



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO.87 OF 2012
CONSOLIDATED WITH CR. A. NO. 133 OF 2012

CAROLINE WANJIKU WANJIRU.....1ST APPELLANT

DENNIS MACHARIA MWANGI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM the judgment of the Hon. E. Nderitu(Senior Resident Magistrate)

in Nairobi Chief Magistrate's Criminal Case No.2263 of 2009 delivered on 20th January, 2012)

JUDGMENT

The two appellants were jointly charged alongside three others with two counts of robbery with violence. The 1st appellant was the first accused whereas the 2nd appellant was the third accused. Particulars of Count I were that on the 27th November, 2009 at Bowling Green Restaurant, City Park in Nairobi, within Nairobi area jointly with others not before court and while armed with dangerous weapons namely an AK47 rifle and pistols, robbed Paul Mbugua Kibe of a car make Mercedes Benz registration No. KAW 200 L and a mobile phone make Samsung all valued at Kshs.1, 456,000/- and immediately after the time of such robbery killed the said Paul Mbugua Kibe.

Particulars of Count II were that on the same date at the same place jointly with others not before court and while armed with dangerous weapons namely an AK47 rifle and pistols robbed Patrick Munene Mwangi of a Kenwood compact disc player, 30 compact discs plus two mobile phones make Alcatel model H2 plus Samsung D500 all valued at Kshs.54,500/- and at the time of such robbery threatened to cause personal harm to the said Patrick Munene Mwangi.

The 1st appellant was charged with a third count of giving false information to a person employed in the public service contrary to Section 129 (a) of the Penal Code in that on 29th November, 2009 at Parklands Police Station in Nairobi within Nairobi Area informed No. 59104 Corporal Benson Moenga that she had been robbed of a mobile phone make Nokia 112 and cash Kshs.7,000/- by robbers who thereafter abducted her which information she knew or believed to be false, intended thereby to cause the said No. 59104 Corporal Benson Moenga to believe that she had been robbed and subsequently abducted, hence commenced investigations towards recovery of the said property and apprehend the purported robbers and abductors, which the said No.59104 Corporal Benson Moenga ought not to have done if the true state of facts respecting to which such information had been given was known to him.

The 2nd appellant was charged under Count IV with handling stolen property contrary to Section 322(2) of the Penal Code. It was alleged that on the 11th December, 2009, at Dandora in Nairobi within Nairobi area otherwise in the cause of stealing dishonestly retained one mobile phone make Alcatel model H2 and 30 compact discs knowing or having reason to believe them to be stolen property or unlawfully obtained.

The 1st appellant was found guilty in Counts I and III. She was sentenced to death in Count I and the penalty in Count III was held in abeyance. The 2nd appellant was found guilty in Counts I and II. He was sentenced to death in both counts. As regards Count No.IV which the court treated as an alternative charge no orders were made in the sentence despite the fact that the 2nd appellant was found in possession of the goods outlined in the particulars of the charge. We shall address this issue elsewhere in this judgment.

Both appellants were aggrieved by the judgment of the learned trial magistrate and preferred this appeal. They separately filed their Grounds of Appeal. In a petition of appeal filed on the 22nd March, 2012 the 1st appellant raised the following main grounds of appeal:-

- a. **That the learned trial magistrate convicted her in the first count of robbery with violence on the basis of an alleged confession which she had retracted.**
- b. **That the learned trial magistrate relied on inconclusive evidence of a mobile phone belonging to her in convicting her.**
- c. **That the case was not proved beyond reasonable doubt.**

The 2nd appellant in a Petition of Appeal filed on 18th May, 2012 raised the following main grounds of appeal:-

- a. **That he was convicted on the basis of contradictory and uncorroborated evidence.**
- b. **That he was convicted on extraneous evidence that had not been adduced by the prosecution witnesses.**
- c. **That the trial court applied the wrong standard of proof thus arriving at an erroneous decision.**
- d. **That the trial magistrate erred in sentencing him to death in two counts thereby occasioning him a miscarriage of justice.**

At the hearing of the appeal, the 1st appellant was represented by Learned Counsel Mrs. Betty Rashid whereas the 2nd appellant was in person. Both relied on written submissions. Mrs. Rashid for the 1st appellant urged that the only evidence used to convict her on the 1st count of robbery with violence is that of her alleged confession which she retracted. She submitted that although a trial within a trial was conducted the 1st appellant's statement was admitted in evidence.

