



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO. 29 OF 2017

(CONSOLIDATED WITH CRIMINAL APPEAL NO. 28 OF 2017)

SWALEH MUHAYA LUBANGA.....1ST APPELLANT

VITALIS SHIKOLI MAHINDU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kericho Chief Magistrate's Court

Criminal Case. No. 1596 of 2012 (Hon. S. M. Mokuu (CM)) dated 7th August 2017)

JUDGMENT

1. The appellants were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence are that on the night of 16th and 17th September 2012 at Kipchimchim area in Kericho district of the Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely pangas and rungas, robbed Everline Bii cash Kshs.15,000/-, one LCD Dell computer monitor s/no.CN-02NOON-64180-16H-OSPS valued at Kshs.15,000/-, Dell computer keyboard CN-011D3V-71581-14B-3RKG valued at Kshs. 6,500/-, Dell computer mouse valued at Kshs 1200/-, two mobile phones make Nokia LIMEI-35435004993054 valued at Kshs.7,000/-, Samsung duos twin sim IMEI3598280477862326359829/359829047786230 valued at Kshs. 15,000/-, six aluminium sufurias valued at Kshs. 6,000/-, three open shoes valued at Kshs. 3,000/-, green Bata slippers valued at Kshs. 70/-, 20 kgs of dry maize valued at Kshs. 1,500/- and 5 litres of milk valued at 360/- all valued at 62,130/= the property of Everline Bii and at the time of such robbery used actual violence to the said Everline Bii.

2. The appellants faced an alternative charge of handling stolen property contrary to section 322 (2) of the Penal Code. The particulars of the offence were that on the 19th September 2012, at Grassland village in Kericho District within Rift Valley Province, otherwise than in the course of stealing, dishonestly retained one LCD Dell Computer Monitor S/No.CM=N-02NOON-64180-16H-OSPS valued at Kshs.15,000/=, Dell computer key board CN-011D3V-71581. 14B-3RKG valued at Kshs.6,500/-, Dell computer mouse valued at Kshs. 1,200/- two mobile phones make Nokia IMEI-35435004993054 valued at Kshs.7,000/-. Samsung duos twin sim IMEI-3598280477862326359829/359829047786230 valued at Kshs. 15,000/-, six aluminium sufurias valued at Kshs. 6,000/-, three open shoes valued at Kshs. 3,000/-, green Bata slippers valued at Kshs. 70/-, 15 kgs of dry maize valued at Kshs. 1000/- all valued at Kshs. 61,630/- knowing or having reasons to believe them to be stolen property.

3. The appellants were tried before Hon. G.M.A Ong'ondo (SPM), (as he then was) and found to have a case to answer on 24th November 2016. The defence case was fixed for hearing on 9th February 2017. However, as Hon. Ong'ondo had been elevated to the position of a judge of the Environment and Land Court, the defence case was heard by Hon. S. M. Mokuu, (CM) upon compliance with section 200 of the Criminal Procedure Code in which the court declined to start the case de novo. The appellants thereafter, on 3rd July 2017, elected to proceed with the matter from where it had reached.

4. In his judgments dated 7th August, 2017, Hon. Mokuu found that the prosecution had established its case against the two appellants on the main count beyond reasonable doubt, and proceeded to convict them of the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

5. When given an opportunity to mitigate, the 1st appellant, Swaleh Muhaya Lubanga, said he had nothing to say in mitigation and asked the court to sentence him as it had found him guilty. The 2nd appellant, Vitalis Shikoli Mahindu, also had nothing to say in mitigation. The

prosecution stated that the accused had previous records, having been convicted in Criminal Case No. 1595 of 2012 and sentenced to death. Accordingly, the trial court noted that the sentence for the offence of robbery with violence is a mandatory death sentence, but since the appellants already had a mandatory sentence of death, the sentence in this case would be held in abeyance.

