



**Nzyoki v Republic (Criminal Appeal E051 of 2022)
[2025] KEHC 14343 (KLR) (7 October 2025) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E051 OF 2022
NIO ADAGI, J
OCTOBER 7, 2025**

BETWEEN

BENSON NZYOKI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgement and sentence delivered on 3rd November 2022 by Hon. M. A. Otindo (P.M) in Chief Magistrate 's Court at Machakos Criminal Case No. 425 of 2017)

JUDGMENT

Introduction

1. The Appeal herein relates to the appellant Benson Nzyoki (was the 2nd Accused) who was charged jointly with one Elijah Videgede George (1st Accused) who filed his separate appeal. They were both charged with five (5) Counts of the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. In this judgement “the Appellant” will thus refer to the 2nd Accused at the trial court. The Appellant pleaded not guilty to all the charges and the matter was set down for hearing.
2. The prosecution called twelve (12) witnesses in proving its case. At the close of the trial, the appellant was acquitted on Count 5 but convicted of the of robbery with violence contrary to Section 296(2) of the Penal Code and was sentenced to death for each of the Count 1, 2, 3, 4 and 6 on 3rd November 2022 however in view of the nature of the penalty, the sentence in counts 2, 3, 4 and 6 were held in abeyance.
3. Being dissatisfied with the decision of the trial court, the appellant has lodged the instant appeal against both the conviction and sentence. The appellant has filled five (5) grounds of appeal in his undated memorandum of appeal. The appellant further filed undated submissions and summarised his grounds of appeal into six (6) as follows:
 - i. contradictions and inconsistencies



- ii. the identification parade
 - iii. identification at the scene of crime
 - iv. the mode and lead of arrest
 - v. the official investigations
 - vi. the alibi defence
4. The Appeal is opposed by the State/Respondent who argue that the trial court properly evaluated the evidence and came to the right conclusion.

The Evidence

5. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. (See *Okeno v Republic* (1972) EA 32). See also *Gabriel Kamau Njoroge v Republic* (1987) eKLR.
6. To enable this Court, discharge the said duty, a brief look at the evidence becomes eminent. However, this Court will not reproduce that evidence. Instead, it will incorporate the evidence as captured by the trial court in its judgment by reference since the Court did it quite well.

The Prosecutions case at trial

7. PW1 was Zacchaeus Mukabane Mandu. He testified that he was living at a place known as Kwa Mwalimu. It had 8 rooms in a plot with a perimeter wall and a gate with a toilet and bathroom in the room. They lived in room three switched the light at 7:00 P.M. and all the rooms were occupied by University Students. PW1 had lived there for one year and had never experienced any problem. PW1 recall on the night of 15th, 16th May 2017, between 12 p.m. – 2.00 a.m. with Dickson Mwirikia (deceased) and George (who is still ill) they all lived in the same room. Dickson and PW1 were leaders in Machakos University Travelling Theatre. They got back home at about 3-4 p.m. at about 5-6 p.m., they left for rehearsals, he felt as if someone was following them. PW1 was a bit suspicious but ignored. When they got to the school gate this person disappeared. They finished the rehearsals at about 9:00 P.M and left the University Compound. They got to their house and latched both bolts. It was not locked.
8. PW1 testified that they normally left the room light on and the three of them slept on the same bed. At about midnight PW1 heard the gate open and heard George scream but he was hit on the head using a metal bar, he became unconscious. When PW1 opened his eyes, he saw three people, PW1 was hit on the mouth using the metal bar. His lower jaw was dislocated. PW1 was stabbed on the head. At the time Dickson was still asleep. PW1 felt pain and could feel from a distance. He was stabbed on the face and ear. Testifying that these people said they wanted phones, laptops and money.
9. Dickson woke up and told them to take everything. Stating that they took their phones every document, money and laptop that Dickson had. After they took everything, they started cutting Dickson all over the head and face. PW1 could see as they were using a sharp object. When they tried look at one of them, he threw a sword or panga at PW1 but he missed. Another one hit him severally with a metal bar and he became unconscious he woke up and found himself at Kenyatta Hospital. These three people had locked all the other rooms from outside after taking all their phones. PW1 woke up the next day in the evening.