She further urged that a repudiated statement lacked evidential value, noting that the statement had been recorded after the 1st appellant had been in custody for 13 days. Counsel argued that the statement had been taken in contravention of the laws governing confessions. Counsel also raised issue with the fact that the retracted statement of the 1st appellant was corroborated by the retracted statement of the 5th accused person. She observed thus, **“the confession no doubt explains the exact circumstances of the offence.....”**

On the charge of robbery with violence she argued that it was not supported by any evidence implicating the 1st Appellant as no evidence was adduced in relation to the robbery of the deceased's property. Lastly, it was her position that the learned trial magistrate erred in relying on inconclusive evidence of a mobile phone belonging to the accused as a basis for the conviction.

The 2nd appellant submitted that the evidence of PW1, the wife of the deceased Paul Mbugua Kibe did not link her to the charges of robbery with violence because she did not name him as one of the persons who were calling her demanding for ransom for the release of her deceased husband. Equally, he submitted

that PW2 from whom PW1 had bought the stolen phone did not also link him to the offences at hand. It was his submission that the prosecution witnesses gave contradictory and inconsistent evidence which did not link him to the offences. He further submitted that there was no evidence to prove that the recovered items were stolen from the complainant in Count II.

MissNyauncho, learned State Counsel opposed the appeal and urged that the 1st Appellant's repudiated statement was admitted in evidence after trial within a trial was conducted. Therefore, the repudiated statement had evidential value as it was taken according to the laws governing confessions. She also argued that a retracted confession was admissible and as such the learned trial magistrate was right to hold that the same was corroborated by the confession of the 5th accused.

Finally, she maintained that the mobile phone was properly produced in court and it was not necessary to call an expert from Safaricom Mobile Phone Subscriber to produce the IMEI print out as its production complied with Section 68 (1) (f) of the Evidence Act.

It is now our onerous duty to re-evaluate the evidence on record and come up with our independent findings. We think we should first address the patent question of whether the 1st appellant retracted her confession which was the basis of her conviction; and whether a retracted confession was admissible.

The 1st appellant testified that she was made to sign a document at Parklands Police Station on 17th December 2009 by PW12, Stephen Olao. She alleged that she was not given an opportunity to go through it and when she enquired if she could do so she was threatened that she would be beaten. Having been tortured previously for 13 days she opted to sign the statement out of fear of being subjected to further torture. It was her position that she did not voluntarily sign the said statement. She informed the court during cross examination that though the signature on the statement was hers, the handwriting was not.

The basis of the law on confession can be found in the following:

- i. **Articles 49(1) (b), (d) and 50(2) (a) and (4) of the Constitution.**
- ii. **Sections 25 to 32 of the Evidence Act.**
- iii. **The Evidence (Out of Court Confession) Rules, 2009; and**
- iv. **The case law.**

The effect of Articles 49(1) (b), (d) and 50(2) (a) and (4) of the Constitution is that:

(49)(1) An arrested person has the right to:

a) Remain silent

b) Not to be compelled to make any confession or admission that could be used in evidence against him.

(50)(2) Every accused person has the right to a fair trial which includes the right:

(a) To be presumed innocent until the contrary is proved.

(4) Evidence obtained in a manner, that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

The Evidence Act, on the other hand makes the following provisions with regard to confessions by criminal suspects;

Under Section 25A(1):

- i. **A confession or any admission of a fact tending to prove the guilt of an accused person is generally not admissible.**
- ii. **Only confessions and admissions made in court before a judge, a magistrate or made before a police officer (not the investigating officer) of the rank higher than Chief Inspector and a third party of the accused person's choice are admissible.**

Under Section 26 any confession or admission purported to be made by an accused person which appears to the court to have been made as a result of any inducement, threat or promise by a person in authority is not admissible if it gives the accused person grounds to believe that by making it he could gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Under Section 32(1), a confession made by one accused person which affects his co-accused person and the confession is proved, the court may take the confession into consideration as against the co-accused person and the accused person whose confession has been admitted.

All confessions therefore not made in court must be obtained in accordance with the **Evidence (Out of Court Confession) Rules 2009**. There is no room for admissibility of a confession without the necessary safeguards of the law as provided under **Sections 25 to 32 (inclusive) of the Evidence Act** and under the Evidence (Out of Court Confession) Rules.

