



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEALS NO. 14 OF 2015 AND 13 OF 2015 (CONSOLIDATED)

BONIFACE SAVALI MULYUNGI 1ST APPELLANT

JOSPAT WAMBUA 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the conviction and sentence in Mwingi SRM Criminal case No. 210 of 2013 – H. M. Nyabari – Ag SPM).

JUDGMENT

1. BACKGROUND

The two appeals No. 14 of 2015 and 13 of 2015 were consolidated and heard together, as they arose from the same criminal trial in the subordinate court. Boniface Savali Mulyungi (who was 1st accused) is the 1st appellants and Josphat Wambua (who was 2nd accused) is the 2nd appellants.

The two appellants were jointly charged with robbery with violence contrary to section 296 (2) of the Penal Code at the Mwingi Court. The particulars of the offence were that on 27th March 2014 at about 9.30am at Mwingi Township within Mwingi Central District of Kitui

County, jointly with another not before the court being armed with a dangerous weapon namely a pistol robbed Esther Kilonzo 63 Yu Line valued at Kshs. 2,410/=, 263 Yu Airtime cards valued at Kshs. 5,440/=, cash Kshs. 1,080/=, receipt book, mobile phone charger valued at Kshs. 300/=, and a bunch of keys and immediately after the time of such robbery threatened to use personal violence to the said Esther Kilonzo. Both denied the charge. After a full trial, they were convicted of the offence and sentenced to death.

Aggrieved by the decision of the trial court each of the appellants filed his separate appeal on 12th February 2015. However before the hearing of the appeals and with the permission of the court, each of the appellants filed amended grounds of appeal which they relied on. The grounds of appeal are similar and they are in summary as follows:-

1. The learned trial magistrate erred in law and fact in failing to appreciate that the identification by PW1 and PW2 was not positive and without possibility of errors or mistake.
2. The learned magistrate erred in law and fact by admitting evidence of identification by PW1 and

- PW2 while the cloth described by PW1 was not produced in court as an exhibit to show that the robbers were wearing the same during the alleged incident.
3. The learned magistrate erred in law and facts by failing to appreciate that crucial witnesses were not called by the prosecution thus the case remained unproved.
 4. The learned trial magistrate erred in law and facts by shifting the burden of proof to the appellants contrary to the law.
 5. The learned trial magistrate erred in law and facts in concluding that the evidence of PW1, PW2 and PW3 was safe to sustain the conviction while it was insufficient.
 6. The learned magistrate erred in law and facts in failing to take into account and consider the appellants alibi defence.

2. SUBMISSIONS

Each of the two appellants, with the permission of the court, filed written submissions which we have perused and considered. Josphat Wambua (2nd Appellant) in his written submissions relied on the case of **Ali Ramadhan Vs. Republic - Criminal Appeal No. 70 of 1985** on identification, of an accused who was chased from the scene. He contended that the public who chased and arrested him should have been called to testify in court, which was not done.

Learned Principal Prosecuting Counsel Mr. Okemwa opposed the appeals. Counsel submitted that the offence was committed in broad daylight when PW1 was accosted by three men at about 9.30 am. Counsel emphasized that the arrest of the appellants was effected within two hours thereafter and PW1 was able to identify the two appellants who had already been arrested by members of the public. PW1 had also seen them twice that day, initially while they rode away after they snatched her items, and secondly, when they came back to the Total petrol station at Mwingi Town and then proceeded towards Kyuso on a motor bike. In counsel's view, there was proper and positive identification of the appellants as the robbers.

Counsel submitted further that the evidence on record established that the appellants were found in possession of the stolen goods. The items were also produced in court as exhibits. As such the doctrine of recent possession applied to this case. Counsel relied on the case of **Arum Vs. Republic (2006) 1KLR 233**.

With regard to the contention of the trial court shifting the burden of proof, counsel submitted that the record did not indicate any shifting of the burden of proof by the trial court to the appellants. According to counsel the prosecutor went out of his way to produce the OB entry No. 19/27/3/2014 as an exhibit, after the appellants unexpectedly raised an alibi defence. Counsel therefore maintained that the burden of proof was not shifted to the appellants, as the alibi defence was displaced by the prosecution evidence.

