



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 29 OF 2016

(Formerly Nakuru HCCRA No. 246 of 2013)

(Being an Appeal from Original Conviction and Sentence in Criminal Case No.1610 of 2012 of the Chief Magistrate's Court at Naivasha before S. M. Githinji - CM)

ISAAK ANJELIMO MAKANA.....1ST APPELLANT

ELIAKIM KINDIGA BOGE.....2ND APPELLANT

PETER LEPETA LONGIALAN.....3RD APPELLANT

-VERSUS-

REPUBLIC.....PROSECUTOR

J U D G M E N T

1. The Appellants herein **Isaak Anjelimo Makana, Eliakim Kindiga Boge** and **Peter Lepeta Longialan** were charged jointly in the lower court with Robbery with violence contrary to Section 296 (2) of the Penal Code. In the alternative and second counts each of them was independently charged with Handling stolen property, on different dates in June, 2012 at various locations.

2. The particulars of the main charge state that on the night of 20th and 21st May, 2012 at *La Belle Inn* in Naivasha Municipality within Nakuru County they jointly robbed **David Wanyonyi Malaba** of one mobile phone make LG serial number 901CYEA0000492, One laptop make Dell 620, assorted brands of spirits, Safaricom credit cards of different denominations, a bunch of keys all valued at Kshs 79,580/= and cash Kshs 64,830/=, the property of *Ms La Belle Inn* and at or immediately before or immediately after the time of such robbery, killed the said **David Wanyonyi Malaba**. They denied the charges. Following a full trial, the court found them guilty and convicted them on the main count only. They were sentenced to death.

3. Aggrieved by the decision the Appellants appealed to the High Court. In the amended grounds of appeal filed by 1st Appellant (and 1st Accused in the lower court) the 1st Appellant raised four grounds as follows:

“1. THAT, the learned trial magistrate erred in law and fact when he convicted me in the instant case believing that I was an employee of La Belle Inn yet failed to find that all allegations raised against me were not proved to the required standard of proof.

2. THAT, the learned trial magistrate erred both in law and fact when he convicted me in the

present case yet failed to find that vital and crucial witnesses never testified.

3. THAT, the pundit trial magistrate erred both in law and fact when he convicted me in the instant case yet failed to find that the evidence of recovery was not conclusive.

4. THAT the pundit trial magistrate erred in law and fact when he rejected my plausible defence.”

4. At the hearing of the appeal the 1st Appellant relied on his written submissions in support of the said grounds. With regards to the 1st and 2nd grounds, the Appellant challenged the prosecution evidence to the effect that he was in the material period an employee of the complainant, *La Belle Inn* and on duty on the material night. He pointed out that no credible evidence was tendered in proof of the assertion.

5. Further, that the weak evidence tendered on that score did not place him at the scene of the offence on the night of the robbery. He also took issue with the failure by the prosecution to call as a witness the woman who allegedly led to his tracing and arrest.

6. Concerning grounds 3 and 4, the 1st Appellant argued that the evidence vide **PW7, PW9** on the alleged theft and recovery of a phone from the 1st Appellant inconsistent and inconclusive. Similarly that evidence connecting him and his co-accused with the offence was inconclusive. The Appellant took issue with the manner in which the inventory of recovered goods was allegedly prepared, and later, the manner in which it was presented in the trial. He has submitted that he gave a plausible defence. In his opinion, his conviction was erroneous as it was not properly supported by evidence.

7. **Eliakim Kindiga Boge** the 2nd Appellant (and also 2nd Accused in the lower court) also filed amended grounds of appeal, the relevant ones being 2 – 5, which are to the effect that:

“2. THAT the learned trial magistrate erred in law and fact in putting reliance upon circumstantial evidence motivated by a grudge between PW7 and PW1.

3. THAT the learned trial magistrate erred in law and facts by not finding that the charges were grounded on a defective charge sheet that cannot sustain a conviction.

4. THAT the learned trial magistrate erred in law and facts by not finding that the prosecution never proved any conspiracy/nexus between the three accused as PW7 alleged in the absence of documentary proof in the form of data.

