



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NOS. 9 of 2015 & 10 OF 2015(CONSOLIDATED)

MOHAMED LOGE HUSSEIN1ST APPELLANT

HASSAN KEROW ABDI 2ND APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 1022 of 2013 H. Ndungu – Chief Magistrate)

J U D G M E N T

The two appeals No. 9 of 2015 filed by Mohamed Loge Hussein (1st Appellant) and No. 10 of 2015 filed by Hassan Kerow Abdi (2nd Appellant) were consolidated and heard together as they arose from the same trial in the subordinate court. Hassan Kerow Abdi was the first accused in the trial court, while Mohamed Loge Hussein was the second accused.

The two appellants were charged jointly in the Subordinate Court a total of seven counts.

Count I was for robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence were that on 30th July 2013 at Hagadera Refugee Camp in Fafi District within Garissa County jointly while armed with dangerous weapon namely AK47 rifle robbed Ahmed Abdullahi Salat of his mobile phone make Nokia 1280, refugee certificates, driving license and cash Kshs. 20,000/= all valued at Kshs. 27,600/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Ahmed Abdullahi Salat.

Count II was also for robbery with violence. The particulars of the offence were that on the same day and place jointly while armed with a dangerous weapon namely AK47 rifle robbed Eluli Abdullahi Adow of his mobile phone make Nokia 1280 and cash Kshs. 80,000/- all valued at Kshs. 81,600/- and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Eluli Abdullahi Adow.

Count III was also for robbery with violence. The particulars of the offence were that on the same day and place jointly while armed with a dangerous weapon namely AK47 rifle robbed Ibrahim Said of his mobile phone make Nokia 1280 and cash 6,000/- all valued at 7,200/- and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Ibrahim Said.

Count IV was also for robbery with violence. The particulars of the offence were on the same day and place jointly while armed with a dangerous weapon namely AK 47 rifle robbed Dahir Abdinashir Ahmed of his mobile phone make Nokia N1280 and cash Kshs 8,000/- all valued at Kshs 9,600/- and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Dahir Abdinashir Ahmed.

Count V was for being in possession of a firearm without a firearm certificate contrary to Section 4(2) (a) of the Firearms Act Cap 114. The particulars of the offence were that on 2nd August 2013 at Hagadera Refugee Camp in Fafi District within Garissa County jointly were found in possession of one firearm make AK47 rifle serial No. CB3801 without a firearm certificate.

Count VI was for possession of ammunition without a firearm certificate contrary to Section 4 (2) (a) of the Firearms Act. The particulars of the offence were that on the 2nd of August 2013 at Hagadera Refugee Camp in Fafi District within Garissa County jointly were found in possession of 69 rounds of 7.62 mm special ammunition without a firearms certificate.

Count VII was for possession of firearm accessories contrary to Section 26 (1) (e) of the Firearms Act. The particulars of the offence were that on the 2nd August 2013 at Hagadera Refugee Camp in Fafi District within Garissa County was found in possession of firearm accessories namely five (5) AK47 rifle magazines without a valid firearm certificate.

They pleaded not guilty to all the charges. After a full trial, they were convicted of all the counts by the trial court. They were sentenced to suffer death on count I. The sentences on count II to count VII were left in abeyance, as they had already been sentenced to death on count I.

Dissatisfied with the decision of the trial court, each of the appellants filed his appeal in person. Before the appeals were heard however, Ms Orlando Udoto & Okello Advocates filed amended grounds of appeal on behalf of Mohamed Loge Hussein. Hassan Kerow Abdi also filed amended grounds of appeal before the appeal was heard.

The grounds of appeal of both appellants can be summarized as follows:

1. That the court failed to find that the prosecution failed to provide key documents to prove the Mpesa transactions and also admitted evidence on the Mpesa transactions without a certificate on electronic evidence.
2. That the learned magistrate erred in convicting the appellants by relying on contradictory and inconsistent evidence as to where the weapons were recovered.
3. That the court erred in convicting the appellants without there being evidence of an identification parade.
4. That the trial court erred in convicting the appellants while key witnesses were not called to testify.
5. That the learned magistrate erred in convicting the appellants without considering their defences which was an alibi defence.
6. That the learned magistrate erred in convicting the appellants while the prosecution case had not been proved beyond any reasonable doubt.

Counsel for Mohamed Loge Hussien (1st Appellant) filed written submissions. Hassan Kerow Abdi (2nd appellant) who appeared in person, also filed written submissions.

Miss Njalale learned counsel who appeared for 1st appellant relied on the written submissions filed. Counsel asked that her presence be dispensed with at the hearing of the appeal because she would be abroad. Her client (1st appellant) agreed to the arrangement.

On the hearing date, 1st appellant relied on the written submissions filed and stated that he asked for the OB report of 31st August 2014 No. 27 from Hagadera police station at the trial but he was not

supplied with the same. Secondly, he submitted that though the charge sheet mentioned an AK47 rifle, PW1, PW2, PW3 & PW4 talked about a pistol.