Counsel submitted further that the magistrate considered relevant issues in the judgment including the alibi defence. Counsel maintained that the circumstances of this case and the evidence on record, pointed irresistibly to the guilt of the appellants. He relied on the case of **Alex Boniface Muliungi Vs. Republic (2014) eKLR** a decision of the Court of Appeal.

Counsel submitted further that Boniface (1st appellant) raised the issue as to why the motor bike they rode on, and the alleged firearm were not produced as exhibits. Counsel maintained that no gun was recovered and that when the appellants rode towards Kyuso they had an opportunity to dispose of the firearm. The motor cycle was also not recovered, and as such could not be produced as an exhibit.

Counsel submitted that though the appellants were arrested by members of the public who were not called to testify, the evidence of PW1, PW2, PW3 and PW4 was consistent and trustworthy and as such, there was no need to disturb the decision and findings of the learned trial magistrate.

In response to the Prosecuting Counsel's submissions, Boniface the (1st appellant) asked the court to evaluate all the evidence on record. Josphat (the 2nd appellant) asked the court to peruse the whole file before delivering its judgment.

3. THE FACTS

At the trial the prosecution called four witnesses, three before closure of the prosecution case, and one to rebut the defence of alibi of the appellants.

PW1 was Esther Muli Kilonzi the complainant. It was her evidence that on 27th March 2014 at about 9.30am she left her office in Mwingi Town to supply Yu Simcards and scratch cards near Kenya Commercial Bank in the same Town. She was carrying 33 activated and 30 unactivated lines, together with scratch cards whose value she could not remember. She passed behind Kenya Commercial Bank coming to the main road when she met three men, one talking on the phone, one standing and the third sitting on a motor bike.

While passing near the one who was sitting on a motorbike, the man who was standing snatched her polythene bag in which she carried the items. She tried to scream but he pointed a small gun at her and instructed her to run away or be shot. The three men then immediately boarded the motor bike and rode towards where she came from. Shortly thereafter they came back through the Total petrol station, and she saw them cross the road proceeding in the Kyuso direction on a motor bike which did not have number plates.

She went and reported the incident to Mwingi Police Station and the police took her on a motor vehicle and proceeded to Kyulungwa where they found several people who informed them that robbers had proceeded to Ikuusia. The police and herself proceeded on for about 2 kms, where they found two people arrested by members of the public and near them was a red polythene paper bag with several Yu scratch cards, which she identified as that which was robbed from her. She stated that it was 1st appellant who snatched her polythene bag and pointed a gun at her while the 2nd appellant was the person speaking on the phone. They however did not find the motor bike. She testified that in the polythene bag were scratch cards, Yu lines, a charger, keys, receipt book, and a wallet which contained Kshs 1,080/=.

After getting the appellants, they proceeded to the police station where she recorded a statement. She identified the items recovered in court and stated that her Kshs 1,080/= was not recovered. She stated also that the charger and key holder assisted her to identify the cards and lines as hers and that the key also opened her house. Her wallet was not recovered however. According to her, when the two appellants were seen by her and the police, they had been thoroughly beaten and the gun was not recovered.

In cross examination, she stated that all exhibits were recovered at Ikuusia. She stated that a few cards and the wallet were missing together with the money. She maintained that she was robbed at about 9.30am and that the appellants were arrested at 10.00 am. She stated that all the appellants were wearing black jackets. She insisted that she saw both appellants riding towards Kyuso road. She maintained that all the exhibits produced in court were recovered when the two appellants were arrested.

PW2 was Daniel Wambua a boda boda operator at Mwingi Town. It was his evidence that on 27th March 2014 at 10.00am as he was coming from Mwingi Baptist church heading to Nzeluni stage, he met three men one of them sitting on a motor bike while two were walking on foot. He saw them snatch from a lady a polythene paper bag and then ran and board a motor cycle and spinned off to the Kyuso road.

The lady started screaming and he immediately followed them up to Ikuani Market where he alerted other boda boda operators who followed them to Kyulungwa and alerted other boda boda operators. According to him, the assailants were still in sight ahead of them. The man then turned right and entered a murrum road and his motor cycle ran out of fuel but other boda boda operators pursued them.