6. Dissatisfied with both their conviction and sentence, the accused filed the present appeals, which were consolidated on 22nd January 2018 and heard on 29th May 2018. The 1st appellant, Swaleh Muhaya Lubanga, filed written submissions which he highlighted. The 2nd appellant, Vitalis Shikoli Mahindu, made oral submissions. The state was represented by learned Senior Prosecution Counsel, Mr. Ayodo.

7. I will consider the appellants' submission and the submissions of the state later in this judgment. However, as the 1st appellate court, I am required to re-evaluate the evidence before the trial court and reach my own conclusion. In doing so, I bear in mind that I have neither seen nor heard the witnesses.

8. The case against the accused commenced before Hon. S.M.S. Soita on 4th March 2015, who heard two of the prosecution witnesses. Hon. Ong'ondo then took over the case, and section 200 (3) was complied with and the appellants elected to proceed with the case from where it had reached.

9. PW1, Everline Bii (Everline), was asleep in her house at around 11.00 p.m. or midnight on 16th September 2012 when she was woken up by noise and she switched on the lights. Her house help was in the next room. She opened her door to find out if her house help had awakened. When she did so, two people entered her room and warned her not to scream. They stated that they had been sent to kill her and had been given Kshs.50,000.

10. She was able to see them as there were electric lights in the room. They asked her to lie down, then asked her where the alarm was, which they disconnected after she pointed it out. They then asked for money and took her bag from which they took Kshs.15,000/-. They asked for more money and cut her on the left hand. They then took her phone, a Samsung, and her child's phone, a Nokia.

11. Everline was able to identify the appellants as the two persons who came to her room. One of them, (Vitalis Shikoli Mahindu, the 2nd appellant) would kick her every time he asked a question or when she was responding to a question. The appellants had spent about 2 hours in her house, the 2nd appellant instructing the 1st appellant to ransack PW1's house. The 1st appellant tied PW1's hands in the bathroom when they were leaving. They had also tied the house help who untied herself and freed PW1. After she was untied, Everline raised an alarm and neighbours came. She was treated at Kericho District Hospital. She later checked and found that the appellant had taken, among other things, a debe of maize, a computer, 6 sufurias and other items which she could not recall. She had reported the matter at Kericho Police Station.

12. On 20th September, 2012, Everline was summoned to Kericho Police Station where she was shown various items. She identified a pair of sandals, a computer monitor, 6 sufurias, her child's phone and a bucket. She was able to identify the computer monitor from some writings inscribed on it by her child. She also identified various other items produced in court as exhibits.

13. It was her evidence that the appellants had gained entry into her house by cutting window grills, which she indicated from a photograph showing the cut grills. She also identified metal cutters (exhibits 11 (a) and (b)) which the appellants had when they entered her house. She also identified her phone and her son's phone which had been stolen during the incident on 16th September 2012.

14. Everline was also asked, on the same day, 20th September 2012, to participate in an identification parade. She was able to identify the appellants from a parade of 7-8 people. The 1st accused (1st appellant) had been wearing a long navy blue jacket usually worn by police, while the 2nd appellant was wearing a jungle jacket. She had been able to see what they were wearing as the light was on during the incident at her house.

15. Everline confirmed in cross-examination by the 1st appellant that she had given his description to the police and had recorded a statement. In cross-examination by the 2nd appellant, she stated that the electricity light was on in her room during the incident, though this was not in her statement. She had been injured on the left hand, though the scar had disappeared at the time of giving evidence. She confirmed that she had been robbed of two phones, one hers and the other belonging to her son. The police had visited her house the day following the incident and taken photograph. In re-examination, she stated that she could see the 2nd appellant who had remained in her bedroom while the 1st appellant ransacked the house.

16. PW2, Rebecca Musieka Nyamukho (Rebecca) was PW1's house help. She had been asleep on 16th September 2012 when she heard movement in the house at around 1.00 a.m. Her door was opened before she could get up and a torch directed at her eyes. She was ordered to get out of bed and kneel down, and asked whether she was alone. While she was being questioned, her employer (Everline, PW1) woke up and switched on the light in her room, as well as a fluorescent light in the corridor.