As briefly noted earlier in the instant case, PW12 sought to produce a statement he had recorded from the 1st appellant on 17th December 2009. According to him, the statement was made voluntarily by the 1st appellant at the police station. An objection to its production was raised on grounds that it was not made voluntarily. Counsel for the 1st appellant argued that the statement was obtained without complying with the Evidence (Out of Court Confession) Rules and more specifically Rule 4(1) which outlines the rights of an accused person when he is recording a confession. For avoidance of doubts, we duplicate the same as under;

4. (1) where an accused person intimates to the police that he wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person-

- a. **Has stated his preferred language of communication;**
- b. **Is provided with an interpreter free of charge where he does not speak either Kiswahili or English;**
- c. **Is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;**
- d. **Is informed of his right to have legal representation of his own choice;**
- e. **Is not deprived of food, water or sleep;**
- f. **Has his duration, including date and time of arrest and detention in police custody, established and recorded;**
- g. **Has his medical complaint, if any, adequately addressed;**
- h. **Is availed appropriate communication facilities; and**
- i. **Communicates with the third party nominated by him under paragraph (3) prior to the caution to be recorded under rule 5.**

The trial Magistrate consequently ordered that a trial within a trial be conducted to determine if the statement was taken in accordance with the law. This was conducted on 11th February 2011. In her ruling dated 24th February 2011, she found that the statement was obtained in conformity with the set out Rules and as such, was admissible in evidence. She made the following remarks:-

“Accused behavior is not consistent with a person who has been tortured. It is no wonder she confirmed to PW1 that she had not been threatened or subjected to any inhuman treatment had not been deprived of food and water and had no medical complaints whatsoever. I have no doubt that having expressed her wish to confess, she gave out her confession voluntarily

without any torture, threat or degrading treatment. It is clear that PW1 complied with the provisions of out of court confession rules. He established and recorded the period accused 1 had been in custody which is 13 days. He informed accused her right to call a friend, relative or counsel but she opted to confess in the absence of all of them. He established accused health condition and enquired if she had been deprived of food and water. That accused preferred to confess in English cannot be doubted noting that this court had an opportunity of hearing her speak in perfect English language during cross-examination and in part in examination in chief. The upshot of all this is that I do find that the confession production of which is objected was obtained from accused 1 and that the same was obtained in conformity with the set out rules and as such is admissible in evidence.”

We have satisfied ourselves that Rule 4(1) of the aforesaid Rules was well complied with. For the reasons outlined in the learned Magistrate’s ruling, we shall now address ourselves to the issue of whether the trial court relied on a retracted confession. We begin with the question of “What is a retracted statement?” We’ll establish this using the following case law;

In the case of Tuwamoi -Vs- Uganda [1967] EA 84 p. 88, the Court of Appeal for Eastern Africa said:

“... a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to retract, to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that statement was not a voluntary one.”

In another case of Komora–Vs- Republic (1983)KLR 583, the Court of Appeal held:

1. “There is no rule of law or practice that requires corroboration of a retracted confession before it can be acted upon, but it is improper to act upon it in the absence of corroboration in material particulars; unless the court is satisfied of its truth after a full consideration of the material facts and surrounding circumstances.
2. A retracted confession occurs when the accused person admits that he made the statement recorded but now seeks to retract or to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that the statement was not a voluntary one (Tuwamoi–Vs- Uganda [1967] EA p 84 & 88).”

In a later Court of Appeal case Thiongo–Vs-Republic (2004)1EA333, the court held that:

“There is no rule of law that a court cannot act on a retracted and/or repudiated confession unless it is corroborated in material particulars. What exists is a rule of prudence that a court should be cautious to act on such a confession unless it is corroborated in material particulars (Tuwamoi -Vs- Uganda [1967] EA 84 (adopted)) in the current case, the retracted confession was amply corroborated.”

The trial magistrate in the instant case exercised caution by ordering a trial within a trial. During that trial, the 1st appellant was unable to rebut the prosecution’s evidence that no force, coercion, fear or torture was ventilated against her so as to obtain the confession. We then conclude that the statement of the first appellant given to Chief Inspector Stephen Olao OCS Parklands Police Station at the time was voluntarily given. It follows therefore, that it was in the learned trial Magistrate’s mind that what the 1st appellant said in her statement was what she wanted to say and not what she was coerced to say by Chief Inspector Stephen Olao. It was thus not a retracted confession as it was given voluntarily. We therefore, find no reason to interfere with the trial Court’s finding on admitting the statement in evidence.