A police vehicle then approached and he boarded the same and they proceeded for about 1 km and found two appellants with a huge crowd, having been thoroughly beaten. According to him, the two appellants were the people who were walking and who snatched the woman's paper bag. It was his evidence that the police arrested the appellants and took possession of the polythene bag. According to him the people around informed the police that the appellants were in possession of a pistol which they threw into the bush. After a search for the pistol, it was not found. It was his evidence also that the paper bag was in the

hands of the 2nd appellant. He also stated that the lady identified the paper bag and airtime scratch cards, a scarf and a book as hers.

In cross examination, he stated that he saw a man snatching the polythene paper bag from a woman who raised an alarm. He said that he found that members of the public had already beaten the appellants at the scene of arrest. He stated also that he was not present when the appellants were arrested nor did he take a photograph of the scene.

PW3 was PC Justus Kipchumba of Mwingi Police Station. It was his evidence that on 27th March 2014 at 9.15am while at the Police Station a woman came running claiming that she had been robbed of Yu lines, Airtel credit cards, cash 1,080/=, a bunch of keys, a scarf, receipt book and mobile charger all in a polythene paper bag, by a robber who had left towards Kyuso direction aboard a boda boda. She also stated that the robbers were three in number. It was his evidence that they boarded the station vehicle with the complainant and PC Irungu together with PC Driver Mutiamua.

On arrival at Kyulungwa, they found a crowd who gave them direction where the boda boda had diverted to. They proceeded further for about 5 kms and found a crowd of people with two suspects whose hands had been tied at the back and were half naked, and had been beaten and were bleeding. These were the appellants who, by then, were not even able to talk.

The members of the crowd informed them that they had pursued the two from Ikuuni Market after an alert from a rider that they had robbed someone in Mwingi Town. They were also informed of two gun shots at the scene. The complainant then alerted her that she had seen a red polythene paper with one of the members of the public which she identified as hers and found the Yu Lines, Airtel credit cards, mobile charger and a receipt book. Inside was a blue polythene paper bag where the cards were stuffed. There was also a bunch of keys and scarf. She however said that her cash Kshs 1080/= was missing.

They searched for the alleged firearm but did not recover the same. They were informed that a 3rd suspect had escaped with another bike. They did not find any cartridge. They arrested the suspects and brought them at Mwingi Police Station. According to this witness, before leaving the scene of arrest, the complainant identified the 1st appellant (Boniface) as the one who snatched the polythene bag and that the 2nd appellant (Josphat) was with him. He thus charged the two appellants.

He also testified that they found the 1st appellant wearing a jacket, a shirt and a pant. From the said 1st appellants jacket, he recovered two leather wallets containing his Equity ATM bearing his names, 6 sim card cases one for Yu and 5 for Safaricom, a business card, Cooperative Bank Card in his name, and a registration form for airtel. From the second wallet there was the 1st appellant's National Identity Card, electors card and ATM, together with an original identity card belonging to Fredrick Omukufa Akaliche and an Airtel card holder. He interrogated the two appellants and the 1st appellant said he had been beaten at Mwingi and dumped at Ikusia Village. The 2nd appellant did not give any account.

He then visited the scene of the alleged crime in the company of the complainant and managed to get two witnesses who recorded their statements. He produced the recovered items as exhibits in court.

In cross examination, he maintained that the complainant said that she had been robbed by three men who had a gun and wore black jackets and escaped towards Kyuso. He stated that someone followed the suspects and alerted people at Kyulungwa. That the person who was following the suspects ran out of fuel near Ikusia Village. He stated that the appellants were arrested about 200 metres from the river where the motor bike ran out of fuel. He stated also that he took the polythene bag from a member of the public who said that the 1st appellant had possession of it. He stated further that no firearm was found, and maintained that the polythene paper bag was found on 1st appellant.

When this witness completed his testimony, the prosecutor informed the court that only one witness had been bonded but was not in court. That he was Kyalo Kilonzo. He asked for issuance of a warrant of arrest as the witness had already been served with summons to appear in court. The appellants did not object. The court thus issued a warrant of arrest for the witness and ordered the case to be heard on 8th

September 2014 with a mention on 21st August 2014.

The case was mentioned on 14th of August 2014 wherein it was put for further mention on 28th August 2014 and for hearing on 8th September 2014. It was mentioned on 29th August 2014 and the hearing date of 8th of September 2014 was confirmed.