10. On 17th May 2017, PW1 learnt that Dickson passed on. PW1 stayed was in hospital for three weeks and was discharged 1st June, 2017. According to PW1 as this incident was going on, he saw one of the attackers before he was affected. He saw the 1st accused who was closest to him. He was wearing something like a Marvin. The 2nd accused was at a distance but he saw him. He was wearing a jacket. PW1 cannot remember the 3rd person very well. PW1 stated they were called at the police station to identify the attackers at Machakos. It was PW1, Moses Mwangi, Mary, Pauline and Patricia Mwikali and Kamau. They were told to sit outside then they were called in one by one. After going in one walk out through another way. When PW1 walked in he identified the accused. They went in twice. PW1 identified the 1st accused the 1st time. He identified Identification parade Form MFI. 6. The 2nd time PW1 was with Moses, Patricia, Pauline and Kamau. PW1 was able to identify the 2nd accused identification parade form MFI. 7
11. In cross-examination, it was the testimony of PW1 that he was asked to record a statement after the identification on how he was able to identify the attackers. PW1 narrated as someone wrote the statement at the station. PW1 saw three men enter their room but PW1 could only identify two of them. Their room was No. 3 and the light was on. Two 4x 6 beds would get into the room and a small space is left. The room was about 3-4 meters squared. PW1 the 1st accused saw very well he was sure. The 1st accused was not brown. The Marvin worn by the 1st accused was covering only his head. PW1 could state what clothing he was wearing. PW1 thought these attackers had an intention of finishing Dickson. PW1 did not have the opportunity to observe all the details as he was hit and he did not immediately wake up.
12. In Further cross-examination, PW1 testified the light was on their room. He identified a slim brown man. That he saw the 2nd attacker, that 2nd accused had a stripped T-Shirt on. PW1 saw the 1st accused vest because he was closest to him and that only the 1st Accused had a Marvin. PW1 saw the 2nd accused well but not as well as the 1st accused. 2nd accused took not more than 30 minutes in PW1's room.
13. In re-examination, PW1 told trial court that he attended the identification parades and identified both accused person. For the 1st accused it was face and voice identification while for accused 2 it was the face. That there was no mistake. PW1 did not record the 2nd accused description because he had just come from the hospital and could not express himself well.
14. PW2 was Moses Njenga Mwangi. He told Trial Court that he was living with Patricia Mwikali and after they prepared food they slept at about 11:30 a.m. He testified that at about 12:30 a. m they were woken up by some disturbance. The doors were being knocked and Patricia woke him up. PW2 heard people outside saying 'Fungueni milango haraka'. He heard the students in Room 3 making noise, one of them said 'niache'. The walls were being knocked. PW1 then heard their door close and the people approached his room; his lights were off.
15. PW2 locked his doors both from inside. They spotted lights for a while and left. PW2 heard them saying even if they shouted no one will help. They passed and went ahead and demanded for a laptop. Then they went to room 3, one could hear things being knocked. They came to their room saying 'fungueni mlango wasichana', PW2 could hear Prisca begging them to let them negotiate. The girls refused to open the door so they broke the windows.
16. He testified that these people were persistent so the girls in room 4 opened. PW2 heard one of them ask for the laptops and phones. Prisca called Dickson while Mary called PW2. They took the laptop and phones, they beat up the girls and came to his room, broke his window and spotted light on him and PW2 opened the door.