The 2nd appellant also relied on his written submissions. He further submitted orally that he had a correction to his written submissions which he tendered in court. He denied that he had been arrested from the house of the 1st appellant, and also he denied knowing the 1st appellant. According to him the Block leader had confirmed this fact in evidence.

He submitted also that an important witness who was a lady, was not called by the prosecution to testify and, further that the actual robbers had escaped that and he had so informed the trial court.

He further submitted that PC Shale wanted to extract information from him about robbers who had escaped and, when he did not disclose that information, he was arrested and charged in this case. He insisted that PC Shale knew that the two suspects who had escaped were still at large, and was deliberately making him pay for their price. He stated that the complaint at the trial was against the escapees who were at large, and urged this court to reconsider the whole case as this was his first time to be charged in court.

The learned Prosecuting Counsel Mr. Mwangi opposed the appeal and submitted that the 1st appellant did not ask for a copy of the OB as suggested by him on appeal. According to counsel, he the 1st appellant merely asked for copy of the charge sheet and witness statements and applied for bond.

Counsel submitted further that with regard to identification, a detailed account of the date and time of the incident was given by prosecution witnesses. PW1 saw two men who flagged him down on the road that morning. The first accused who is the 2nd appellant, had a big gun while the 2nd accused who is the 1st appellant had a pistol. Counsel emphasized that the 2nd appellant was identified at a parade, and through the first appellant's face was covered a detailed description of his physical appearance was given. Counsel submitted that the 1st appellant asked for Mpesa remittances and in the process the witness took note of his voice.

Counsel submitted also that PW2 corroborated the evidence of PW1 to the effect that the 2nd appellant had a gun and commandeered the vehicle, searched them and demanded cash, and when PW2 did not have the cash, he demanded that same be sought from relatives and that was how the Mpesa issue featured.

Counsel submitted further that PW3 corroborated the evidence of PW1 and PW2 on identification. PW4 corroborated the evidence of all these witnesses and stated that he was also assaulted. Counsel relied on the authorities relied upon by the 1st appellant on identification such as case of **Mali Mali Ole Moiyare- Vs – Republic (2014) eKLR.**

With regard to recent possession, counsel submitted that Mpesa transactions were traced to mobile phone No. 0718-320813 which the appellants furnished to PW1, 2, 3 & 4. That number was traced to PW9 and that is how the 1st appellant was arrested.

Counsel submitted also that PW11 testified on the recovery of the rifle which was hidden in a hole under the earth which was under a bed. The same rifle was identified by PW1, 2, 3 & 4. Counsel emphasized that the mother of the 1st appellant led the police to the search. The 1st appellant was arrested on the basis of an organized Mpesa transaction in which he presented himself as the owner of the telephone number and was thus arrested.

Counsel relied on another two cases, cited by the 1st appellant, the case of **Mukiria & Another – Vs – Republic (2005) eKLR** and the case of Vincent **Omondi Ombelo – Vs – Republic (2005) eKLR.**

With regard to counts 5, 6 & 7, counsel submitted that PW13 stated clearly what connected the two appellants to the offences. According to counsel, the alibi allegation was a late attempt to divert attention,

as no alibi defence was raised during tendering of evidence by prosecution witnesses.

In response to the prosecuting counsel's submissions, Mohamed Loge 1st appellant, stated that in a situation where a person covered his face and mouth, the voice cannot be clear. He also emphasized that he informed the trial court that he was not at the scene of the crime and that he was attending an exam for three days.

With regard to the mobile telephone, he stated that his number did not begin with 0718, but it begins with 0711. He submitted that PC Hussein Shale had confirmed his real telephone number during his appearance in court. He stated also that the Mpesa transaction had no relation to the offences alleged.

The 2nd appellant Hassan Kerow on his part, said that it was not true that he was identified, nor was there a description given about his appearance and face. He complained that no identification parade was conducted. He further stated that he did not participate in any robbery and that the case was a fabrication. He lastly said that the mobile telephone number alleged was not in his name.

During the trial the prosecution called 13 witnesses. PW1 was Ahmed Abdullahi Salat, the complainant in count 1. It was his evidence that on 30th July 2013 at around 10.00 a.m., he was driving a miraa pickup registration KBK 357V from Hagadera heading to Damajare and Be Nane, with three passengers who included the lady owner, an old man and a boy. About 8 Kilometres from Hagadera two men emerged from the right hand side of the road, crossed the road and stopped them. One had a big gun and the other had a pistol. The two then ordered them to lie down, and the person with the big gun entered the motor vehicle and drove it towards the right, where the robbers had emerged from. The one with a pistol guarded them and then took them to where the other had driven the vehicle, and on reaching there were ordered to surrender everything they had or they would be shot.

On his part he did not have the money and was threatened with being shot as the robbers demanded Kshs 20,000/- from him. He thus informed his family on phone to send him money through Mpesa which was done. He then gave his mobile phone No. 0718320813 to the robbers who took the money. They were then released to move on with the pickup which was carrying bags of miraa weighing about 30 Kg each.