On the 8th of September 2014, the prosecutor informed the court that the warrant of arrest had not been executed and sought for a mention at 11 am to enable him reach the OCS because the file had been forwarded to him without a memo. At 12.45pm the prosecutor informed the court that he was not able to reach the OCS and because the remaining witness was crucial he asked for a fresh hearing date. Both appellants had no objections and the case was put for hearing on 18th September 2014 with for mention on 11th September 2014.

On the 18th September 2014, the prosecutor said that he had been informed by the OCS that Kyalo (the witness) had relocated to Garissa after he was threatened by the accomplices of the accused, and had closed his mobile phone. He however asked for more time. The appellants did not have an objection and an adjournment was granted.

When the case ultimately came up for hearing on 7th October 2014, the prosecutor informed the court that the investigating officer said that he was having difficulty in tracing Kyalo. However the father of Kyalo was present in court. The prosecutor then asked for a mention date. Both appellants were concerned that they had suffered long in remand. The court however granted the adjournment.

When the matter came up again on 21st October 2014, the prosecutor said that the witness had gone underground. The matter was still adjourned.

The matter then came up on the 31st of October 2014, the prosecutor then said that Kyalo Kilonzo had not been traced to date. He therefore applied to close the prosecution case.

When put on their defences, both appellants elected to give unsworn testimony. However later the 1st appellant Boniface elected to give a sworn defence.

In his sworn defence Boniface Savali Mulyungi (1st appellant) stated that he was a business man running a retail shop business at Kwa Ruben Embakasi Nairobi. That on 27th March 2014 at 4.00 pm, he boarded a bus from Nairobi to Mwingi arriving at 7.30pm. While heading to his house near Musila garden, he met two police officers who arrested and took him to Mwingi Police Station where he was searched and his two wallets taken away. On 7th April 2014, he was brought to court and charges were read to him for offences he did not commit.

In cross examination, he stated that he could not remember the name or identification of the bus company he travelled in and that he had lost the bus ticket. He maintained that he was booked at the police station at 7.20 pm though he did not ask for the OB. He said that this was his second case in court. He said that he did not have with him his single business permit from Nairobi City Council.

Josphat Wambua the 2nd appellant, gave an unsworn defence. He stated that he was from Makueni District Mwea Village. His business was selling chicken at Lungalunga. He stated that on 27th March 2014 at 8.00am, he was at Kitui Open Market and bought chicken and came to Mwingi arriving at 5pm. He entered Kanini Kaseu Bar where he was

arrested at 7pm and taken to Mwingi Police station where he was finally charged for an offence he did not commit. He was not told the charges at the time of his arrest.

In view of the fact that the appellants unexpectedly raised a defence which implied an alibi, the prosecutor applied to the court to allow the OCS Mwingi Police station produce the OB entry showing that the appellants were booked as alleged by the prosecution, to rebut the alibi evidence adduced by the appellants. The 1st appellant opposed the request. The 2nd appellant Josphat Wambua had no objection.

The court allowed the prosecutor to call the OCS Mwingi Police Station to produce the OB abstract relating to the offence before the court.

In consequence, PW4 PC Alex Kwemboi Kirong attended court on 1st December 2014 and testified in respect of the OB entry.

It was his evidence that he had been sent to adduce evidence in respect of OB No. 1927/03/2014. He stated that on 27th March 2014 at 9.15 am while at the report office, he made an entry respecting a report made by Esther Kilonzo who reported that three people snatched her paper bag containing credit cards of unknown value and headed to Waita area in a motor cycle.

On the same day at about 13.30 hours a further report was made by PC Justus Betty and PC Irungu who came back from Kilyungwa with two prisoners namely Boniface Savali Mulyungi and Josphat Wambua who had been arrested after a mob accosted them. The report was that the two were among the three people who had snatched the paper bag containing Yu lines and airtime from Esther Kilonzi and that members of the public said that the 1st appellant (Boniface) was armed with a pistol and shot twice and then escaped on a motor cycle towards Kakulani area armed with a pistol.

It was his further evidence that the information was that the suspects were taken to hospital for treatment, and that the items recovered were 33 activated Yu lines valued at Kshs. 1,960/=, 30 un activated Yu lines, 20 x 100 airtime, Airtel cards, receipt books. He produced the two OB extract entries as exhibits.

In cross examination, he maintained that the complainant made a report at 9.17 am and that the appellants were arrested at 1.30pm. He denied that Boniface was arrested at 7.20pm.