17. PW2 was taken to PW1's room where they were both ordered to lie down and they were both tied up. They were asked for mobile phones and PW1 gave her mobile phone to the appellants. PW1 was asked for money and she pointed to her bag and one of the robbers took Kshs.15,000/- from it. The robbers started ransacking the house and took 3 phones, including Rebecca's phone. One of the robbers asked his colleague to go to the kitchen and collect items from there and they took 6 sufurias and food items, which Rebecca identified in a photograph (exhibit 5). She also identified shoes and a computer monitor and keyboard taken from the house.

18. Rebecca testified that she was able to identify the accused as the lights were on. The 1st accused (1st appellant) was collecting items while the 2nd appellant stood guard. The 1st appellant had then told her to remove her clothes and when Everline intervened, the 1st appellant had hit her with the panga on the head. The appellants had a panga and clippers which Rebecca also identified (P Exhibit 11 (a) and (b)). The

2nd appellant tried to undress PW2 and she screamed, and he left her. The robbers then put off the lights and left. Rebecca had managed to untie herself and then untied her employer. She had been able to identify the appellants, whom she had not known prior to the incident, at an identification parade. In cross examination by the 2nd appellant, she stated that she was shown photographs of the 2nd appellant at the police station and she confirmed that he was the one. She was later called to an identification parade. She confirmed that her employer had switched on the light in the corridor. She had been injured in the hand while she was being tied.

19. PW3 was Hellen Chepkorir Chumo (Hellen) of Grassland in Kapsoit, Kericho. On 31st August 2012, two people had come to ask for rental houses from her mother at Grasslands estate. The two men were the appellants. PW3 had shown them the house and they had paid KShs.1,000/- for a month in cash. She did not issue them with a receipt.

20. The two men had returned at 3.00 p.m. with their luggage in a pick-up motor vehicle, which they had put in the room which she had leased to them, which was next to where she stayed. She had taken photocopies of their identify cards, which showed that the 1st accused (1st appellant) was Swaleh while the 2nd accused (2nd appellant) was Shikoli.

21. On 19th September 2012, at about 9.00 p.m., while she was inside her house, she had heard people talking outside. She had gone out and seen 4 people who identified themselves as police officers. The 4 people had arrested the two appellants and recovered sufurias, pangas, suitcases, shoes and mobile phones, among other items. She had been able to see this as there were electric lights outside the houses. The items were recovered from the house occupied by the appellants.

22. The following day, Hellen had gone to Kericho Police Station and recorded her statement. She had witnessed the recovery of 6 sufurias (exhibit 5), 3 pairs of shoes (exhibit 6 (a) – (c)), two metal cutting bars (Exhibit 11 (a) and (b)), a Nokia and Samsung phone and a panga. She knew both appellants as they were her mother's tenants.

23. Hellen confirmed in cross-examination by the 1st appellant that she had not known him before he came to lease the house. She had not issued the appellants with a rent receipt.

24. In cross-examination by the 2nd appellant, she confirmed that he and his co-accused had given her their national identity cards, though she could not recall all his names on the identity card. She had not issued him with a receipt as she did not have a receipt book at the time. She was present when the appellants were arrested and the items recovered from the room she had leased to them. She had signed the search certificate (exhibit 14) as had the two appellants and P. C. Ouma Saidi.

25. Chief Inspector Abdirahman Mohamed (PW4) had been requested by the DCIO, Kericho to assist in an identification parade on 20th September 2012 at about 1.00 p.m. He testified with regard to the steps he had taken in conducting the identification parade with regard to the 1st appellant, and thereafter the 2nd appellant. He had 8 people in the parade and the appellants were identified by PW1 and PW2. Both appellants were satisfied with the identification parade and signed the forms in respect thereof. The identification parade forms were produced in evidence as exhibits 15(a) and 15 (b). PW4 testified in cross-examination by the appellants that the identifying witnesses had not been shown the accused persons before the parade. He could not tell whether photos of the 2nd appellant had been shown to PW1 and PW2 prior to the parade.