According to this witness, the robbers took 3 kgs of miraa before letting them go.

He stated also that the person carrying the pistol was masked, while the one carrying the big gun did not cover his face. He later heard that some people had been arrested. According to him, the man with a long gun was the 2nd appellant and he also wore a long black coat. He stated that he was aware that the coat and gun were recovered from this appellant on 1st August 2013. He stated also that the gun resembled an AK47 rifle.

He stated that he saw the face of the 1st appellant for the first time during arrest, as the 1st appellant had concealed his face during the incident, but was wearing same clothes he wore during the robbery. He stated that he sent Mpesa to the 1st appellant who was traced through Safaricom Limited Network. He stated also that in the house of 1st appellant were found a green jungle jacket, a bottle with rifle oil, a bag containing cigarettes, an assortment of mobile phones and a Safaricom wallet with money in it.

In cross examination by the 1st appellant, he stated that the face was covered but he could recall his voice and height and the clothes.

In cross examination by the 2nd appellant he insisted that he demanded Kshs 20,000/- or he would kill him. He stated that 2nd appellant was arrested from the house of the 1st appellant.

PW2 was Eluli Abdullahi Adow the complainant in count II. It was his evidence that he was a miraa seller, and that on the 30th July 2013, with PW1 they travelled in a pickup from Hagadera with two other passengers. After a short distance they were stopped by two men one armed with a pistol and the other a

long gun. The two took them to the right hand of the road, where one of them had driven the vehicle while the other directed them to follow. It was his evidence that he was robbed of Kshs. 80,000/- and a Nokia mobile phone. The robbers

then asked the driver for money but he had none. The driver was forced to send for money to be transferred through Mpesa which was done. Thereafter, they were released and proceeded on with their journey and reported the incident to Hagadera police station.

It was his evidence that on 1st August 2013, the appellants were arrested. According to him, during the robbery the 2nd appellant stripped them at gunpoint. That 2nd appellant was the one who drove the motor vehicle and ordered them to produce money and also took the phones. The 1st appellant whose face was covered, was left guarding them. He stated that the 2nd appellant was arrested a day after the 1st appellant. He reiterated that the incident occurred at 10.00 a.m. and, according to him, the 2nd appellant had long hair which reached the shoulders with dreadlocks. He was not present during the arrest, and did not know either of the appellants before.

In cross examination by the 1st appellant he stated that one of the robbers carried a long gun while the other carried a pistol. He maintained that the incident occurred at 10.00 a.m.

In cross examination by the 2nd appellant, he stated that the vehicle was stopped before reaching Abdi Sugu junction in the bush. He did not know the 2nd appellant before, but maintained that the gun was recovered from the house where the 2nd appellant was.

PW3 was Iman Ibrahim Said the complainant in count III. It was her evidence that on 30th July 2013 at 10.00 a.m, she was in a pickup from Hagadera proceeding to Benane when they were stopped on the road and ordered to alight. She stated that the 2nd appellant carried a big gun and his face was uncovered. The 1st appellant had covered his face and had a small gun. They were ordered to give all they had and she was robbed of her bag, scarf, mobile phone and Kshs 8,000/-. According to this witness, the man who covered his face demanded for the money. The robbers took the driver aside then let them go.

In cross examination by the 1st appellant, she stated that the 1st appellant had covered himself with a black cloth. In addition, he took her scarf and also used it to cover himself.

In cross examination by the 2nd appellant, she stated that she did not know him before, and that though she was scared, she noted that this appellant wore a black coat. She stated that she looked at or observed the eyes of the second appellant.

PW4 was Dahir Abdinashir Ahmed, the complainant in count IV. It was his evidence that on 30th July 2013, he was travelling in a pick-up when two unknown men stopped them. According to him, the 2nd appellant did not cover his face but the 1st appellant covered his face. The second appellant carried a long gun and the first appellant carried a pistol. They were ordered to alight from the pick-up whereupon the 2nd appellant boarded the vehicle drove it to the right hand side while the 1st appellant was left to guard them and ordered them to follow the motor vehicle. On reaching the motor vehicle, they were ordered to hand over all their belongings and he gave them Kshs 6,000/-.

It was his evidence that the person who covered his face collected the money. The robbers, according to this witness, took his mobile phone and when he asked for his sim card, the person who covered his head that is 1st appellant kicked him. The robbers then threatened to kill the driver of the pick-up because he gave them no money. The driver thus called his family who sent him money and they took the same plus his mobile phone. It was his evidence that a few days afterwards, he heard that the robbers had been arrested. He described the 1st appellant as tall and slender.

In cross examination by the 2nd appellant he stated that he was present during arrest. The 1st

appellant did not cross-examine him.