5. THAT he erred in law and facts by not finding that my defence far outweighed the weak prosecution case.”

8. In his written submissions in respect of grounds 2 and 3, the 2nd Appellant challenged the evidence of **PW7** tending to link him to the 1st Appellant through an alleged phone call placed by the 2nd Appellant to the 1st Appellant on the latter's phone Exhibit 18. He pointed out that the call was not corroborated through official telephone service provider call data. Regarding evidence of the recovery of a bottle of *Tia Maria* liquor and glasses from his home, he disputed the identification thereof as part of the stolen property by **PW2**.

9. Submissions in respect of grounds 4, 5 and 6 repeat some of the submission on grounds 2 and 3 but additionally reiterate the 2nd Appellant's defence and asserted that the prosecution evidence by **PW7** could not be relied upon.

10. **Peter Lepeta Longialan** the 3rd Appellant (and 3rd Accused in the lower court) relied on five amended grounds appeal four of which are relevant as follows:

“1.;”

2. **THAT he erred in law and facts in not finding that the allegedly given names – Turu and Ekai were not mine as my full names appear in the charge sheet and identification card.**

3. **THAT he erred in law and facts in not finding that the alleged leading to my arrest was not conclusive in the absence of the Safaricom data to connect the two lines.**

4. **THAT he erred in law and facts in not finding that the alternative charge herein was based on suspicions which were not proved in court.**

5. **THAT my defence was not considered as per provisions of Section 169 (1) of the Criminal Procedure Code.”**

11. He too filed written submissions. Therein, he took issue with evidence by **PW7** that he contacted the 2nd Appellant concerning the 1st Appellant after the robbery, pointing out that there was no evidence that the names “**Turo**” or “**Ekai**” referred to him, or that the 1st Appellant is also known as “**our man**”. He also, like the 2nd Appellant faulted the police for failing to avail official call data to confirm alleged calls made between the three Appellants.

12. Regarding property recovered in his home including a meko gas cylinder, mountain bike and an empty bottle of *Bailey’s Irish Cream* he said there was no evidence that these were goods stolen from the complainant or at all. It was also his submission regarding the charge sheet that it was defective arising from the stated anomaly of dates of arrest and arraignment. Finally, he complains that the trial court failed to take into account his defence.

13. The appeal were opposed by Mr. Koima, representing the Director of Public Prosecutions. Mr. Koima restated the prosecution evidence at the trial and argued that the doctrine of recent possession was properly applied in respect of stolen goods found with the Appellants on arrest. He submitted that **PW1** identified the stolen goods recovered from the Appellant. He further stated that the prosecution established that the Appellants contacted each by phone other and that the 1st and 2nd Appellants led police to the home of the 3rd Appellant.

14. The duty of the first appellate court as stated in **Pandya -Vs- Republic [1957] EA 336** is that:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

15. The prosecution called nine witnesses. The prosecution case was as follows. The 1st Appellant was a recent employee of the *La Belle Inn* during the material period. He worked as a guard and was on duty on the night of 20/5/2012 when the complainant’s manager **Stephen Chege Kibingu (PW1)** clocked off at 9.45pm. Also on duty with the 1st Appellant was another guard employed earlier. His name was **David Wanyonyi Malaba** (now deceased). The duties of **Wanyonyi** included keeping custody of office and hotel door keys, receiving proceeds of sale at close of business, issuing room keys to guests, and to let in/out workers coming on or going off from work.

16. For this reason, after the close of business, the deceased would remain behind a locked gate inside the hotel, while the 1st Appellant guarded the external part of premises and attended to the outer gate. Both wore green uniform issued by the employer, *La Belle Inn*. At the close of duty on the night of 20/5/2012 the manager (**PW1**), the Accountant **Simon Maina Gichuki (PW3)** and the housekeeper **Ernest Arukwe Marika (PW2)** left for their respective homes. The last persons to leave were bar attendants **Benson Kiige Kariuki (PW4)** and **Michael Warutere Wachira (PW5)**. They handed over the day's proceeds to the deceased to place in the safe. They left both the deceased and the 1st Appellant on duty.