For us to adequately consider the other issues for determination, it is important that we briefly re-look at the evidence on record. The history to the robbery is set out majorly in the evidence of PW4 Patrick Munene Mwangi who was the complainant in Count II. He worked as a supervisor at Bowling Green Restaurant at City Park, Nairobi. On 27th November, 2009 at about 10.00 p.m., he was taking stock at the restaurant’s counter. By then, most of the patrons had left but he was with Robert Njiru who was the

counterman. At about 10.30 p.m., when the gate to the restaurant had already been shut by the watchman, a vehicle drove in. The watchman opened the gate, and three young men alighted, proceeded to the bar and sat near the counter. They ordered for drinks, as one of them went round the compound. Five minutes later, two other motor vehicles were waiting at the gate to drive in and as the watchman went to open the gate, he was accosted by the man and a commotion ensued. As PW4 stood up to go and find out what was happening, the young men seated near the counter flashed a pistol and ordered them to lie down. The music inside the restaurant was switched off. PW1 had placed his mobile phone, make Alcatel, on the music system where as it was charging. He could not quite recall what the young men did, but when all was quiet they got up and found the men gone. That is when he found out that his items as listed in Count No. II had been stolen. His colleague, Robert Njiru also lost a mobile phone, make Samsung. PW1 spent the night in a lodging where he borrowed a mobile phone to call a waiter who in turn called the proprietor of the restaurant. The latter then called police from Parklands Police Station. Outside the restaurant was a Mercedes Benz white in colour registration No. KAW 200 L which had been abandoned. The following day, they recorded their statements. On 8th December, 2009 Robert Njiru was arrested by the police on allegations that he had operated his mobile phone against the advice of the police. PW1 was also locked up at Parklands Police station cells where together with Njiru, he remained for five days.

While all this was going on, PW1, Catherine Njeri Nduati the wife of the deceased, Paul Mbugua Kibe was frantically looking for her husband. She testified that on the 27th November, 2009 at about noon, she was at home with her deceased husband. The deceased told her that he was leaving for Westlands and thereafter to see a dentist at M. P. Shah Hospital. He left home while driving a Mercedes Benz KAW 200L. By 9.00 p.m, the deceased had not returned home but PW1 communicated with him and he told her that he was at Plums Club in Westlands and would be returning home soon. At 11.00 p.m. the deceased had not returned home and she called him again. This time his mobile phone had been switched off. She got worried and thereafter she saw several missed calls from telephone No.0722-325021. On calling this number, a male asked her whether she was Margaret Njeri but she responded that her name was Catherine Njeri. She also confirmed to the caller that she was the wife to Paul Mbugua (the deceased). The caller told her he was in a group of people who were holding her husband and that they were demanding a ransom of Kshs10, 000,000/- for his release. They warned her not to involve police officers, failing which she would find him in a morgue. They assured her that he was safe and they allowed her to talk to him at around 7.00 p.m. the following day. She was later called by a different number and when she spoke to her husband, he requested her to raise at least Kshs.2, 000,000/- from relatives. She assured him that she would ensure she raised the money and she would maintain a good relationship with the abductors. She contacted her siblings who were able to raise Kshs.600, 000/.

On the third day, which was on a Sunday, she asked to talk to her husband but they indicated that she had not made any effort to raise the money and disconnected her. On the next day Monday, they called her and she told them how much she had raised. They requested that she increases the amount to Kshs.800,000/-. That is when the abductors told her to board a *matatu* and would direct her where to deliver the money. She was directed to various destinations which led her to Dandora. As she was walking as directed, she was approached by young men in their early thirties to whom she gave the money. They assured her they were the men talking to her on phone and she recognized the voice of one of them as the person who was talking to her on phone. She demanded to see her husband but the men took off assuring her that her husband would be home by night together with his mobile phone. They then switched off the phone they were communicating with. Sadly, the deceased did not return home. On 31st November, 2009, his body was found in Kangundo and later transferred to the Lee Funeral Home.

PW2, Jane Muthoni Kiarie, purchased a Nokia mobile phone, model 1112, (exhibit 6) from the 5th accused person on 3rd December, 2009 and the police traced it to her house on 11th December, 2009. That is when she led the police to the house of the 5th accused person where they arrested him together with the 3rd and 4th accused persons. They were taken to Gigiri Police Station where they learnt that the mobile phone did not belong to the 5th accused but to Caroline Wanjiku (the 1st appellant). The 1st appellant had been arrested and was at the police station from 11th to 18th of December, 2009. PW2 did not know the 1st appellant and had never transacted any business with her but had known the 5th accused

since childhood.

PW3, Robert Njiru's evidence tallied with that of PW4.