26. PW6, No. 73135 Cpl Chebet Winrose was the investigating officer. She had been instructed to investigate the robbery incident following a report on 18th September 2012 by PW1. She had visited the scene, along the Kipchimchim-Cherote road, and found that the sitting room window grills of PW1's house had been cut and the windows pushed open. The compound fence had also been damaged. She took photographs of the window and fence which she produced as exhibit 10.

27. PW6 was also the investigating officer in Kericho CM CR. No. 1595 of 2012. She noted that the *modus operandi* of the robbers in the two cases was the same. Using undercover officers and Safaricom printouts, they had located the present appellants. They had laid an ambush on the appellants at the home of Chepkorir Chumo (PW3) in Grasslands estate, and had arrested the appellants. They had recovered various items from the house occupied by the appellants. Some of the items which she produced in evidence had been identified by PW1 and PW2 as having been stolen from the complainants, or used in the robbery, in the case of the metal cutting bars (exhibit 11 (a) and (b)). PW1 and PW2 had been injured during the robbery and had been issued with P3 forms. They were treated by Dr. Kirwa (PW7).

28. PW7 was Yego Kirwa, a clinical officer at Kericho County Referral Hospital (sic). He had examined PW1 and PW2 on 19th September and 17th September 2012 respectively. PW2 had bruises on her left forearm. PW1 had tenderness on the scalp and on the right palm. PW7 assessed the injuries on PW1 and PW2 as harm caused by a blunt object. The P3 forms were produced as P. exhibit 12 and 13 respectively.

29. The appellants had been found to have a case to answer. In his defence, the 1st appellant, Swaleh Muhaya Lubanga, elected to give a sworn statement and call no witnesses. He stated that police officers came to his place of business where he was staying on 19th December 2012. They carried out a search and recovered various things which they loaded into a vehicle. He was also arrested and taken to Kericho Police Station and was thereafter charged in court. He claimed that the complainant was not able to identify what had been stolen from her and that prior to the identification parade, there were photographs which had assisted in his identification as the complainant had never seen him.

30. In cross-examination, he stated that he did not remember events of 8th September 2012, but only remembered 8th December 2012, when he was arrested at Kapsoit at the place he was staying. He confirmed that he knew PW3 but stated that she did not own rental houses. He was paying rent to Margaret Ngeno, a sister of his landlady. He had been arrested on the same day as his co-accused.

31. The 2nd appellant, Vitalis Shikoli Mahindu, was affirmed. He confirmed that he was staying at Grassland along the Kericho-Kisumu Road. He had been arrested on 19th September 2012. He had heard a commotion and a knock at his door, had peeped through his window

and seen four people in civilian clothes. He had asked them to go to his landlord, Edna Chepkoech, then he had opened his door. He had been ordered to lie down and the four people had conducted a search in his house and had seized his household goods. He was the only Luhya in the plot and he was therefore implicated in criminal activities.

32. He further stated in his defence that some 2 ladies were brought to him, and he was asked whether he knew them. There were also 3 of his photographs in the office which the police told him were part of evidence.

33. In cross-examination, he stated that he was staying all alone when the incident occurred. He was not in his co-accused's house when he was arrested. He denied knowing any charges against him, though he confirmed that he was serving a life sentence.

34. In his judgment dated 7th August 2017, the trial court, after analysing the prosecution and defence cases, came to the conclusion that a robbery had occurred at the home of PW1 that it had been perpetrated by the appellants and they had been positively identified. He sentenced both appellants to death in accordance with section 296(2) of the Penal Code, but in view of a prior sentence of death, the sentence in this case to be held in abeyance.

