rang and the caller was discovered to be one of the complainants. The other phone also rang and the caller disclosed that they were waiting at Naivas. Apart from the phones and the toy pistol, the motor bike from which the appellant was apprehended was also found to be the one that the attackers had used to get away.

68. It is therefore clear that even discounting the evidence of identification, the appellant was found in possession of the complainant's recently stolen phone. Delivering the judgment for the majority, **McIntyre J.** in the Canadian Supreme court case of **Republic vs. Kowkyk (1988)2 SCR 59** explored at length the history of the doctrine in various decisions from its roots in the nineteenth century in England and Canada and said in part:

> **"Before going further, it will be worthwhile to recognize what is involved in the so called doctrine of recent possession. It is difficult, indeed, to call it a doctrine for nothing is taught, nor can it properly be said to refer to a presumption arising from the unexplained possession of stolen property, since no necessary conclusion arises from it. Laskin J. (as he then was) (Hall J. concurring) in a concurring judgment in R. v. Graham, supra, said at p. 215:**
>
> **"The use of the term 'presumption', which has been associated with the doctrine, is too broad, and the word which properly ought to be substituted is 'inference'. In brief, where unexplained recent possession and that the goods were stolen are established by the Crown in a prosecution for possessing stolen goods, it is proper to instruct the jury or, if none, it is proper for the trial judge to proceed on the footing that an inference of guilty knowledge, upon which, failing other evidence to the contrary, a conviction can rest, may (but, not must) be drawn against the accused."**
>
> **He went on to point out that two questions, that of recency of possession and that of the contemporaneity of any explanation, must be disposed of before the inference may properly be drawn. He made it clear that no adverse inference could be drawn against an accused from the fact of possession alone unless it were recent, and that if a pre-trial explanation of such possession were given by the accused and if it possessed that degree of contemporaneity making evidence of it admissible, no adverse inference could be drawn on the basis of recent possession alone if the explanation were one which could reasonably be true. Implicit in Laskin J.'s words that recent possession alone will not justify an inference of guilt, where a contemporaneous explanation has been offered, is the proposition that in the absence of such explanation recent possession alone is quite sufficient to raise a factual inference of theft."**

69. In the end, the majority of that Supreme Court accepted the following summary of the doctrine:-

> **"Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply."**

70. In **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Cr App. No. 272 of 2005(UR),** the Court of Appeal held that:

> **"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.**
>
> **In other words, there must be positive proof:**
>
> **i). that the property was found with the suspect;**
>
> **ii). that the property is positively the property of the complainant;**
>
> **iii). that the property was stolen from the complainant;**
>
> **iv). that the property was recently stolen from the complainant.**
>
> **The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."**

71. The applicability of the doctrine of recent possession was dealt with in **Erick Otieno Arum vs. Republic [2006] eKLR** where he Court of Appeal held:

> **"In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the**

court can only rely on the adduced evidence after analysing it and after it accepts that which it considers is the correct and honest version. That duty as has been said is wholly on the trial court and on the first appellate court. This court has no such duty on hearing a second appeal such as before us but if it be satisfied that that duty has not been fully discharged by the first appellate court then it will take the line that had it been done either or both courts would have arrived at a different conclusion."

72. And **Malingi vs. Republic, [1989] KLR 225**, the Court of Appeal had this to say about the doctrine of recent possession:

"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver."

73. In his sworn testimony, the appellant neither denied that he was found in possession of the said items nor did he attempt to explain his possession of the same. In this case the evidence was that the stolen property was in possession of the appellant hours after they were stolen.

74. I am therefore satisfied that the above ingredients of recent possession were proved by the prosecution. Although the Learned Trial Magistrate did not allude to the doctrine of recent possession, as I have stated hereinabove this Court is obliged to re-evaluate the evidence and arrive at its own decision keeping the necessary precautions in mind. I therefore find that the recent possession of the phones by the appellant clearly implicated him in the robbery.

75. As regards non-compliance with section 169(1) of the ***Criminal Procedure Code***, I wish to rely on **Aloise Onyango Odhiambo vs. Republic [2006] eKLR** where the Court expressed itself as follows:

"We have perused the judgment of the learned trial magistrate and are satisfied that after summarizing the evidence adduced before her, the learned magistrate analyzed and evaluated this evidence and gave reasons for the decision she reached. It may not have been a perfect analysis and evaluation but it does meet the basic requirements of Section 169(1) of the Criminal Procedure Code. In any event, this court as a first appellate court has a duty to analyze and evaluate afresh the entire evidence adduced before the trial court and draw its own conclusion to ensure that the Appellant is not prejudiced."