PW5, Obadiah Nyaga Karuri, was the watchman guarding the restaurant at about 10.30 p.m. when the robbers struck. While corroborating the evidence of PW4, he testified that when he opened the gate for a vehicle that wanted to drive into the restaurant's compound, he noted that there were two vehicles which were driving close to each other. The second motor vehicle had two persons who got out and pointed a gun at him. Another man kicked him and he fell down and lost consciousness. In court, he identified an AK47 rifle (P. Exhibit 11) as the gun that was pointed at him alongside its magazine. When he regained consciousness, he saw a Mercedes Benz (P. Exhibit 6) at the parking yard. He later learnt that PW3 and PW4, who were inside the restaurant at the time had also lost some of their personal goods which were later recovered. It was his further testimony that although there was electricity lighting where he was attacked, he was not able to identify the robbers who attacked him.

PW6, Corporal Benson Moenga of Parklands Police Station testified that on 29th November, 2009 at about 3.30 p.m., the 1st appellant went and reported that she had been abducted while in the company of a friend, one K-Baba, on 27th of the same month, and that she had been held hostage until 28th November, 2009 at 8.00 p.m. She reported to him that she was in a Mercedes Benz KAW 200 L. PW6 recalled that on the same day, PW1 had reported that her deceased husband Paul Mbugua had gone missing since the 27th November, 2009 and that he had left home in his Mercedes Benz KAW 200 L. He booked the report of the 1st appellant. According to the 1st appellant's report, she drove to Bowling Green Restaurant with her friend and as they were parking their vehicle, they were surrounded by a group of armed men who pulled them out of their vehicle into another motor vehicle. They ransacked them and robbed them of Kshs.7,000/-, a mobile phone and personal documents. They were thereafter driven into a deserted place and put into two separate rooms. On the following morning, they were served with tea and food for lunch. In the evening, the 1st appellant and another woman she had found in the room she was being held in were driven off and dumped at another place which she came to know was Lironi. A good Samaritan assisted her with fare and she reported the matter at Kikuyu Police Station where she was advised to go to Parklands Police Station. The investigations were later taken over by Gigiri Police Station and that is when PW6 learnt that the friend who the 1st appellant said had accompanied her, had been killed. Investigations that were thereafter carried out revealed that the 1st appellant's report was false and that indeed, she was a culprit to the robbery.

PW7, Chief Inspector John Kipyegon, recorded the confession of the 4th accused. According to him, he followed all the rules and regulations as laid down in the Evidence (Out of Court Confession) Rules, 2009.

PW8, Police Constable Christopher Mugira of Parklands Police Station was informed by his colleague, Mr. Ogweni of an abandoned Mercedes Benz at Bowling Green Restaurant. They proceeded to the restaurant from where they towed the vehicle to Parklands Police Station.

PW9, Chief Inspector Henry Kiambati of CID Gigiri, recorded the confession of the 5th accused person.

PW10, Police Constable Solomon Waweru who was attached to Gigiri CID participated in the search for the deceased Paul Mbugua Kibe. The body was found at Kangundo after which they moved it to Lee Funeral Home for preservation.

PW11, Rashid Nyiva Kavuvi, testified that she was an agent and a caretaker of plot christened Muyuyu House in Dandora where she had lived since the 9th December, 2009. Among the tenants in the plot were the 3rd accused and his wife (the 5th accused). On 11th December, 2009, a young woman requested to see the 5th accused and she directed her to her house. After a short while, the young woman came out with a group of people and they returned to the house shortly. In another few minutes, they came out of the house holding Macharia (2nd appellant) and 5th accused's mobile phones, a small bag and a pistol. When

PW11 inquired what was happening, she was told by people who introduced themselves as police, that they had arrested the two accused persons. She identified the small bag that was with the two accused persons in court.

PW12, Chief Inspector Stephen Olao took the confession statement of the 1st accused person.

PW13, Benjamin Mutua Kimani, a resident of Komarock and a village elder of Kiunga Kimwe Village, testified that on 30th November, 2009 at about 6.00 a.m. he received information from a young boy that there was a person lying in a farm. He proceeded to the farm where he confirmed that the person was dead and was lying with the face down. The body was fully dressed and the clothes were soiled. He appeared to have an injury on the head but he did not recognize him. He reported the matter to the chief who in turn called the police who visited the scene and carried the body away.