35. In his written submissions, the 1st appellant argues, first, that the complainants, PW1 and PW2, failed to identify the perpetrators of the robbery. They had not described the perpetrators to the police and the circumstances of the robbery were not conducive to identifying the attackers.

36. His second argument is that there was no satisfactory evidence to prove that the appellants resided in the plot where they were arrested. There was no receipt for rent payment nor were their identity cards produced to show that they were tenants at the plot as testified by PW3.

37. The 1st appellant also questions the conduct of the identification parade. He contends that the parade was conducted unfairly and that the evidence of PW4, who conducted the parade, was inconsistent and full of contradictions. He notes in particular that the members of the parade were not of the same features as the appellants, that the photographs of the appellants were disclosed to the victims during the parade, and that the appellants who were alleged to have been in police attire during the robbery, should have had the same attire at the identification parade.

38. Finally, he contends that there was no evidence showing that the complainants sustained injuries during the robbery.

39. In brief oral submissions at the hearing of the appeal, the 1st appellant submitted that when the complainant reported at the police station, she did not give his name at the police station, and he had been arrested as a suspect. He argued that the police had taken his photographs and shown the complainant, which is how she picked him out at the identification parade. It was also his submission that there was no tenant from the premises where he had been living who came to testify that they knew him.

40. He submitted further that the police should have photographed him with the things allegedly stolen that were found in the house in order to show that they belonged to him. It was also his submission that the ball cutter was not proved to be his, nor were fingerprints taken to confirm that it was his.

41. In his oral submissions, the 2nd appellant argued that the complainants did not give a description of the perpetrators. He urged the court to set aside his conviction on the grounds of lack of proper identification of the perpetrators.

42. His second ground related to the house that he was alleged to have been occupying. He submitted that PW3 had been unable to give his name to the court, and her evidence was fabricated. She was not able to prove that he was her tenant, nor did she produce copies of the identity cards she alleged to have taken from him and his co-accused. Further, she did not produce a receipt to show that the appellants had paid rent to her.

43. The 2nd appellant also attacked his conviction on the basis that the complainant had not been able to prove that the exhibits produced in court belonged to her, as she did not produce receipts for them. His submission was that he had demonstrated in his defence how he came to be in possession of some of the properties and the court had ordered that they be returned to him.

44. With respect to the identification parade, his submission was that privacy was not observed; that the perpetrators of the robbery had allegedly been in police uniform and the uniform was not given to him during the parade so that the victim could pick him out; that the people in the parade were of different characteristics and were not similar to him in appearance. It was also his contention that his photographs had been seized from him and had been disclosed to the complainant who identified him.

45. The 2nd appellant also argued that the complainants were not injured during the incident; that PW6 told the court that she did not see injuries on PW1 and PW2, yet she was the first person to see the complainants. If they had indeed been injured during the raid, the scars could have been seen by the investigating officer.

46. The 2nd appellant also contended that he recounted in his defence where he was when he was arrested and how he was arrested. His defence was, however, overlooked by the trial court. It is also his contention that his constitutional rights were violated by the trial court as his trial was delayed for almost 4 years. He had applied for recall of PW1 before the final magistrate who heard the case but his request was denied. He too urged the court to allow his appeal.

47. Through Mr. Ayodo, Prosecution Counsel, the state opposed the appellants' appeals and urged the court to dismiss the consolidated appeals and uphold the convictions and sentence.

48. From the grounds of appeal and submissions of the appellants and the state, four main issues arise for determination:

- i. Whether the trial court failed to analyse the entire evidence.**
- ii. Whether the appellants were properly identified as the perpetrators of the offence;**
- iii. Whether the identification parade was properly conducted;**
- iv. Whether the trial court considered the appellants' defence**

49. A number of subsidiary issues were also raised by the appellants, which I shall address in the course of this judgment.