PW5 was Abdi Shuguli Hassan who operated Masalani Mpesa agency at Hagadera Refugee Camp. He stated that on 30th July 2010 at 10.00 a.m., while at the agency, Igaal called on phone and asked him to send him Kshs 10,000/- but did not tell him why he needed the money. He sent that money through mobile telephone No. 0718320813. Later, the said Igaal came and took him to the police station saying that the money sent had been robbed.

In cross examination by the 1st appellant, he stated that he sent the money but could not confirm the robbery. In cross examination by the 2nd appellant he stated that he did not know him.

At this stage of the criminal trial, the presiding magistrate was transferred and a new magistrate took over the conduct of the case. Section 200 of the Criminal Procedure Code (cap. 75) was complied with and the appellants elected to proceed with the trial from where it had reached.

PW6 was Mohamoud Ali Abdi the owner of an Mpesa shop at Hagadera. He testified that on the 30th of July 2013, in the morning, a customer requested to be sent Kshs 10,000/-. That customer wrote to him the name and amount required. He sent the amount to mobile phone No. 0718320813, but later another person came and told him to reverse that transaction.

There was a network problem and when he ultimately contacted the Safaricom Limited, he was told that the cash had already been withdrawn.

In cross examination by the 1st appellant, he stated that he sent the money to the telephone number he was given and gave the same number to the police. In cross examination by the 2nd appellant, he stated that the 2nd appellant brought the money and gave the telephone number to which he sent the money. He stated that he had no grudges against the 2nd appellant.

PW7 was Abdullahi Ahmed, a refugee camp leader at Block J7 Hagadera Refugee Camp. He initially testified on 31/3/2014. It was his evidence that on 1st August 2013 at 2.00 pm, he received a report that a gun had been recovered at Block J7, where the 1st appellant and his mother lived. (At this point, the prosecutor asked that the witness be declared hostile and the case was adjourned).

When the hearing resumed on 28th May 2014, he testified that a gun was recovered from the house of the 1st appellant, whom he knew.

In cross examination by the 1st appellant, he maintained that he knew him before. He stated also that he had no prior information of the 1st appellant's involvement in criminal activities.

In cross examination by the 2nd appellant, he stated that he did not know him before.

PW8 was Zahara Ali Farah, a housewife and block leader at Hagadera Refugee Camp Block J7.

It was her evidence that on 1st August 2013 at 2.00 pm, as she was going to the market, she received a telephone call from the police, summoning her to the block. She proceeded there and found that the police had surrounded the block. Shortly thereafter, she heard a gunshot in the house of Mohamed Loge (1st appellant) and police came out with a gun. The house was 40 metres away from where she stood.

In cross examination by the 1st appellant, she said she knew him before as a student. She maintained that she saw the gun which was recovered from the house. In cross examination by the 2nd appellant, she stated that she did not know him before but knew the owner of the house from which the gun was recovered.

PW9 was PC Hussein Shale. It was his evidence that on 30th July 2013 at about 10.30 a.m., PC

Mbiji requested for help arising from an allegation of a robbery of Kshs 100,000/-, which included Kshs 80,000/- cash and Kshs 20,000/- through Mpesa. According to him, he traced the information on the Mpesa transaction to the 1st appellant, but did not have the information in court. (At this point the prosecutor asked for an adjournment to get the transaction information). When the witness resumed tendering evidence on 27/6/2014, he testified that he had managed to get the Mpesa transaction information which involved mobile phone number 0725 604952 in the name of an Mpesa Agent. He testified that money was sent to number 0725604952 for Abdi Ali's number 0721937215.

He also stated that another Kshs 10,000/- was received from Number 0720242154 and was transferred by the recipient to 0723782141 – that is Kshs 9,890/- in the name of Hajir Osman.

According to this witness, Garissa CID assisted in investigations and traced Mohamed Hussein who was the common caller on number 0711818556 who was the 1st appellant. He did not however have serial numbers of phone. (At this point, the witness was stood down again on request of the prosecutor to obtain other details). Later, he came to testify on 18/8/2014 and stated that the CID at Garissa were unable to exploit the mobile telephones because they were time barred. He further clarified that Kshs. 10,000/- was sent to Daud Hassan on mobile telephone number 0718320813 from number 0720242152, and the other Kshs 10,000/- was sent to Hassan's other number 0723782141. He stated further that airtime of Kshs. 109/- was bought from No. 0718320813 and sent to 0725604952. Thereafter Kshs. 9,890/- was transferred from 0718320813 to telephone 0723782141 in the name of Hajir Osman. Another Kshs 9,890/- was transferred to the same Hajir Osman.

In cross-examination by the 1st appellant, he stated that the 1st appellant did not feature in the Mpesa transaction. He said that the 1st appellant took the police to the house of Hassan Kerow(2nd appellant) whom they arrested, only after the mother (of the 1st appellant) offered to take them there. He stated that he knew that the 1st appellant was a student but maintained that the 1st appellant was a common caller of the person they found in the house (2nd appellant) who had dangerous weapons.