PW14, Benjamin Kilonzo and the Assistant Chief of Komarock Sub-location, testified that on 30th November, 2009 at about 6.30 a.m. he received information from PW13 about the body of a person that was lying in a farm. He proceeded to the scene and confirmed the report. The body was swollen and had head injuries. It also had soiled clothing and one shoe. The blood on the body was not fully dried. PW14 called the OCS of Kangundo Police Station who, together with his officers, proceeded to the scene and carried away the body.

PW15, Chief Inspector Alex Mundindi Mwandawiro, a firearms examiner, examined a pistol and a rifle that had been brought to him by Police Constable James Rono. The two firearms were an AK47 serial No. 22845 and a colt pistol serial No. 2091969 which were produced as P. Exhibits 11 and 12 respectively. He also examined two magazines and 25 rounds of ammunition. The firearms were found to be in good general and mechanical condition and capable of being fired, while the ammunitions were live as defined by the Firearms Act.

PW16, Corporal Suleiman Opondo of CID Kangundo was among the officers who collected the body from the farm where it was found by PW13 and PW14. He testified that the deceased was identified by the relatives three days thereafter. He had received information that the deceased had been kidnapped within Parklands area.

PW17, Police Constable Kiprotich Rono of Gigiri CID was the investigating officer in the case. His testimony was that he took over the investigations from officers from Parklands Police station. He summed up the evidence of all the prosecution witnesses. In addition, he testified that he got a mobile phone print-out from Safaricom with a view of establishing the communication between PW1 and the abductors. PW1 was using a mobile phone No.0722-325021 and was receiving calls from Nos. 0714-079902 and 0718-547903. The first No. 0714-079902 belonged to one employee of Bowling Green Restaurant who had been robbed during the robbery. The second Number 0718-547903 belonged to one of the suspects, Francis Waweru (4th accused). He went on and requested for the IMEI number of the mobile phone reported to have been stolen from Baoling Green. The same was number 35806801-0706720 which would show the history of all the calls made and received from its line from 26th November, 2009. It was linked to telephone No. 0722-775723 which belonged to Caroline Wanjiku the 1st appellant herein. She had earlier reported that the phone had been robbed from her. However, the police established that the phone was still in use even after the purported robbery and that it had been paired with another line No.0725-867220.

Police officers from the Special Crime Prevention unit officers established that the 1st appellant worked for Channa Construction Company. Upon interrogation by PW17, she indicted that she had been kidnapped together with her boyfriend at Bowling Green Restaurant after which they were taken into separate rooms where they were confined and thereafter driven to a place in Kikuyu and abandoned. PW17, not being convinced by her story, locked her up in the cells and begun to track the IMEI number that was traced to Dandora Silanga area. The call was received by Jane Muthoni Kiarie (PW2), who still had the phone inside of which was the SIM card No.0725-867220. PW2 disclosed that she had bought the phone from Joyce Wangui (5th accused). She led PW17 to the house of the 5th accused where they found

her with a man who introduced himself as her husband (2nd appellant). In the house, were also the 4th accused, who said was their house-help and two others. He arrested all of them. From the house he recovered a bag which had several CDs which were later identified by PW3 as having been stolen from the Bowling Green Restaurant. From the 2nd appellant, PW17 recovered an Alcatel mobile phone which had been robbed from PW4 at the restaurant. The 5th accused told PW17 that the Alcatel phone belonged to one Shiku who had left with her husband on the night of 27th November, 2009. While at Gigiri Police Station, the 5th accused identified the 1st appellant as the said Shiku. The 1st appellant did not deny this fact. The 5th accused denied involvement in the robbery but told PW17 that her husband had been to their house on the 27th November, 2009 in the company of the 1st appellant and that she was ready to assist the police in tracing the other persons who were with her husband.

On 12th December, 2009, the 5th accused took the DCIO – Gigiri together with Special Crime Prevention and Flying Squad officers to a building within Juja area where she said the other persons lived. At about 6.00 a.m. a saloon vehicle drove to the gate of the building and when the occupants spotted the police officers, they sped off towards Thika Road. The police gave a chase into Zimmerman area where they cornered the vehicle. The passenger on the front seat alighted and attempted to shoot at the officers with an AK47 rifle but was gunned down in time. The other two occupants of the vehicle were also gunned down as they attempted to alight from the car. From the driver's seat, an American Colt Pistol was recovered. The AK47 had 25 rounds of ammunition. From the suspect who had the AK47 rifle, a Samsung mobile phone which had been robbed from PW3 was recovered. It had a SIM-card with No.0714-079902 which was one of the numbers that were used to call PW1 demanding for ransom.