76. The upshot is that the appellant was convicted on sound evidence and the Learned Senior Resident Magistrate, despite the finding that the appellant was properly identified by PW1, was justified in reaching the decision he reached and convicting the appellant of the offence of robbery with violence contrary to section 296(2) of the ***Penal Code***. Accordingly, there is no valid reason to interfere and I hereby uphold the conviction.

77. As regards the sentence, the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015,** (**Muruatetu's case**), held at para 69 as follows:

"47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.

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

[49] With regard to murder convicts, mitigation is an important facet of fair trial. In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.

[50] We consider *Reyes* and *Woodson* persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked

crimes and criminals is not in keeping with the tenets of fair trial.

[52] We are in agreement and affirm the Court of Appeal decision in *Mutiso* that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in *Joseph Kaberia Kahinga* that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.

[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict."

78. In arriving at its decision the Supreme Court relied on a number of foreign decisions and international instruments and in so doing expressed itself as hereunder:

"[31] On the international arena, however, most jurisdictions have declared not only the mandatory but also the discretionary death penalty unconstitutional. In *Roberts v. Louisiana*, 431 U.S. 633 (1977) a Louisiana statute provided for the mandatory imposition of the death sentence. Upon challenge, the US Supreme Court declared it unconstitutional since the statute allowed for no consideration of particularized mitigating factors in deciding whether the death sentence should be imposed. In *Reyes* (above), *t*he Privy Council was of the view that a statutory provision that denied the offender an opportunity to persuade the Court why the death sentence should not be passed, denied such an offender his basic humanity. And in *Spence v The Queen; Hughes v the Queen* (*Spence & Hughes*) (unreported, 2 April 2001) where the constitutionality of the mandatory death sentence for the offence of murder was challenged, the Privy Council held that such sentence did not take into account that persons convicted of murder could have committed the crime with varying degrees of gravity and culpability. In the words of Byron CJ;

"In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty."

[32] Two Indian decisions also merit mention. In *Mithu v State of Punjab*, Criminal Appeal No. 745 of 1980, the Indian Supreme Court held that "a law that disallowed mitigation and denied a judicial officer discretion in sentencing was harsh, unfair and just" while in *Bachan Singh v The State of Punjab (Bachan Singh)* Criminal Appeal No. 273 of 1979 AIR (1980) SC 898, it was held that "It is only if the offense is of an exceptionally depraved and heinous character, and constitutes on account of its design and manner of its execution a source of grave danger to the society at large, the Court may impose the death sentence."

[33] The UN United Human Rights Committee has also had occasion to consider the mandatory death penalty. In case of *Eversley Thomson v St. Vincent,* Communication No. 806/ 1998U.N. Doc. CCPR/70/806/1998 (2000), it stated that such sentence constituted a violation of Article 26 of the Covenant, since the mandatory nature of the death sentence did not allow the judge to impose a lesser sentence taking into account any mitigating circumstances and denied the offender the most fundamental of right, the right to life, without considering whether this exceptional form of punishment was appropriate in the circumstances of his or her case.

……..

[39] The United Nations Commission on Human Rights has recommended the abolition of the death sentence as a mandatory sentence in *Human Rights Resolution 2005/59: "The Question of the Death Penalty"* dated 20 April 2005, E/CN.4/RES/2005/59. It urges all States that still maintain the death penalty*:*

'…(d) Not to impose the death penalty for any but the most serious crimes and only pursuant to a final judgment rendered by an independent and impartial competent court, and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence;

…

(f) To ensure also that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults nor as a mandatory sentence."

79. The Court therefore concluded as follows:

[56] We are therefore, in agreement with the petitioners and amici *curiae* that Section 204 violates Article 50 (2) (q) of the Constitution as convicts under it are denied the right to have their sentence reviewed by a higher Court – their appeal is in essence limited to conviction only. There is no opportunity for a reviewing higher court to consider whether the death sentence was an appropriate punishment in the circumstances of the particular offense or offender. This also leads us to find that the right to justice is also fettered. Article 48 of the Constitution on access to justice provides that:

"*The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."*

[57] The scope of access to justice as enshrined in Article 48 is very wide. Courts are enjoined to administer justice in accordance with the principles laid down under Article 159 of the Constitution. Thus, with regards to access to justice and fair hearing, the State through the courts, ensures that all persons are able to ventilate their disputes. Access to justice includes the right to a fair trial. If a trial is unfair, one cannot be said to have accessed justice. In this respect, when a murder convict's sentence cannot be reviewed by a higher court he is denied access to justice which cannot be justified in light of Article 48 of the Constitution.