In cross-examination by the 2nd appellant, he stated that the complainants did not mention Kerow Hassan,(2nd appellant) but they traced the telephone number from Safaricom Ltd. They did not arrest Hajir Osman because the 2nd appellant sent purchased airtime from the complainant's number to a number which the 2nd appellant used but without registering the same. He maintained that the 2nd appellant was found with the subject mobile phone.

PW10 was Lawrence Nthiwa, a Firearms Examiner at the Firearms Laboratory at CID Headquarters. He stated that he had worked with Hassan Maningo, a firearms examiner who had resigned. It was his evidence that on 19th August 2013, PC Samir Ahmed of Hagadera police station submitted a rifle, 69 rounds of ammunition, 5 magazines and one spent cartridge.

Hassan Maningo a firearms examiner conducted tests and found that the gun was an AK47 rifle. The 66 rounds 7.62 X 39 mm were tested and 5 were successfully fired from the rifle. The 5 AK47 rifle magazines were examined and found to be in good condition, the firearms examiner found that the cartridge 7.62 X 39mm was fired from the same rifle.

He identified the report signed by the Hassan Maningo the firearms examiner and produced it in evidence as an exhibit. He stated that the items were accompanied by an exhibit memo.

In cross examination by the 1st appellant, he stated that he did not know if the rifle was owned by the Kenya Government. The 2nd appellant did not ask this witness any question.

PW11 was PC Michael Rono. It was his evidence that on 30th July 2013 in the morning hours he was with PC Hussein and PC Otundo together with the complainant called Ahmed Salat. They boarded a motor vehicle to Hagadera Refugee Camp Block J, in the company of the 1st appellant. When they arrived at the 1st appellant's house, he pointed to them the 2nd appellant, whom they found sleeping in

the bed. He entered the house with PC Hussein and on searching under the bed, PC Hussein found a white polythene bag in which was wrapped an AK47 rifle. Also found were 5 magazines and a heavy jacket, and bullets loaded in the magazine and others rolled in polythene paper in total 69 bullets. They also recovered a green bag, magazine pouch, bottle containing oil and a jungle cap all rolled together. Inside the house were also dismantled mobile phones. The complainant identified the rifle as the one used to rob him. They took the items to Hagadera Police Base and charged the appellants.

In cross examination by the 1st appellant, he said that he was present during his arrest and that the 1st appellant was arrested because he forced the complainant to transfer money through Mpesa to his phone. He maintained that 1st appellant led them to the house. He denied presence of uniform in the house.

In cross examination by the 2nd appellant, he stated that they found him sleeping and that the Block leader was present during the search. He maintained that they took all the items from the house. He stated that he did not know the 2nd appellant before.

PW12 was Ali Keinan Ahmed, a businessman at Hagadera. It was his evidence that on 30th July 2013, one Ahmed Abdullahi Salat called him at around 11 a.m. and asked him to send him Kshs 10,000/-, which he sent through his Mpesa No. 0718320813.

In cross examination by the 1st appellant, he said that did not know why Salat wanted the money. The 2nd appellant did not cross examine this witness.

PW13 was IP Samir Yunis, the officer in charge Hagadera Police Station base. He testified that on 30th July 2013, he reported to office at 6.00 a.m. went through the OB and found no report from the public. At around midday however, the officer at the counter informed him that one Hassan had reported a robbery with violence. The officer brought the reportee to his office and the reportee claimed to be making a report on behalf of his cousin Ahmed who had been confronted by 2 bandits in his pick-up while transporting miraa.

According to the witness, the reportee informed him that Ahmed would make a report that evening after his day's work. He thus assigned PC Mbiji to find out more, and asked the Police Officer to track the mobile money transfers. He however took charge of investigations.

According to the witness, Ahmed made a report to the police that evening, and said that they were confronted by 2 armed men, one with an AK47 rifle and the other with a pistol about 30 minutes drive from Hagadera. The reportee said that one of the robbers took control of the pickup and drove it into the bush, after ordering those on board that is, his wife and 2 other passengers to alight. He stated that the robbers robbed them of all money and personal effects and that as he did not have cash, he was forced to send Kshs 20,000/- through Mpesa No. 0718320813 which was received from two different services from Hagadera.

It was also his evidence that he (the witness) engaged the CIU (police) to track on the Mpesa transaction numbers, since the reportee said that once he sent the money the robbers caused the same to be withdrawn.

He stated that on the 1st August 2013, an officer from CIU informed him that they had narrowed down to a frequently used number 0723782141 which withdrew Kshs 20,000/- sent to Ahmed by the two robbers. He thus quickly assembled the officers and CIU officers who had managed to track the frequently used number to Dubshill shop in Hagadera, and PC Rono and others proceeded to town and arrested the 1st appellant and brought him to the police station, and he interrogated him.

It was his further evidence that the mother of the 1st appellant went to the police station and said her son was innocent but that she had warned him against involvement with some men who slept in his house. The police then asked her to take them to the residence of the 1st appellant and she took a team of

officers there, who arrested the 2nd appellant. According to him, it was the same team which had arrested the 1st appellant.