17. The first worker to report on duty early on the morning of 21/5/2012 was **PW2**. He did not see the 1st Appellant at the gate and on going through the hotel gate, he saw the deceased lying on the floor inside the premises in a pool of blood and the manager's office door open. He ran outside in search of the 1st Appellant and not finding him called **PW1, PW3** and police.

18. **CPL Samuel Meshami (PW9)** of Naivasha Police Station attended the scene. An inventory of property stolen in offices and the bar including cash, was prepared. These goods are stated in the charge sheet. Police took away the body of the deceased and commenced investigations. **PW9** and **PC Baraza (PW7)** the latter who recognized the 1st Appellant on being shown his photograph, proceeded to the home of the 1st Appellant in Busia on the night of 21/5/2012. Not finding him they proceeded to Kitale and notified local police. On 2/6/2012 an informer led to the arrest of the 1st Appellant at Kitale by Kitale Police.

19. **PW7** travelled to Kitale on 3/6/2012 and received items allegedly recovered from the 1st Appellant on arrest. These included his watchman uniform, a mobile phone make *LG* identified to belong to the murdered guard and an inventory of all recovered goods including some Shs 3,150/=, the 1st Appellant's Identity Card and National Social Security Fund (NSSF) card, his mobile phone make **Nokia**, a jungle (green) trouser, cap and a letter authored by Manera Farm. He was moved to Naivasha Police Station.

20. It was further the prosecution case that the 1st Appellant led **PW7** and **PW9** to the house of the 2nd Appellant in Naivasha on 3/6/2012 at 4.00am. Therein were found newly purchased items including beddings and electronics such as a television set, DVD, amplifier and motor vehicle battery to run the appliances as there was no power in the home. Also recovered were an empty bottle of *Tia Maria* liquor and a wine glass. The 2nd Appellant did not produce receipts for the new items which police took alongside the liquor bottle and the glass.

21. Two days later, police traced the 3rd Appellant who led them to his house. A search revealed suspected stolen property for which the said Appellant could not account. These were an empty bottle of *Bailey's Cream* liquor, used meko gas cylinder, used Phoenix Mountain Bike as well as the 3rd Appellant's phone. The post mortem conducted on the body of the deceased guard revealed that he died from strangulation and bludgeoning wounds on the head.

22. When placed on their defence, all the Appellants elected to make unsworn statements. Following is a summary of the statement of the 1st Appellant. He gave his name as **Isaak Anjelimo Makana**, a businessman residing at Kitale. While going about his charcoal business on 2/6/2012 he was intercepted by police who placed him in custody before transferring him to Naivasha. He said the police took his **Nokia 1200** phone, a wallet containing personal documents and a green trouser issued to him in 2011 while in the employment of Delamere. He denied the offences.

23. **Eliakim Kindiga Boge** the 2nd Appellant said he was a welder and hailed from Vihiga. He said police officers including **PW7** went to his house on 4/6/2012 at 5.30pm and questioned him regarding a laptop. They took several items from his house including an empty bottle of liquor which he had taken from a ceremony in 2011. He said he knew **PW7**, having fought with him and been arrested by him previously. He denied the charges against him.

24. The third Appellant **Peter Lepeta Longialan** said he hailed from Isiolo and worked as a night guard.

While on duty on 4/6/2012 he was arrested and questioned about a certain man known as **Ekai**, a Turkana tribesman. He then led police to his house where a search was conducted. Police took his items including a meko cooker, bicycle, and phone and empty liquor bottle. He was subsequently placed in custody and charged. He denied the offences facing him.

25. The trial court in its judgment, did not, upon summing up the evidence on each side, set out the facts not in dispute and those for determination before embarking on the evaluation. However the trial court observed, correctly, that the prosecution evidence against the Appellants was circumstantial. It is the duty of this court to analyse the evidence afresh and draw its own conclusions.