17. PW2 switched on the light and opened the door, one of the attackers got in and asked for his laptop. PW2 gave it out very fast. He asked for the charger which PW2 gave out. According to PW2, he was holding a crow bar or machete, the other one came from behind him and took the laptop and charger which he gave him. That the 3rd person was standing at the window. PW2 gave his phone Hauwei and Nokia. He then did as if to hit PW2 but he begged and he left. The girl was still on the bed so they left. PW2 locked the door very fast and switched off his light.
18. According to PW2 he spoke face to face with the assailants so he recognized them very well. That the 1st accused is the one who took his property and passed it over to the 2nd accused. He testified that the 1st accused was wearing jackets he had a big head and was wearing a Marvin whose colour he was not sure. As per PW2 the 2nd accused was wearing a jacket. The 3rd person was not seen well by PW2. He told the trial court that when he got out, he could see blood drops from room 3. He was told Zacchaeus and Dickson had been taken to hospital. They were with George who could not talk at all. George was then taken to Level 5 emergency and was referred to Kenyatta Hospital when he came back to school he appeared not so well, so he left school. After he improved, he asked Zacchaeus where Dickson was. They later told him that Dickson had passed on.
19. On the 1st identification parade, PW2 identified the 1st accused. He recognized him from his head and even voice. He tried to hide his voice because on that night he had a crooked voice. On the 2nd parade, PW2 identified the 2nd accused, he was brown and slim, he also recognized his eyes because he looked PW2 in the eye. They were 7 people in the identification parade, 2nd Accused, he recognized him he lives in Kathemboni.
20. In cross-examination, it was the testimony of PW2 that the 1st accused person was the first person to enter his room. He had a big head and a big face. He was wearing a Marvin. PW2 recognized his voice it was crooked. He said fungueni nataka hiyo laptop- charger iko wapi. He left and came back for the phones. He was the same person who shouted hata mpige kelele hakuna mtu atawasaidia. He also “achana na hiyo akazike hao maiti. Testifying that when he went to record his statement, he was asked to describe how these attackers looked like and he did. PW2 picked the 1st accused at the identification parade. He could not remember if it was the 2nd person. PW2 was taken to the parade twice. The first time PW2 raised his hands and touched him but was told to go back to the line and be sure. The 2nd time chose him. He could not remember what position he was in the parade. He asked two people to speak so he could identify the voice. He did not ask the others to speak. He told the trial court that the police did not tell them that robbers were in the parade or whether there was a suspect. Testifying that there were approximately seven people in the were almost alike. Some did not have ears as the 1st accused person, he could not remember if they all had shoes, they were 7 people almost alike colour height and ears. He had not seen the 1st accused at the police station before the parade.
21. In cross- examination by the 2nd Accused, PW2 testified that he is the victim the accused attacked that he does not know the 2nd accused but he went to PW2’s place. Testifying that the plot had 8 rooms, he was a tenant and his room had light on. PW2 attended the parade and there about 7 people, the people were not wearing uniform and they looked alike. He stated that he described the attackers and maybe the police did not write. He recorded in his statement that he recognized the 1st Accused’s voice.
22. In re-examination, it was PW2’s testimony that the witness statement was not in his writing, he narrated as the police recorded. PW2 has stated what happened. PW2 described the 1st accused to the police and he identified him at the parade.
23. PW3 was John Kamau Njoroge. He testified that on the night of 15th- 16th May 2017 he was in his room asleep. At about midnight he heard a bang on his neighbours wall. That his neighbour was in



room 3 while PW3 lived in room 2. When PW3 woke up he heard people's voices speaking outside. He sat silently to listen. He told trial court that in room 3 there was three occupants. He noticed the voices were foreign. PW3 then heard those voices telling Mary and Priscah to open the door then he heard window panes breaking. PW3 then heard them leave room 4 for room 5 occupied by Priscah and Moses.

24. It was his testimony that when they left room 5 he heard footsteps walk to room 1 then they told the occupants to open the door then they were asked for their phones. After that they went PW3's room and knocked. They asked PW3 to open he opened and was pushed to the wall and asked to give money that he had but he said he had none. There were a power bank and a phone, they took the power bank and placed in a bag and bottles of soda. They then pulled him and, in the process, saw his wallet and took Ksh1,500. PW3 was not able to see the faces of this people but he saw a crow bar after they parked the things in the bag, one threatened to hit him but the other one told him 'wachana na yeye atatusaidia kuzika yule tumeua'. PW3 testified that after they left, he went back to sleep until police officers came.
25. They introduced themselves so he opened. In room 3, PW3 learnt that Dickson had been seriously injured so was Zack. The police took them to the hospital. They realized later that George was seriously injured as he could not talk. Mary was also hit. Later PW3 visited Dickson in Hospital. Dickson died. PW3 told the Trial Court that his lights were off but after he opened the door, the robbers switched on the lights. PW3 was not able to recognize any of them and that none of his belongings was recovered.
26. In cross- examination, PW3 testified that he recorded his statement soon thereafter. He was not injured. His statement was read to him and he was asked to do any corrections. He saw the body of a masculine make and brown though he did not see his face. That the 1st accused is neither masculine or light skinned.
27. In cross- examination by the 2nd accused, PW3 told the trial court that he did not recognize any of the voices of the attackers. That person who was masculine and light skinned is not in court.