PW17 further established that the deceased was well known to the 1st appellant and the 2nd accused. On the fateful day, the deceased had communicated with the 2nd accused who owned telephone line No.0720-370193. The deceased's line was No.0722-781210. PW17 established that the 2nd accused had invited the deceased and the 1st accused for supper at Bowling Green Restaurant. Prior to driving to the Bowling Green Restaurant, the deceased had arranged to meet the 1st appellant at Plums Restaurant. It is from here that the 1st appellant convinced the deceased to call the 2nd accused who invited them for supper. According to PW17, the assailants had pre-arranged to have the deceased kidnapped as they perceived him to be having money. After the kidnap, they demanded for a ransom of Kshs.10,000,000/-. The 2nd accused was arrested at Gachie area where the police were led by the 1st appellant. The 4th accused told PW17 that the people involved in the kidnap were many and each one of them got Kshs.42,000/- from the ransom given. PW17 further testified that the persons who were gunned down included a taxi driver who was driving the car, one Simo and Kariuki alias Karish who had the AK47 rifle. PW17 also participated in searching for the deceased until his body was found within Kangundo area.

The 1st appellant gave an unsworn statement of defence in which she denied involvement in the offences. She said that she was a secretary with Channa Construction Company. On 4th December, 2009, she went to work as usual and at 11.00 a.m. four police officers went to her place of work, arrested her and escorted her to Gigiri Police Station where she was handed over to the investigating officers. She confirmed to the police that she knew the deceased since January, 2009 and she had last met him in June, 2009. The police officers escorted her to her house where they recovered nothing but she was returned to the cells. She claimed to have been severely tortured by male police officers who also threatened her with death with a view to extracting information from her. On 17th December, 2009, she was transferred to Parklands Police Station where she was given a document to sign without being given an opportunity to read it through. She stated that although she was charged with robbing the deceased, she was not with him on the fateful night and that she did not visit Bowling Green Restaurant. She denied making any report of a robbery against her at Parklands Police Station.

The 2nd appellant also gave an unsworn statement of defence. He recalled that on 11th December, 2009, his friend, one Njeri, called him to go and fix a television aerial. While at his friend's house, at about 2.00 p.m., he heard noise at a neighbour's house. When he went out to find out what was happening, he was pushed back by an armed man together with another neighbour named Thairu. They were ordered to lie

down as the house was searched. They were then handcuffed, bundled into a waiting car and driven to Gigiri Police Station. In the cells, he met PW3 and PW4 but who were later released. He was charged on 18th December, 2009 for offences he said he did not participate in.

Having summarized the evidence on record, we now determine whether the learned trial magistrate relied on inconclusive evidence of a mobile phone belonging to the 1st appellant that was used as a basis for convicting her.

The 1st appellant challenged the trial magistrate's findings that a mobile phone belonging to her was used to communicate in the robbery. The line number was marked as P.Exhibit No. 23. The IMEI number that was in the phone was 358068010766720. She argued that the evidence adduced by the prosecution on this number was inconclusive without calling an expert from Safaricom to produce the IMEI number. She also challenged the evidence of the 5th accused person regarding the said mobile phone as being weak and unacceptable in law.

The 5th accused person had disclosed how her husband and the 1st appellant went to their house where the 1st appellant spent the night on their sofa set and left her phone Nokia 1110 which the 5th accused sold to one Jane Muthoni. This evidence was corroborated by PW2 who testified that she had bought the mobile phone from the 5th accused. A confirmation of this evidence was made by PW17.

PW17 interrogated the 1st appellant who, by that time, had been arrested and was in custody. She told him that she had been kidnapped together with her boyfriend and taken to an unknown place where they were put in a room and later separated and released. He was not convinced with her story whereupon he arrested her. He sought a print out of the mobile line which result gave him the mobile IMEI number as 358068010766720 which was evidentially linked to her phone by a print out. Using the number, he was able to track and communicate with PW2 at Dandora Silanga area. He managed to trace PW2 who explained that she bought the phone from the 5th accused who in turn took PW17 to her house where they found the 3rd and 5th accused. It is abundantly clear that the report by the 1st appellant on 29th November 2009 at Parklands Police Station in Nairobi that she had been robbed of a mobile phone make Nokia 1112 was well choreographed by her in an effort to cover up her participation in the robbery. Besides, her phone was found as not having been lost but had actively been used by her co-accused immediately after the robbery. As such no evidence of the phone was concocted against her. The evidence of the phone linked the 1st appellant as one of the master minds of the robbery.