26. Based on the respective cases advanced at the trial, there was no dispute concerning the arrests of the Appellants on the dates and at times stated, pursuant to the robbery that undisputedly occurred at the *La Belle Inn* on the night of 20th and 21st May, 2012. Further that in the said robbery, the deceased **David Wanyonyi Malaba** a guard at the Inn was violently murdered. Although there seemed to be some controversy regarding the actual goods stolen during the robbery, there was no doubt that properties were taken from the offices and bar of the premises on the night in question. The one issue in serious contention was the involvement of the Appellants in the robbery.

27. Regarding the 1st Appellant, the prosecution principally relied on the circumstantial evidence of his employment by the Inn as a guard and being on duty on the material night with the deceased, his subsequent disappearance on the material night and recent possession of a phone, said to have been issued to the deceased for his duties and taken from him on the material night.

28. With regard to the 2nd and 3rd Appellants, the prosecution mainly relied on evidence of possession of recently stolen property and additionally, in the case of the 2nd Appellant, the recovery of the several new electronic goods at his home upon his arrest.

29. Concerning the circumstantial evidence based on recent possession, the Court of Appeal laid out the applicable principles in **Simon Kangethe –Versus- Republic [2014] eKLR** the Court of Appeal had this to say:

“Section 111 of the Evidence Act provides that: existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him...

In Ogembo -Versus- Republic, [2003]1 EA, it was held that:

“For the doctrine of possession of recently stolen property to apply, possession by the appellant of the stolen goods must be proved and that the appellant knew the property was stolen.”

Recently, this Court in Moses Maiku Wepukhulu & PAUL NAMBUYE NABWERA -Versus- Republic CR.A NO. 278 OF 2005 (Koome, Mwera & Otieno-Odek, J.J.A.) quoted with the approval what constitutes the doctrine of recent possession in the case of Malingi -Versus- Republic, [1989] KLR 225:

“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. 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.” [Emphasis added]

The doctrine is a rebuttable presumption of fact. Accordingly, 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.

As was aptly stated in the case of Hassan -Versus- Republic, (2005) 2 KLR 151:

“Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or a receiver.”

30. Evidence by **PW1, PW3, PW4** and **PW5** left little doubt that goods and cash had been stolen from the hotel on the material night. The witnesses stated that a phone, make **LG**, a Dell laptop, assorted brands of liquor, Safaricom airtime cards and cash Shs 64,830/= were among the items stolen. Exhibit 12 an inventory prepared upon the 1st Appellant’s arrest at Kitale on 2/6/2012 indicates that among items found in his possession at the time were the **LG** phone identified by **PW1**, cash Shs 3,150/= and guard uniform comprising of green hat and trouser. The inventory bears signatures of the four police officers involved and that of the Appellant **Isaak Makana Anjelimo**.

31. In his judgment, the learned trial magistrate observed regarding the **LG** phone that:

“He (1st Appellant) had the phone bought by his employee for use by his killed colleague. The phone was recovered and matched to its receipt and box, of which PW1 had. The sets of facts when weighted together point irresistibly to the guilt of the 1st Accused.”

32. The trial magistrate in my view, erroneously overlooked that fact that the evidence relating to recoveries made at Kitale was hearsay as the police officers who made the recoveries did not testify. During cross-examination of **PW7**, the 1st Appellant raised the question whether the said witnesses would testify.

33. I agree with 1st Appellant’s complaints as captured in grounds 2 and 3 that the Kitale Police Officers were the proper persons to give evidence on the circumstances of the recovery of the said phone and cash and to produce the inventory. Thus the trial court ought not to have relied on the hearsay evidence of recovery in drawing a conviction against the 1st Appellant.

34. However, even after excluding evidence of recent possession against the 1st Appellant, there was other independent circumstantial evidence against the Appellant by **PW1, PW3, PW4**, and **PW5**. To the effect that, he was at the material time a guard employed by the *La Belle Inn* and was on duty when the workers closed down for the night. On the next morning when **PW2** arrived at about 5.00am, he did not find 1st Appellant but his colleague lay severely injured and dead in the hotel.