PW4 was Mary Nyambura, she testified on oath that on the night of 15th- 16th May, 2017, she was watching a movie on her roommate's laptop Priscah Wanjiru. She then fell asleep living the lights on. That after minutes to midnight, she heard as if the wall to room 3 was being hit. Priscah the asked her if she heard something but she told her to go back to bed as she was dreaming. In room 3 there was Dicky and some freshers who had come to crash. That the room was for Peter and Dicky. They heard as if there was a fight. The they heard them knock the window saying "nyinyi wasichana fungueni hapa". They broke the window and removed the curtain. They told them to open the door. At this time, they were hiding behind the door. They kept on hitting the window grill for about 15 minutes.

28. PW4 stated that if they did not open the door and they manage to get in they would kill them. They finally opened; they pushed them on the bed. PW4 looked at one of them who hit her with a crowbar on her right shoulder. The other one told him he did not want violence. They took her roommates laptop, earrings and money. PW4 testified that two people entered their room and that the person who hit her was brown while the other was wearing a black Marvin but she did not look at him so she could not tell how he looked. PW4 could recognize the person who hit her. It was the 2nd accused who hit her. That after they took whatever they wanted, they went to room 5. They did not bother to close their door and after about 15 minutes the police came. PW4 later learnt that door 3 Dicky was unconscious while Zack was injured seriously on the ear. They were taken to hospital. She went to Machakos Level 5 the next day for treatment. Zack was fine but Dicky died. She went for his burial in Nakuru. None of the items was stolen was recovered.
29. PW4 said that there were security lights around the washrooms and another outside the gate. The same could not light the whole plot. PW4 told the trial court that after Dicky's burial her roommate said



- she had seen the 2nd accused at a certain bar in Kathemboni. They later went to identification parades. PW4 identified the brown man. She produced her P3 Form MFI 8.
30. In cross examination, it was PW4's testimony that she was in room 4 and there was security lights outside the bathrooms and outside the gate. She did not see the 1st accused. PW4 identified him according to the description by her colleagues.
 31. Testifying that she identified the 1st accused by his voice. Her roommate told her the one who had a black Marvin is the one who said "fungueni hapa nyi wasichana". He had a husky voice. She told the trial court that there were around 6 or 7 people in the parade. She cannot recall which number the 1st accused was. She told him to say "nyi wasichana fungueni hapa" and he did. They were not allowed to make any statement after identification. According to PW4 she asked about 3 men in the parade to speak. They were not of the same height or body built. She did not remember if any had a Marvin or shoes. They dressed normally. PW4 did could not remember the dates she went for the identification parade but it was around 2, 3 or 4. It was not 6.00 pm. It was in the afternoon.
 32. In cross-examination by the 2nd accused, it was the testimony of PW4 that the 2nd accused is the one who hit her. Testifying that there were 8 rooms in the plot but she cannot tell how many occupants. They had a light on so she was able to see the 2nd accused. She told the police there was light. That it was not recorded. She said the person who hit her was brown (it was not recorded) she cannot remember the date of the parade but there were between 6-10 people. These people were all different. Testifying that 2nd accused is the one who hit her because she looked at him so he saw the 2nd accused well. 2nd accused is brown. That he had a black jacket. They were not called to record a statement after the parade. PW4 gave 2nd accused Kshs.900/= . This is what was stolen. She recorded that Kshs.1,100 was stolen.
 33. In re-examination, she testified that she narrated as the police recorded her statement. What she had stated is what happened. That she recorded there was enough light in her room. She had the 1st accused speak but it was her roommate who told her he had a husky voice. She identified him through what she was told by her roommate. She recognized the 2nd accused well. The parade was between 2-4 p.m. or thereabouts.
 34. PW5 was Priscah Wanjiru Mureithi, she testified that on the night of 15th -16th May,2017, she was in her house No.4 living with Mary. She was asleep when she heard some voices outside. She woke up and asked her if she heard anything. She told her to go back to sleeping because she was dreaming. Testifying that they then heard their window break. The light was on so they heard them say in a harsh voice fungueni mlango. They got out of the bed and hid behind the door. They threatened to kill them so they opened the door because they had bent the grills. They entered the room as they went to the bed. They took her laptop and money. They then told them to close the door. She told the Trial Court they were two people who entered the room. He was not a tall guy- medium, brown and sunken eyes. Only one spoke asking her hii ni laptop gani and she responded. The other person told her roommate to stop looking at him then hit her. She could have identified the one who took her laptop. After they left their house they went to house No. 5 after some minutes the police came. They got out and the ones who were injured Dickson, George and Zack were taken to Machakos Level 5. PW5 went to see them. She learnt that they were taken to Kenyatta- Zack and George are okay. That the other one died. She went for his burial in Nakuru. It is the 2nd accused who took her laptop. (points at accused 2). PW5 identified the 2nd accused with the sunken eyes.
 35. In cross-examination, it was her testimony that she was able to identify the 2nd accused. She only participated in one identification parade. She did not identify the 1st accused. PW5 said she could