[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.

[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution."

80. The Court also found that:

"Article 27 of the Constitution provides for equality and freedom from discrimination since every person is equal before the law and has the right to equal protection and equal benefit of the law. Convicts sentenced pursuant to Section 204 are not accorded equal treatment to convicts who are sentenced under other Sections of the Penal Code that do not mandate a death sentence. Refusing or denying a convict facing the death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. This is repugnant to the principle of equality before the law. Accordingly, Section 204 of the Penal Code violates Article 27 of the Constitution as well.

……..

[66] It is not in dispute that Article 26 (3) of the Constitution permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that Article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in Article 50 (1) of the Constitution must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.

……

[69] Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."

81. In addition, the Supreme Court said at para 111 of the said judgment that:

"It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein …"

82. Section 204 of the ***Penal Code*** provides that *"Any person convicted for murder shall be sentenced to death."* Similarly section 296(2) of the ***Penal Code*** provides that the offender convicted for robbery with violence in circumstances stipulated therein *"shall be sentenced to death."*

83. That the principles enunciated in the ***Muruatetu Case*** apply to the offence of Robbery with Violence was appreciated by the Court of Appeal in **William Okungu Kittiny vs. Republic, Court of Appeal, Kisumu Criminal Appeal No. 56 of 2013 [2018] eKLR** where it held that at paras 8 and 9 that:

"[8] Robbery with violence as provided by Section 296 (2) and attempted robbery with violence as provided under Section 297 (2) respectively provide that the offender:-

"…shall be sentenced to death."

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 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, the decision broadly considered the constitutionality of the death sentence in general.

…..

[9] From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies *mutatis mutandis* to Section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under Section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution."

84. The effect of the said decisions in my view is and I hold that while the death penalty is not outlawed**,** but is still applicable as a discretionary maximum penalty for the offence of robbery with violence, section 296(2) of the ***Penal Code*** is however inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for the offence of robbery with violence. It therefore follows that the sentence of death imposed on the appellant ought to be revisited.

85. That the decision of the Supreme Court applies to even matters in which the appeals had been heard and disposed of was explained by the Court of Appeal in **William Okungu Kittiny vs. Republic** (supra) when it held that:

"[11] Although the appellants' appeal was dismissed by the Court of Appeal on 20th June, 2008, which was then the last appellate court, the constitutional petition filed in the High Court revived the case and by the time the Supreme Court rendered its decision, this appeal was still pending.

The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases.

[12] From the foregoing, the learned judge having partly found in favour of the appellant erred in law in not remitting the case for sentence re-hearing and the appeal is allowed to that extent. Now that the Supreme Court has opened the door for sentence re-hearing, the matter is remitted to the Chief Magistrate's Court, Kisumu, for sentence re-hearing and sentencing only. The Registrar of this Court to return the record of the Chief Magistrates Court at Kisumu- Criminal Case No. 181 of 2004 as soon as reasonably practicable for sentence re-hearing and sentencing by the Chief Magistrate."

86. Similarly, the same Court in **Rajab Iddi Mubarak vs. Republic [2018] eKLR** held that:

"Like Section 204, section 296(2) of the Penal Code that provides a mandatory death sentence, and therefore the principle enunciated by the Supreme Court would apply in this case. It is clear that the trial magistrate was of the view that the only lawful sentence for robbery with violence under section 296(2) of the Penal Code is death. This is a clear indication that the trial magistrate did not exercise her discretion in sentencing. Although the appellant did not say anything in mitigation, opting to maintain his innocence, he was treated as a first offender and therefore ought not to have been given the maximum penalty of death. This was a factor not considered by the first appellate court."

87. The Court therefore found that the decision did not prohibit courts below it from ordering sentence re-hearing in any matter pending before those courts. Accordingly, this being the first appeal, this Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed. That jurisdiction, in my view calls for circumstances in which it should be exercised so that it exercised judicially rather than arbitrarily. As the Supreme Court appreciated in the **Muruatetu's case** (supra) at paras 41-43:

"It is evident that the trial process does not stop at convicting the accused. There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage too. Pursuant to Sections 216 and 329 of the Criminal Procedure Code, Chapter 75, Laws of Kenya, mitigation is a part of the trial process. Section 216 provides:

The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.

Section 329 of the Criminal Procedure Code provides:

The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency."