35. **PW2** stated in his evidence-in-chief that:

“That time I reported on duty. There was usually a guard outside and another inside. That day I did not find the guard. The outer guard was to open for me the gate. The gate had no padlock. I opened and entered.....put on the lights on the hotel. I looked ahead and saw the inner guard lying on the ground between the snacks area and hotel. I tried to call him..... He is called Wanyonyi. He did not answer. I went outside to look for his colleague. I looked at him properly and noted he was lying in a pool of blood.....manager’s office door open I rushed towards Railways Police Station..... I called managercalled the Accountant.....we did not get the outside guard. He was traced later on. He is the 1st Accused on duty that night when I reported office at 1.00pm. His uniform was green.”

36. **PW2’s** account is confirmed not only by the Inn manager **PW1**, but also by **PW3**. Both identified the 1st Appellant as the night guard who remained after the close of the hotel, on duty with deceased guard on

the night of the robbery. In particular, **PW1** stated that the role of the deceased guard was confined to the inner side within the hotel. He kept door keys and would give out hotel room keys to guests and collect sale proceeds. According to **PW4** and **PW5** the day's proceeds from the bar were given to the deceased guard as the bar tenders reported off duty. After **PW1** and **PW3** were called to the hotel by **PW2** they confirmed his report and noted the break in to the office and the missing items.

37. They also went to the home the 1st Appellant at Kihoto but did not find him there. Under cross-examination by the 1st Appellant **PW1** stated:

“You worked for us about 2 months. You were the outer guard. You were guarding premises, chairs and vehicles. That day you had not signed (upon reporting) on duty. You had signed with us a temporary contract. I do not have the contract in court.”

38. **PW3** stated that the 1st Appellant ordinarily handed over at 6.30am and that upon his arrival at the hotel before that time on 21/5/2012, he did not find the 1st Appellant. He explained that the Appellant's personal file which had been in the manager's office went missing. He also confirmed during cross-examination that as the accountant he would pay the 1st Appellant's salary.

39. While **PW1** left the hotel at 9.45pm on the material night, **PW2** left at 10.00pm, **PW3** at 9.30pm, and **PW5** at 11.00pm. **PW4**, a bar tender like **PW5** told the court that after closing his side of the bar at 10.30pm he did his accounts and like **PW5** handed over the proceeds to the deceased guard. He said he was the last person to leave the hotel and at the time only the deceased guard and the 1st Appellant were left on the premises.

40. All these witnesses were emphatic that the 1st Appellant was the hotel's night guard on duty with the deceased on the material night they gave his name as **Makana**. They asserted familiarity with the 1st Appellant who had worked for close to 2 months at the hotel. At the same time all of them freely admitted that they did not know the 2nd and 3rd Appellants.

41. The 1st Appellant admitted that he was arrested at Kitale several days after the robbery in Naivasha. There can be no conceivable reason for **PW1** to **PW5** to make false claims against a person they did not know, as is suggested by the 1st Appellant. The explanation that the 1st Appellant's records went missing from the hotel following the robbery is reasonable. Besides mere documents would not be any more credible than the evidence of those who knew and interacted with the 1st Appellant in the material period.

42. In the case of **Anjononi –Vs- Republic [1980] KLR 59** the Court of Appeal stated that:-

“.....recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because, it depends upon the personal knowledge of the assailants in some form or other”.

43. The 1st Appellant's defence canvassed in cross-examination of witnesses seemed to be denial of his employment with the *La Belle Inn* and presence at the hotel on the material night. However, in his defence he did not state categorically whether or not he had any relationship with the hotel and confined his defence to his arrest and possession of the green uniform Exhibit 4 and 5. The latter were identified by **PW1** as uniform given to the 1st Appellant by the complainant hotel upon being hired. The 1st Appellant stated that the outfit was issued by a previous employer in 2011.

44. In **Republic -Vs- Kipkering Arap Koskei (1949) 16EACA, 135** where the Court stated:-

“.....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable

hypothesis of innocence is always on the prosecution and never shifts to the accused.”