- positively have identified the attackers if she saw them. She identified the 2nd accused. She did not identify the 1st accused. She went for the 1st identification parade where she identified the 2nd accused.
36. In cross-examination by the 2nd accused, it was testified that she recognized the voice of the person who took her laptop. She recorded this with the police. She might have omitted to record this with the police. The lights were on. She recorded with the police.
37. In re-examination. She told the trial court she narrated to police as he recorded. Whatever she had stated what happened. She attended only one parade. She was not able to know whatever the parade she attended was the 1st or the 2nd. PW5 said that there was light. She did not know if the police omitted to record.
38. PW6 was PC Hassa Musa Kibucho. He testified that he is attached at Machakos Police Station. He recalls on 21/9/2017 at about 5.30. PW6 was called by his informer from Makutano Junction Kyumbi that there were men whom they had been looking for over crimes committed were seen at the stage. PW6 called PC Kibuga and asked him to accompany him to Makutano junction. They took a private car and rushed there and, on their way, they called the OCS and informed him of what was going on. On arrival they met the informer who told them he was suspecting one of the two young men and pointed him to them. They stood and watched this man's movement; he went to the Machakos stage and entered a Maruti Nissan Vannette. PW6 got into the Nissan while his colleague followed.
39. PW5 stated that when they got to a road block, the vehicle was stopped as they had called the police at the road block. He got out and they introduced themselves and he pointed out to the suspect who told them he is Videgede. They got him out of the Nissan as they released the vehicle. It was PW6's testimony that they brought him to Machakos Police Station and handled him over to the CID. Later they were informed Videgede had been positively identified at a parade for various offences.
40. In cross examination, he told the trial court that he could not say that the accused was arrested out of suspicion. He was not involved in the identification parade. He did not recover anything suspicious or illegal from the accused. The accused told him he is a hustler. He stated that his duty was not to investigate this case, he only arrested the accused.
41. PW7 was Dr. John Mutunga. He told the trial court that he is stationed at Machakos Level 5 Hospital qualified from University of Nairobi with MbChb Practice No. A3932. PW7 had a P3 form for Zacchaeus Mukabane aged 21 years. That it is alleged that he was assaulted on 15/5/2017 by persons well known to him. He suffered blunt injury to the mouth involving the lower incisor teeth which became loose and were wired. Cut wound on right ear which was stitched. He told the trial court that it had taken 6 months before examination, probable weapon used was blunt or sharp. He had been seen by a dentist. PW7 formed the opinion that degree of injury as grievous harm on 30/11/2017. PW7 relied on treatment notes and case summary from Kenyatta National Hospital. He produced the treatment notes and case summary dated 5/6/2017, PExb 1, Lab request form PExb 2 (a), Radiology request form PExb 3. Receipt for Lab PExb 4 and P3 Form PExb 5.
42. PW7 also had the P3 form Mary Nyambura Mbugua aged 20 years. It was alleged that she was assaulted on 15/5/2017 and sustained blunt injury to the right shoulder, bruise on right shoulder. It had taken 6 months before the examination. Probable object used was blunt. She had been treated. He assessed the degree of injury as harm. PW7 produced the P3 form as exhibit PExb 8. He did not know the patients before his examination or the perpetrators.
43. In cross examination, he testified that according to the report from the police, PExt.5 stated that they were robbed by thugs not persons known to him so is PExt.8.