Analysis of the Evidence

50. The appellants have argued that the trial court erred in failing to analyse the entire evidence. Had he done so, he would have found that the charge against the appellants was framed and the evidence fabricated in order to frame the appellants. The response from the state is that on the contrary, the trial court had analysed the evidence and found that the prosecution had established the elements of the offence of robbery with violence.

51. I have considered this ground against the judgment of the trial court. I note that after setting out the evidence that was adduced before him, the trial court considered the issues that he needed to address against the elements of the offence of robbery with violence set out in section 296 (2) of the Penal Code.

52. The definition of robbery is contained in section 295 of the Penal Code as follows:

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

53. Section 296 (1) contains the punishment for robbery, while section 296 (2) contains the penalty for robbery with violence in the following terms:

(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.

54. I note that the trial court identified the issues for determination as being whether a robbery was committed, who were the perpetrators, and whether they were positively identified.

55. The court was satisfied that the response on the three issues identified was in the positive. The prosecution had established that a robbery had occurred, which involved two or more perpetrators. The perpetrators had broken into the complainant's house and had inflicted injury on the complainant, PW1. They had stolen various items from the complainant's house.

56. I have already set out the prosecution evidence in this matter earlier in this judgment. The evidence of PW1 and PW2 was clear that they were asleep in PW1's house when the robbery occurred. They described how the two assailants who entered the house harassed them and took away various items from the house. These items had been described to the police by PW1 as the items stolen from her, and by PW6 as the items recovered from the appellants. I am satisfied that the trial court had properly analysed the evidence before it and was correct in reaching the decision that a robbery had occurred.

57. The second element was with respect to the identity of the perpetrators of the offence. The evidence of PW1 and PW2 is that the robbery was committed at night. The complainant and her house help were woken up by the perpetrators of the offence, who were already in the house. The evidence of PW1 and PW2 is that PW1 switched on the light in her bedroom and a fluorescent light in the corridor. The perpetrators did not cover their faces. They stayed in the house for about 2 hours and so PW1 and PW2 were able to see them clearly. They also engaged PW1 and PW2 in conversation during the course of the robbery. The 2nd appellant was directing the 1st appellant to ransack the house, and would kick PW1 every time he asked her a question. I am satisfied that PW1 and PW2 were able to see the perpetrators clearly in the circumstances, and that the trial court properly found that the appellants had been identified as the perpetrators of the robbery.

The identification Parade

58. The appellants complain that the identification parade was not properly conducted. This ground of appeal has several elements. They argue, first, that the parade was not properly conducted as, according to the 2nd appellant, the persons in the parade were not of the same characteristics and description as the appellants. They further argue that since the complainants had stated that their assailants were in clothes that were similar to those worn by police, they should have had such clothes during the parade. Thirdly, it is their contention, more so on the part of the 2nd appellant, that his photographs had been shown to PW2, and that is how she was able to identify him.

59. I have considered the evidence of PW4, Chief Inspector Abdirahman Mohamed, who conducted the identification parade. I note from his evidence that the appellants were satisfied with the conduct of the identification parade, and neither of them raised the issues that they are now raising. He had denied in cross-examination that the witnesses had been shown photographs of the appellants before the parade. From

the evidence of PW4, it is clear that he had followed all the rules in the Police Standing Orders on the conduct of identification parades. The argument that during the identification parade the appellants should have been dressed in the sort of jackets they wore during the robbery, similar to those worn by police officers, would have been grounds for the appellants to claim that they had as a result been pointed out to the witnesses. It is clearly an untenable argument.

60. I note from the evidence of PW1 in cross-examination that she had described the assailants to the police when she reported the robbery incident. I am therefore satisfied that she was able to identify the appellants, and the trial court properly relied on her identification of the appellants at the identification parade as the perpetrators of the offence.