These principles were further developed in **Simoni Musoke –Vs- Uganda (1958) EA 715**, the court quoting **Teper -Vs- R (2) (1952) AC 480** where Privy Council stated:

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

45. The trial court in this case accepted the evidence by **PW1 to PW5** and found as a fact that the 1st Appellant was employed at the complainant’s hotel and “went underground to Kitale” after the offence. I agree with the finding of the trial magistrate that the evidence of **PW1 to PW5** placed the 1st Appellant at the scene of robbery in the material night, and in his capacity as a night guard and that his proven subsequent unexplained disappearance, in light of robbery, speaks volumes.

46. Section 111 of the Evidence Act states:-

“(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall—

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.”

47. The prosecution having proved that the 1st Appellant was employee of the *La Belle Inn* in the material period and on duty on the night of the robbery and his subsequent disappearance from Kihoto to Kitale, the 1st Appellant was expected to explain what happened on the material night. He was the last person seen with the deceased guard while alive. Because he and the deceased were on duty, the events of the material night resulting in the robbery and murder of the deceased are matters within his knowledge. The 1st Appellants defence, a mere denial, was totally displaced by the prosecution evidence.

48. The 1st Appellant must in the circumstances of this case have been involved, possibly with others, in the fatal attack on the deceased. The motive is all too clear to see; money and other goods were stolen from the hotel during the fateful night. Thus in my considered opinion, the exclusion of the hearsay recovery evidence does not affect the prosecution case.

49. Amended grounds 1 and 4 of the 1st Appellant's appeal have no merit. When the circumstantial evidence is properly considered, it is a solid basis for the conviction of the 1st Appellant in so far as the 1st Appellant is concerned, the appeal is dismissed.

50. Concerning the 2nd and 3rd Appellants however, it seems that the 1st Appellant implicated them upon his arrest. It was not disputed that on their arrest the police recovered empty bottles of admittedly expensive liquor in their humble dwellings. However, the empty bottles of *Bailey Cream* and *Tia Maria* Liquors or wine glasses had no special marks associating them with *La Belle Inn*. None of the witnesses **PW1** to **PW5** despite asserting that such liquors were stolen on the material night from *La Belle Inn* positively identified these bottles.

51. In convicting the 2nd and 3rd Appellants the trial court placed much reliance on alleged phone conversation made between them and the 1st Appellant. **PW7** supposedly managed to get information from the 2nd and 3rd Appellants as they talked to him on the 1st Appellant's phone while pretending to be the 1st Appellant. This evidence is not supported by the data from the telephone service provider, and I agree with the 2nd and 3rd Appellant that it is unreliable.

52. That said, the recovery of the empty bottle of expensive *Tia Maria* liquor similar to the brand stolen in the robbery and the possession by the 2nd Appellant of new electronic appliances for which he had no explanation created serious suspicion against him. He did not tender any evidence of his lawful acquisition of these items despite showing some receipts to prosecution witnesses during the trial. **PW7** and **PW9** had told the court that he showed them no receipts on arrest.

53. Similarly the possession by the 3rd Appellant of an empty bottle of *Baileys Cream* liquor which is one of the expensive brands of liquor stolen in the robbery, raises suspicion against the 3rd Appellant. Suspicion however falls below the required threshold of proof. As stated in the case of **Joan Chebichii Sawe -Vs- Republic [2003] KLR 364:-**

“Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge's view that the prosecution had proved its case against the appellant beyond any reasonable doubt.”

54. Police investigators should have taken the recoveries as a first lead. The investigations needed to go deeper to uncover credible evidence connecting the 2nd and 3rd Appellants with the robbery. In the circumstances it is my considered view that the evidence against the 2nd and 3rd Appellants appears tenuous and their convictions unsafe. I will therefore quash their convictions and set aside their sentences. They are set at liberty forthwith unless otherwise lawfully held.

Delivered and signed at Naivasha, this 12th day of **June, 2017.**

In the presence of:-

Mr. Mutinda for the DPP

No appearance for the Appellants

C/C: Barasa

Appellants: All present

C. MEOLI

JUDGE