On whether the appellants were convicted based on contradictory, uncorroborated and unreliable evidence, it was the 2nd appellant's defence that the evidence of PW11 and PW17 was inconsistent and contradictory on the issue of ownership of the house from where he was arrested. He argued that the trial Magistrate ought not to have believed PW11 and PW17 on this issue as the said house belonged to the 5th accused.

We have analyzed the testimony of PW11, the caretaker of the plot where the 2nd appellant and the 5th accused were arrested and note that in her testimony, she indicated that she had not stayed there for long. However, she was able to clearly point out where the 5th accused person stayed on the 1st floor in the plot. This was corroborated by PW17 whose findings established that the 2nd appellant and the 5th accused were arrested together in that house where they lived together as husband and wife. We do not find any contradiction in that piece of evidence.

On the issue of whether the learned trial magistrate convicted the appellants based on extraneous evidence that had not been adduced by the witnesses, we think that the assertion is far-fetched. The 2nd appellant submitted that he had explained in his defence how he came to be in possession of the stolen phone. However, a look at the proceedings shows that no explanation was offered in this respect. The only thing he alleged was that he asked for his phone when he was taken to Parklands Police Station and he was told that it would be handed over to him upon his release. During cross-examination by the 2nd appellant,

PW17 stated that he prepared an inventory of the stolen items they recovered which was signed by both the 2nd appellant and his wife 5th (accused). Amongst those items was the phone, make Alcatel and the same was proved to have been stolen from the counterman at Bowling Green Restaurant together with a CD bag and several CDs. It was produced in court as P.Exhibit 9. The 2nd appellant did not give an explanation of how he came to be in possession of the said phone. We are minded that the burden of proof in criminal proceedings is always on the prosecution to prove its case beyond all reasonable doubt. But where an accused is found in possession of a stolen item, the burden shifts to him to explain his possession of the property. See **Malingi –Vs- Republic (1989) KLR, 225** in which the Court of Appeal stated that:-

“By application of the doctrine (to wit doctrine of recent possession) the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he had in his possession had been stolen; it had been stolen a short period prior to the 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 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 item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.”(emphasis ours)

In the present case, undoubtedly that phone was taken from the possession of the 2nd appellant after having been stolen during the subject robbery. It had been stolen within a short period before his arrest. He was linked to the robbery at Bowling Green Restaurant from where the phone was stolen. He did not rebut these incriminating facts leaving no doubts that he was as guilty as charged.

As to whether the trial magistrate applied the wrong standard of proof in the case thereby arriving at an erroneous decision, we think that that submission has no basis. Both appellants were convicted based on a comprehensive summary of the prosecution’s case against their weak defences that did not dislodge the prosecution’s evidence. In her summary, the learned trial magistrate observed that the prosecution had proved its case beyond all reasonable doubt. All the evidence crystallized demonstrated that when the appellants committed the robbery they were in the company of others and they were armed with guns. They used actual violence to the victims and thereafter killed the deceased Paul Mbugua Kibe and they also stole property belonging to their victims. Hence, all elements of the offence of robbery with violence were proved. It was also proved that the 1st appellant gave false information to PW6 that she had been robbed. Further, the 2nd appellant was found in possession of the stolen goods and he could not explain how he came by them. Having said so, it is our view that the case was proved beyond all reasonable doubt and that the appellants were respectively guilty in all the four counts.

Finally, we must address ourselves on the issue of sentencing. **Firstly**, we observe that the learned trial magistrate was wrong in finding that Count IV was an alternative charge whereas it was drafted as a main count in the charge sheet. And in her own words she stated that:-

“Having convicted accused 3 on the main charge I make no finding on the alternative charge of handling stolen property contrary to Section 322(2) of the Penal Code.”

Secondly, the learned trial Magistrate erred in pronouncing the death sentence against the 2nd appellant in respect of Counts I and II and making no orders in respect of Count IV. In our view, having found him guilty in Count I, II and IV, only the death Sentence in respect of Count I would have been pronounced and sentences in Count II and IV be held in abeyance.

In the upshot, the appeals are dismissed. We order that the 2nd appellant shall suffer death in Count I and we sentence him to three years imprisonment in respect of Count IV. Sentences in Counts II and IV shall be held in abeyance.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 2nd day of June 2015.

L. KIMARU

G. W. NGENYE – MACHARIA

JUDGE

JUDGE

In the presence of:-

Mrs. Rashid for 1st appellant

2nd appellant in person

Ms. Ndombi, for the respondent