He testified that in the process, the officers recovered an AK47 rifle under the bed together with 69 rounds of ammunition. He produced the rifle as exhibit. He also received 5 magazines, a black coat and a jungle cap and an improvised pouch. He produced these as exhibits. In addition, he received a canvas bag and an assortment of mobile telephone parts and two white transparent polythene bags which he produced as exhibits.

It was his further evidence that with the two appellants in custody, he requested the police officers to take him to the house in order to acquaint himself of the real situation. On arrival at the house where items were recovered, he noticed that a hole had been dug under the bed where the items were hidden. He also found the male and female Block leaders at the Refugee Camp who confirmed that the first appellant harbored the 2nd appellant in his house.

He then proceeded to the police station but did not conduct an identification parade because the complainant was at the scene of the arrest and was also the person who pointed the two persons to the arresting officers.

He also visited the scene of attack about 8 Kms North of Hagadera town. He saw or confirmed the motor vehicle marks leading to the bush where it stopped and people were robbed of their possession.

He then prepared the charge's against the appellants and obtained a court order to obtain Mpesa transaction records. According to him, PW3 obtained the Mpesa transaction records and produced the same. He also produced the Nokia telephone recovered from the first appellant which was used frequently in communication with others. He identified the two appellants in the dock, as the people who were arrested.

In cross examination by the first appellant, he stated that the said appellant was arrested when he was called to collect money not knowing that he was being trapped by police officers. He stated that Dubshell was a shop dealing in cash and Mpesa transactions. He stated that the complainant had identified him and the 2nd appellant, as the persons who confronted him. He maintained that the telephone number was picked after investigations by CIU officers and produced in court by PW8, and was registered in the name of Hajir Osman. He stated that the 1st appellant was arrested in the company of a man who ran away. He maintained that the surrounding circumstances and the arrest pointed to the fact that the 1st appellant had committed the offences charged. He stated that after arrest, the 1st appellant led police officers to his house.

In cross examination by the 2nd appellant, he stated that the reportee did not mention the name of the 2nd appellant. He stated that the telephone produced in court as exhibit was in the name of Hajir Osman. He maintained however that the complainant testified that the 2nd appellant forced him under threat to transfer money to Hajir Osman. He denied having told the 2nd appellant at the police station, that there was no case against him. He denied using force to extract a confession. He maintained that the rifle and ammunition and other items were recovered under the second appellant's bed on which he was found sleeping in the house of the first appellant. He stated that all the phones used to transact the Mpesa money transfers were not recovered.

That was the end of the prosecution evidence.

When put on their defences, each of the appellants gave unsworn testimony. The 1st appellant Mohamed Loge Hussein stated that he was a refugee at Hagadera. That on 29th July 2013, he sat for standard 8 examinations, and proceeded to sleep inside the shop as a watchman. On the 1st of August 2013, when he went to open the shop, his mother asked him to tell her what stock he needed and then

asked him to go and buy additional stock after giving him Kshs. 11,000/-.

While at the market shopping, he received a call from someone who was at Abushill exchange. Since he was expected money from his sister, he went to the exchange and was arrested by a police officer who informed him that one Hajir had used his telephone and that the police needed him to show them where Hajir was. They then put him in the cells, took his fingerprints and took him to Garissa police station where he was charged. He produced in court some papers which he claimed were his examination papers and said that the police took his Kshs 11,000/- and his telephone.

In his defence, the second appellant Hassan Kerow Abdi said he was a refugee and that on the 1st August 2013 during the day, one, Ahmed Abdullahi Salat went to him with police officers. He was asleep in the house. Police knocked the door with Abdullahi Salat and he was told he was under arrest. They took him outside and asked him to give information which would lead to the arrest of Najib and Kasneb with whom he was not related. He told the police that he did not have any information about them and they took him to the police station where they still asked him about the same persons. When he said he did not know them, they put him in the cells. Later in the afternoon they took him to the Dadaab police station and the following night, officers took him to the bush and asked the to give them information. They then took him to the police station cells, put a rifle over his head, photographed him and took to the Garissa police station and charged him.

Faced with the above evidence, the learned magistrate found that the prosecution had proved its case against each of the appellants beyond reasonable doubt. The court thus convicted them on all counts and sentenced them.

This being a first appeal, we have to start by reminding ourselves that that the appellant in a first appeal is entitled to expect the evidence as a whole to be subjected to fresh and exhaustive examination and the appellate court's own decision on the evidence – see the case of **Pandya –vs- R(1957) EA 336**. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, it must make its own findings and draw its own conclusions, but give due allowance to the fact that it did not see witnesses testify to determine their demeanor – see the case of **Okeno –vs- Republic (1972) EA 32**.

We have re-evaluated the evidence on record. We have considered the written and the oral submissions of both the appellants on the one hand and the State. We have perused and considered the authorities cited to us. The appellants have raised several grounds of appeal.