61. With respect to the evidence of PW2, I do have some concern. She testified that she was able to see the assailants for the two hours or so that they spent in the house as the lights in the house were on during the robbery. She testified that one of them, the 1st appellant, had told her to take off her clothes, and when PW1 protested, cut her on the hand. The 2nd appellant had tried to take off her clothes, and she had screamed and he had stopped. However, she stated in cross-examination that she had been shown photographs of the 2nd appellant before the identification parade, and she confirmed that he was one of the perpetrators. Had the evidence of PW2 been the only evidence linking the 2nd appellant to the offence, then there would have been cause for concern. However, coupled as it was with the recovery of the stolen items from the house where the appellants were staying and the evidence of PW1, I am satisfied that the complaint with regard to the identification parade is not of much avail to the appellants.

62. The appellants have also complained about the recovery of the stolen items from the house in which they were staying. The evidence of PW3 placed them in the room where the items were recovered shortly after the robbery. PW3 had leased the premises to them. She was staying in the room next door. She was present when the items that the robbers had taken from the complainant were taken from the house that the appellants were occupying. I am satisfied that the trial court properly found that the appellants were found in recent possession of items recently stolen, and were unable to give an account of how they came into possession of the stolen items.

63. The appellants have argued that the investigating officer had not noticed the injuries on the complainants. I note that the evidence of PW7, Yego Kirwa, was that he had examined the complainant and PW2 and had found that they had been injured. I am not satisfied that this argument, in any event, is of much assistance to the appellants given the definition of robbery with violence under section 296 (2).

Whether the Appellants' Defence was considered

64. The appellants have complained that the trial court did not consider their defence. The court noted that the appellants were evasive in their defences. Indeed, having considered the defence evidence against the prosecution evidence, I find that the defences, which were mere denials, did not displace the very strong prosecution evidence against them. It is noteworthy that the 2nd appellant signed the search certificate on the recovery of the goods from the house they were occupying, and in the course of the trial, he even claimed some of the goods found together with the stolen items as his, and they were returned to him. I therefore find no merit in this ground either.

Compliance with section 200 of the Criminal Procedure Code

65. I note the complaint by the appellants that the trial court did not comply with the provisions of section 200 of the Penal Code as it did not allow the case to start *de novo*. However, I note that the trial court considered the application by the appellants for the case to start *de novo*, but declined in view of the time the case had taken. In any event, as I indicated earlier in this judgment, the appellants had indicated on 3rd July 2017 that they were ready to proceed with the matter from where it had reached. This ground therefore has no merit.

Breach of Constitutional rights

66. The 2nd appellant has argued that his constitutional rights were breached as the trial took a very long time, about 5 years. I have read the record of proceedings before the trial court. I note that the appellants were facing trial in other courts, in Kericho and in Kakamega, and there were days when they were not produced in court and the trial the subject of this appeal could not proceed. I have noted also that at times, the trial did not proceed as the appellants were not willing to proceed. On 14th November 2013, for instance, the appellants applied for the trial magistrate to disqualify himself, and for the matter to be allocated to another court, which was done. On 5th February 2014, the appellants indicated that they would not be ready to proceed until certain items which they alleged had been taken from them by the police were returned to them.

67. Taken together, the reasons for the delay in the hearing of the case before the trial court cannot be laid at the feet of the prosecution, or of the court. I am therefore unable to find a basis for the allegation that the trial court violated the 2nd appellant's constitutional rights. In any event, I believe that the law is clear that even where a breach of rights has occurred, that is not of itself sufficient to vitiate a trial. What the party whose rights are found to have been violated is entitled to is an award in damages- see **Julius Kamau Mbugua vs Republic Court of Appeal Criminal Appeal No. 50 of 2008**. I therefore find no merit in this ground either.

68. I accordingly do so, and uphold the conviction. The trial court found that as the appellants were already under sentence of death following a prior conviction, the sentence in this case is to be held in abeyance. The orders of the trial court are upheld accordingly.

Dated, Delivered and Signed at Kericho this 3rd day of October 2018.

MUMBI NGUGI

JUDGE