44. In cross examination by the 2nd accused, he lamented that Zacchaeus did not mention names of persons who injured him. According to PW7 Part 1 was filled at the police station. the date of injury was stated in Part 1 and time is 10.00 p.m. Mary did not mention any names.
45. PW8 was PC James Mwaura. He told the Trial Court that on 20/11/2017 he was called by OCS Machakos to his office where he found Inspector David Kemboi, PC Samuel Kibuga and PC Geoffrey Ngetich. That the OCS briefed them that he had information of wanted suspect having been seen with Tumba area entering a chang'aa den. They proceeded to the area and entered the den where they found the suspect. They arrested him and brought him to the station. the suspect was in a group that was seated outside the house. They arrested him immediately before they identified themselves but some of them were in uniform. Testifying that he was wanted for several crimes. He did not know him before the arrest. 2nd accused attempted to run away but they caught him.
46. In cross examination, it was PW8's testimony that he knows the suspect was charged with robbery with violence. He did not arrest the 1st accused.
47. In cross examination by the 2nd Accused; it was testified that the Picture of the 2nd accused was in the records of the police as he was wanted. PW8 told the trial court that all he did was to arrest the 2nd accused and the scene of crime was about 4km from court. The 2nd accused were not in possession of anything at the time of his arrest.
48. PW9 was Inspector Simon Muinde Mutisya. He testified that he is No. 232872 Deputy DCIO Kathiani formerly the investigator DCI Machakos. He recalled on 22/9/2017 at about 5.15 p.m. – 6.00 p.m. he was requested by No. 440/330/17 the investigating officer Anthony Mwanguya CPL to conduct an identification parade for Videgede George (accused 1). He used Form 156 identification parade form. He used No. 46 a-n of the Force Standing Orders. He inquired from him if was willing to take up in the parade he accepted and signed the Form. He signed that his advocate and family were far so he would go on he indicated his I.D card and put a thumb print. According to PW9 he picked 9 people who had similarities with the suspect.
49. He recorded the names of the witnesses in the parade those on the line up. The identification parade was within the OCPD's office exit and entry was one. Testifying that the suspect stood between number 3 & 4 and was identified by Mary Nyambura Mbugua a student at Machakos University. Further that the witnesses were not meeting each other. The suspect then changed and stood between No. 5 & 6. He told the trial court that Moses Njenga Mwangi did not identify the suspect. That suspect then stood between No. 7 & 8. That Priscah Wanjiru Mureithi identified him touching him. According to PW9 the suspect then stood between No. 6 & 7 and Zacchaeus Mukabane identified him by touching. That the 5th witness, Pauline Wangari Gatharu identified the suspect by touching. At about 6.00 p.m. when the identification parade was concluded the suspect said he was satisfied. He placed his thumbs print and I.D number. PW9 signed the Parade form. The witnesses did not see the suspect before conducting the identification parade. The investigating officer was also not present. He took the suspect back to the cells.
50. The witnesses told him the lights were on at the time of the incident so they saw the suspect well. PW9 did not know the suspect before all he did was conduct the identification parade. The suspect was in court (he identified the 1st accused).
51. PW9 also testified that he also recalls on the 20/11/2017 from 10.00 a.m. to 10.30 a.m. that while at work station, the investigating officer No. 74794 CPL Anthony Wanguya requested him to conduct the identification parade for Benson Nzioki Muasya alias Kanyoki (accused 2). Testifying that the investigating officer was not present at the identification parade. He inquired from the suspect if they