4. ANALYSIS

From the above evidence the learned trial magistrate found that the prosecution had proved their case against the appellants beyond reasonable doubt and convicted and sentenced them. There from arose the present appeal.

We have to start by reminding ourselves that this being a first appellate court, we are duty bound to re-evaluate the evidence on record and come to our own conclusions and inferences, bearing in mind that we did not have the opportunity to see witnesses testify to determine their demeanor and give due allowance for that fact - See the case of **Okeno Vs. Republic 1972 (EA) 32.**

We have re-evaluated the evidence on record.

The appellants have raised several grounds of appeal. In our view the issues for determination are whether firstly there was positive identification of the appellants. Secondly, whether the doctrine of recent possession applies. Thirdly whether crucial witnesses were not called by the prosecution and the effect of the same. Fourthly whether the defence of alibi of the appellants was considered.

With regard to identification, the courts have stated over and over again that trial courts should evaluate the nature and circumstances of identification evidence carefully before convicting on the same to avoid the possibility of mistaken identity. The English **case of R –vs- Turbull (1970) ALL ER 549** is a classic example on identification which has been relied upon by courts in Kenya. In the case of **Cleophas Wamunga –vs- Republic Criminal Appeal No. 20 of 1982 –(UR)** the Court of Appeal stated as follows –

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on the correctness of the identification”.

There is no doubt that the incident herein occurred in broad daylight at around 9.00 am or slightly

thereafter. The complainant PWI stated that she did not know any of the robbers before the incident. The incident was a sudden occurrence and she must have been scared or perplexed by the sudden unexpected events.

The complainant PWI Esther did not describe the appearance of any of the appellants. When she went to the police station to report the incident, she did not describe the appearance of any of the robbers. She merely stated that they wore black jackets. PW2 Daniel Wambua who said that he saw the three people, one of whom snatched the polythene bag from the complainant and then all the three rode on a motor bike towards Kyuso, also did not describe the appearance of any of the assailants. Therefore though the time of the incident was in broad daylight at about 9.00 am, it cannot be said that any of the eye witnesses was able to visually identify or describe the identity of any of the people who robbed PW1. None even attempted to make a description of whatever nature, regarding the appearance of any of the three. It cannot thus be said that the appellants or any of them was visually identified by the eye witnesses at the scene.

This leads to the second consideration on recent possession. In spite of the fact that the robbers were not identified by the complainant PWI, who merely raised an alarm and proceeded to the police station to make a report, the evidence on record is that she then saw them ride on the motor bike towards Kyuso direction. PW2 also independently gave the same story that he saw the three ride a motor bike towards Kyuso direction and, being a boda boda operator and having heard the screams of the complainant and actually seen them snatching her polythene bag, gave chase on his motorbike, to the motor bike which was carrying the robbers towards Kyuso direction.

It was PW2's evidence that he gave chase and did not lose sight of them as they rode ahead of him. He met other boda boda operators and informed them that those riding ahead of him were robbers and these boda boda operators also gave chase together with him until a point where the robbers turned into a murrum road and PW2's motor bike fuel ran out of fuel.

Though PW2 stopped there, his colleagues continued with the chase. Shortly thereafter the police with the complainant arrived in a motor vehicle and PW2 boarded the same towards where the other boda boda operators had chased the robbers and found that two people had already been arrested and badly beaten.

The complainant PWI also found and identified the polythene bag snatched from her and some of the items contained therein.

With the appellants having been found in circumstances which established that they were in possession of the items stolen shortly after the incident, and they having been tracked down straight from the scene of the robbery to the point of the arrest, in our view the doctrine of recent possession as espoused in the case of ***Julius Kiunga Mbirithia Vs. Republic - Meru Criminal Appeal No. 111 of 2013 eKLR*** applies in this case.

In our view, it was not just a coincidence that the robbed items were found where the appellants were restrained and beaten. The items belonged to the complainant, as she positively identified them. They were the recently robbed items just less than an hour earlier. Immediately at the robbery, PW1 raised an alarm, she saw the direction the robbers followed on the motor bike and proceeded to make an immediate report to the police, PW2 also saw them robbing the complainant and heading in the same Kyuso direction described by the complainant PWI. On his part, PW2 gave chase without losing sight of them. He got the assistance of other boda boda operators who also gave chase. Though his motor bike ran out of fuel before catching up with them, they were caught by other boda boda riders and the robbed items recovered. These other boda boda riders had no reason in our view, to implicate them.