They have complained that the prosecution omitted to provide proper documentary evidence for the production in court of the Mpesa transaction extracts in question, on which the 1st appellant was arrested.

The evidence on the Mpesa transaction relates to more than one mobile phone number. An extract of the Mpesa transaction was produced by a police officer PW9 PC Hussein Shale. He stated that 1st appellant Mohamed Hussein was involved in suspect Mpesa transactions but did not get the transaction information. He was stood down and came back to testify on 27/6/2014 when he stated that he now had the transaction information involving Mpesa Agent phone number 0725604952 and that money was sent to number 072560492 for Ali's number 0721937215. He also stated that another Kshs 10,000/- was received from number 0720 242154 and transferred by the recipient to 0723782141 – that is Kshs 9,890/= in the name of Hajir Osman.

He further stated that the Garissa CID (who did not testify) traced Mohamed Hussein (1st appellant) who was a common caller on number 0711818556. The witness was stood down yet again to obtain details.

When he came to court again on 18/8/2014, he stated that the CID Garissa were not able to exploit the mobile phones as they were time barred. He however clarified that a further Kshs 10,000/- was sent to Daud Hassan on mobile phone number 0718320813 from number 0720242152, and Kshs 10,000/- sent to Hassan's other number 0723782141. He stated also that airtime of Kshs 109/= was bought from No.

0718320813 and sent to No. 0725604952, and thereafter Kshs 9,890/= was transferred from 0718320813 to number 0723782141 in the name of Hajir Omar and another Kshs 9,890/- then transferred to the same Hajir Omar. He then produced the Mpesa transaction document as Exhibit 10, which is being contested on appeal.

We note that none of the names of the appellants appear in exhibit 10. The names that appear therein are HAJIR OSMAN, ABDI ALI, HAJIR OSMAN and ALI MOHAMED.

The Mpesa transaction is electronic evidence, whose admissibility was incorporated in our laws, not so long ago. Counsel for the 1st appellant has cited the decision in the Mombasa High Court case of **Republic –vs- Barisa Wayu Matoguda (2011)eKLR**, which we fully agree with, that there are special provisions of the law governing the admission of electronic evidence in court. The admission of such evidence is governed by section 106B of the Evidence Act (cap 80), which provides as follows:-

106B(1) “Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electromagnetic media produced by computer (herein referred to as computer output) shall be deemed to be a document, if the conditions mentioned in this section are satisfied in relation to the computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or any fact stated therein where direct evidence would be admissible”.

The word “**computer**” is defined under the Kenya Communications Act 1998, as any electronic, magnetic, optical or other high speed device or system which performs logical arithmetic and memory function by manipulations of electronic, magnetic or optical impulses and includes all inputs, processing, storage, software and communication facilities which are connected or related as a system network.

The data or use of mobile phones an Mpesa herein, being electronic data, falls squarely under section 106B of the Evidence Act. Therefore, for the same to be admissible in evidence it had to comply with the conditions set out in the section. The conditions to be fulfilled with regard to the computer before its data or information processed through it can be admissible as evidence, are contained in subsection (2) of the section. There is also the requirement of a certificate under subsection (4), which provides as follows:

106B(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section a certificate doing any of the following –

- a. **Identify the electronic record containing the statement and describing the manner in which it was produced.**
- b. **Giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by computer.**
- c. **Dealing with any matters to which conditions mentioned in sub-section (2) relates; and**
- d. **Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate)**

Shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.

In effect, for electronic evidence to be admissible a certificate as required under the above provisions of the law is mandatory. In the absence of such a certificate such evidence or printed data or information is admissible. In our present case, no such certificate was

tendered in court, so the exhibit on the mobile phones data purportedly produced by PW 10 was no evidence at all, and the trial court should not have relied on the same.

In addition to the failure by the prosecution to provide the certificate required by law, the evidence of PW 10 was hearsay evidence, as according to him, it was obtained by the CID Garissa. It was thus necessary for the CID from Garissa to come to court and testify on the way and circumstances in which the said print out was extracted. Such witnesses not having been called to testify, the evidence was not admissible.

Further, though PW 10 tendered evidence on a frequently used mobile number of the 1st appellant, the print out produced did not have any of those communications. It also did not contain any information on a mobile phone number in the name of the 1st appellant or associated with the 1st appellant.

We thus find that the electronic printout is not admissible in evidence. Even assuming it was potentially admissible, it was not brought through direct evidence of the Garissa CID Officers who obtained it and was thus hearsay evidence, and in any case did not touch any of the appellants. In our view therefore none of the two appellants could be convicted on the basis of the mobile phone printout produced by PW10. The fact that the 1st appellant was called on phone from Dubshle Mpesa shop to go and collect Mpesa money and the fact

that he went there could only be suspicion which is not adequate to connect him beyond reasonable doubt to the robbery offences.

The appellants have complained that they were not described in the first report to the police.