88. The Court found that due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. At paragraph 71 of its judgement, the Supreme Court in the **Muruatetu's case** (supra), while making it clear that it was not replacing judicial discretion, and in order to avoid a lacuna, advised the Courts to apply the following guidelines with regard to mitigating factors in a re-hearing sentence for the conviction of a murder charge. In my view there is no reason why the same principles cannot apply to re-hearing sentence for conviction of robbery with violence.

89. As regards the factors that ought to be considered in sentencing, the said Court held that:

"Although the appellant did not say anything in mitigation, opting to maintain his innocence, he was treated as a first offender and therefore ought not to have been given the maximum penalty of death. This was a factor not considered by the first appellate court. We find that in the circumstances of this case given the injuries suffered by the complainant and the items of which he was robbed, and the appellant being treated as a first offender, a term of fifteen (15) years imprisonment would be an appropriate sentence."

90. As a guide in sentence re-hearing the Supreme Court in ***Muruatetu Case*** (supra) held that:

"[71] As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

91. That the possibility of reform and social re-adaptation of the offender is to be considered in sentence re-hearing implies that where the appellant or the petitioner has been in custody for a considerable period of time the Court ought to consider calling for a pre-sentencing report and possibly the victim impact report in order to inform itself as to whether the appellant/petitioner is fit for release back to the society. As appreciated by the Supreme Court in ***Muruatetu Case*** (supra):

"Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing. In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR,* where the High Court held that the objectives include: *"deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim."* The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

"Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct."

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict."

92. In my view, fairness to the petitioner or appellant where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the appellant during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the Court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report.

93. In its decision the Court referred to Article 10(3) of the Covenant stipulates that— "*[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."* In my view where the Petitioner/Appellant has spent a considerable period of time in custody, it may be prudent for the Court while conducting a sentence re-hearing, in order to determine whether the Petitioner/Appellant has sufficiently reformed or has been adequately rehabilitated to direct that a pre-sentencing report be compiled. This is so because the circumstances of the appellant in custody may have changed either in his favour or otherwise in order to enable the Court to determine which sentence ought to be meted. It may be that the appellant had sufficiently reformed to be released back to the society. It may well be that the conduct of the appellant while in custody may have deteriorated to the extent that it would not be in the interest of the society to have him released since one of the objectives of sentencing is to protect the community by incapacitating the offender.

94. However in the case of the first appeal and where the period spent in custody is not very long, the Court may well proceed to pass an appropriate sentence.

95. Although the Supreme Court did not outlaw the death sentence, in deciding whether or not to impose death sentence it was held in **Bachan Singh vs. The State of Punjab (Bachan Singh) Criminal Appeal No. 273 of 1979 AIR (1980) SC 898** a decision cited in the **Muruatetu's case** (supra) that:

"It is only if the offense is of an exceptionally depraved and heinous character, and constitutes on account of its design and manner of its execution a source of grave danger to the society at large, the Court may impose the death sentence."

96. Similarly cited was the decision of the Privy Council in **Spence vs. The Queen; Hughes vs. the Queen (Spence & Hughes)** (unreported, 2 April 2001) where **Byron CJ** was of the view that:

"In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty."

97. Therefore whereas death sentence has not been declared unlawful and may still be lawfully imposed where there exist *the most exceptional and appropriate circumstances*, it is nolonger mandatory to impose such a sentence where the facts to not cry out for the same. In my view in situations where the law prescribes a grave sentence, the Court in imposing the sentence ought to give reasons for imposing a particular sentence so that the act of sentencing does not become arbitrary.

98. Back to the instant case, appellant has have been in custody since 2010, a period of 8 years. The Appellant was armed with a metal bar which he found at the scene, a toy pistol which was found by PW8 to feature parts consistent with conventional handguns, though was incapable of firing ammunition but could produce loud sound. According to PW2 she did not sustain any serious injuries. The injuries sustained by PW1 were however classified as harm. Save for the cash, one phone and the wedding ring, the motor cycle and one phone were recovered. It is therefore my view that the death sentence imposed upon the appellant was too harsh in the circumstances, including the fact that he had no previous records.

99. Consequently, I set aside the death sentence imposed upon the appellant and substitute therefor a sentence of 15 years imprisonment each for counts I, II and III to run from the date of arrest. In line with the practice in **Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97**, where it was held that if a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, the Court should impose concurrent sentences, the said sentences will run concurrently.

100. Right of appeal within 14 days.

101. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 15th day of October, 2018.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Ms Mogoi for the Respondent

CA Geoffrey