Though no evidence was tendered by any of the members of the crowd who chased, restrained and beat up the appellants, there is no doubt in our minds that the appellants were the assailants, as we do not think that the police would lie about the place of arrest and what was recovered.

Since we have found that the appellants were found in recent possession of the robbed items, the burden

of proof shifted to them to explain their possession of the items.

In the case of *Malingi –vs- Republic (1989) KLR 225 at page 227* – the court stated –

“the trial court has a duty to decide whether from the facts and the circumstances of the particular case under consideration the accused person either stole the item or was guilty or innocent receiver. By the application of the doctrine, the burden shifts from the prosecution to the accused to explain his possession of the item complained about”.

In our view, the appellants were with the evidence on record, obliged to explain how the items stolen came to be with them at the scene where they were arrested following the chase by the public. They did not do so in their defences. They did not even attempt to do so, and as a consequence, they did not shake the prosecution evidence. In our view therefore they were the robbers.

The next issue is on contention of failure to call crucial witnesses by the prosecution. We are aware of the rule that where the prosecution fails to call crucial witnesses in criminal cases, then the court may make an inference that such evidence or such witness would contradict the prosecution case, *see Bukenga –vs- Uganda (1972) EA 549*.

In our present case, none of the members of the public who assisted in arresting the appellants was brought to court by the prosecution to testify. However in our view, and going by the record, there was no failure or indolence on the part of the prosecution to call any witness.

There was a witness called Kyalo whom the prosecution tried many times to summon and the court even issued a warrant for his arrest, but he did not come to court. The prosecution said that the witness had been threatened by accomplices of the appellants and relocated to Garissa. None of the appellants challenged that statement of the prosecution.

In our view therefore, it cannot be said that the prosecution failed to call crucial or relevant witnesses. We find no fault on the part of the prosecution. The court was thus entitled to determine the case on the basis on evidence on record, without considering whether to make an adverse inference on the prosecution case for failure to call crucial witnesses.

The last issue relates to consideration of the defences of the appellant. All the two appellants raised a defence of alibi. The burden is always on the prosecution to prove its case against an accused person beyond any reasonable doubt, and the defence is not required to prove the accused’s innocence, even if the defence is one of alibi. See the case of *Kosssam Ikiru Vs. R (2014) eKLR*.

Courts have held that a defence of alibi should preferably be raised at the earliest during the trial see *Karanja –vs- R (1983) KLR 501*.

None of the appellants indicated any intention to raise a defence of alibi during the prosecution case. Even the investigating officer PW3, who re-arrested the appellants, was not asked any question nor was there any suggestion put to him, that any of the appellants was arrested in circumstances or time or place other than those described by the prosecution witnesses. The prosecution having been ambushed by the defence of alibi after it had closed its case, sought the permission from the court to call a witness to produce the OB entry to show the circumstances and time when the appellants were arrested and brought to Mwingi Police Station. The court allowed this request.

The said two extract entries of the OB were produced in court as exhibits by PW4 PC Alex Kirongo. It is clear to us that a robbery report by the complainant PW1 was made at around 9.17 am. And a second report on the bringing of the appellants to the Mwingi police station and booking them was made at 1.30 pm. This evidence was not shaken in cross-examination.

The prosecution evidence thus completely displaced the defence of alibi of the appellants. It is obvious in our view, that the defence of alibi of the appellants was an afterthought and was not true. In our view the

alibi defence was properly rejected by the trial court.

5. DETERMINATION

Though the learned magistrate wrote a short judgment, in our view he came to the correct conclusion that the prosecution had proved its case against both the appellants beyond any reasonable doubt. The learned magistrate came to the correct conclusion that the doctrine of recent possession applied to the case. The learned magistrate also correctly found that the defence of alibi was a false defence, as it was displaced by the cogent and believable evidence of the prosecution.

To conclude, we find that both appeals lack merit. We thus dismiss both appeals and uphold the conviction of the trial court. The sentence of death is the mandatory sentence provided for by law. We thus uphold the sentence.

Dated and delivered at Garissa this 1st day of March, 2016.

GEORGE DULU

EDWARD MURIITHI

JUDGE

JUDGE