In our view, from the evidence on record, it is true that the complainants did not make a report at the police station describing any of the robbers. For the 1st appellant, he was said to have covered his face during the robbery. As for the 2nd appellant, though the incident occurred during in broad daylight at 10.00 am, no description was given of him by any of the complainants to the police. He was arrested because he was found sleeping in a house used by the 1st appellant.

The appellants have complained that no identification parade was conducted. The police claimed that the appellants were arrested in the presence of a complainant and therefore such identification parade would not have had much weight. Indeed no identification parade was conducted. From the evidence on record, it is clear to us that the appellants were not identified by any of the complainants. The evidence of identification on record is hazy and not conclusive. A conviction cannot be founded on such hazy evidence of identification – see the case of ***Cleophas Otieno Wamuga –vs- Republic – Criminal Appeal No. 20 of (1982) UR.***

In criminal cases the burden lies on the prosecution to prove an accused person guilty beyond any reasonable doubt. This position was clearly stated in the famous English case of ***Woolington –vs- DPP(1935)UKHL1***, and has been consistently applied in Kenya - see the case of ***Republic –vs- BMM(2014)eKLR*** and the case of ***David Muturi –vs- Republic (2015) eKLR*** relied upon by counsel for the 1st appellant. In the English case of Woolington case, the court stated as follows:-

“throughout the thread of English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner guilty If at the end of the whole case, there is a reasonable doubt created by the evidence given by either the prosecution or prisoner the prosecution has not made out a case and the prisoner is entitled to an acquittal”.

In our view, the prosecution did not tender sufficient evidence at the trial to prove any of the robbery with violence charges against the appellants.

What about the offences of possession of firearm, ammunition and ammunition accessories without certificate?

The prosecution did not call the mother of the 1st appellant who led the police to the house of the 1st appellant where the 2nd appellant was found sleeping in a bed, and the gun and ammunition was found in

the ground under the bed. However, the prosecution called the Block Hagadera Refugee Camp leaders PW7 Abdullahi Ahmed and PW8 Zahara Ali Farah who were present during the search. PWII PC Machael Rono was part of the police team who did the search when the items were recovered in the house. In our view, the prosecution called necessary witnesses regarding recovery of the items. In any case, the 1st appellant could himself have called his mother to testify as a witness, if he wished to.

We find no material contradictions in the evidence regarding the recovery of the items under the bed. In our view possession was proved. Possession is physical possession or control. In the Concise Oxford English Dictionary 12th Edition, possession is defined as – “**state of possessing something, visible power or control, as distinct from lawful ownership**” The prosecution evidence was that the items were recovered in the house of the 1st appellant under a bed on which the 2nd appellant was sleeping. There was no suggestion that the items were recovered elsewhere. Though the 2nd appellant claimed that he was taken for interrogation in the bush and a rifle was placed on his head, and then was charged with an offence of possession of that firearm, he did not explain how the other items were also recovered and connected with him.

With regard to dusting, we are of the view that such dusting would not add value to the prosecution case as there was no allegation or evidence that any of those items was found in the hand of any of the appellants. The items were covered in cloth or polythene material under the bed. As such no fingerprints were likely to be found.

PW10 Lawrence Nthiwa a firearms examiner produced the firearms examiners report which confirmed the items to be a firearm, ammunition and accessories. In our view possession of the items was proved, and the items were proved to be a firearm, ammunition and accessories.

The appellants have also complained that their alibi defences were not considered by the learned magistrate. Our perusal of the record does not show that any of the appellants suggested that he was somewhere else during of the prosecution evidence. It was in their unsworn defences, that they stated that they were not at the scene of the robbery, with the 1st appellant saying that he was sitting exams. The evidence on record shows that they were both present when the firearm and other items were recovered. In our view, the alibi defence was an afterthought meant to divert attention from the real issues.

Having evaluated all the evidence on record, we find that the prosecution did not prove the appellants guilty of the robbery charges beyond reasonable doubt. The evidence on record is of mere suspicion. Such evidence however strong such suspicion cannot be the basis for a conviction in a criminal case see the case of *Sawe –vs- Republic (2003) KLR 364*. We will therefore acquit them of the robbery charges.

We however find that the prosecution proved beyond reasonable doubt count V for possession of a firearm without a firearm certificate, Count VI for possession of ammunition without a firearm certificate, and count VII for possession of firearm accessories without a certificate.

We thus quash the conviction on the four counts of robbery with violence and set aside the sentence of death imposed. We however, uphold the conviction for count V, for possession of firearm without a certificate VI for possession of ammunition without a certificate and count VII for possession of firearms accessories without a certificate and sentence the appellants to serve 5 years imprisonment for count V, 5 years imprisonment for count VI, and 5 years imprisonment for count VII. The sentences will run concurrently from the date they were sentenced by the trial court.

Delivered and dated on 1st March 2016.

GEORGE DULU

EDWARD MURIITHI

JUDGE

JUDGE