- could conduct the identification parade to which he had no objection. He said no to his suggestion on whether he needed an advocate and his family present. He accepted the parade and wrote down his name. that there were five witnesses present to do the identification. He picked eight persons from the cells. After they were put on line he called the suspect and asked him to take a position that he wished.
52. The people were of the same age, height, weight and appearance. He stood between No. 3 &. Mary Nyambura identified him by touching the shoulder. The suspect said he will not change position throughout the parade. Moses Mwangi Njenga, Patricia Mwikali Mulinge, George Nabwite and Zacchaeus all identified him by touch. PW9 stated that the suspect was satisfied with the parade. He wrote his name on the form which he then signed. The suspect also signed. PW9 complied with the procedures fully as per the force standing orders. That the witnesses were consistent in the identification the witnesses stated that the lights were on so they recognized the suspect. PW9 produced the report as Exhibit 7. He did not know the suspect before this identification parade. The witnesses never met. He called them one by one.
53. In cross examination, he told trial court that he did not inquire how long the 1st accused had been in the cells or to his health status. The other members were from the cells. There were several people in the cells. He had eight members for the 1st suspect. He did not know how long they had been in the cells. He informed the suspect and those in the cells that he was to conduct the identification parade at the same time. He informed the members when they were at the parade. The suspect has a right to have an advocate or friend present. PW9 was not the one of the investigators in this case but he was an investigator under DCI.
54. The 2nd accused consented to the identification parade because he signed. According to PW9 he did not talk to the witnesses before the identification parade. He spoke to each of the witnesses at the parade. The witnesses had stated in their statements that they would recognize the suspect if they saw them. PW9 did not have a hand in the arrest of the 1st accused neither did he know how he was arrested. The witnesses were able to identify the 1st suspect. He did not fix the 1st accused.
55. In cross examination, by the 2nd accused, it was stated by PW9 that he was the one who conducted the identification parade the investigating officer was not present. That 2nd accused consented to the parade. PW9 would not know if the investigating officer photographed the 2nd accused before the parade and showed his pictures to the witnesses. PW9 was not present when Mary testified but what he knew was that the members of the parade were looking alike. That the 2nd Accused his name at the identification parade and it is not true that he was forced to write his name on the parade form. He was not in uniform. According to PW9 he informed members that they were going to conduct the identification parade.
56. In re-examination, it was testified that he granted the 1st accused a chance to state if he wishes to have an advocate or family members present and he said hakuna haja. The suspect consented because he signed. Testifying that if a suspect says no, they would not proceed with the identification parade. Witnesses are spoken to at the parade. Exhibit 7 shows No. but the accused consented to have the parade that is why he wrote his name and I.D number. PW9 inquired from accused 2 if he wished to change position but he said he wished to remain in the same position.
57. PW 10 was Dr. Joseph Ndungu. He testified that a pathologist and lecture at UON. And that he worked as a pathologist for 14 years and as a doctor for 21 years. He told court that the documents before him was a post-mortem report for Dickson Mwithia. PW10 performed the post-mortem on 22/5/2017 at Kenyatta National Hospital. That the body was identified by Simon Muchiri the deceased grandfather and Robert Wahome his uncle. Testifying that body of an African male aged 20 years. Good physique. The body had a bandage on the right elbow. Stitched cut wound about 6 cm on the left eye brow 8.5 cm cut would on the left side of head stitched. Left ear 4.5 cm laceration stitched.



- Part of the earlobe was missing. Contusion on the left shoulder. On internal examination, internal bleeding in the subdural and subarachnoid. Fracture on base of skull. He concluded that the cause of death was due to head injury caused by blunt trauma. He signed the report and produced it as exhibit.
58. PW11 was George Kundu Wabwire. He told the trial court that he recalls on 15/5/2017 at about midnight it was now 16th. They were living in room 3 from the gate. He was with Zacchaeus and the late Dickson. It was a single room. That they were asleep when PW11 heard a loud bang. When he woke up, he felt himself being with an iron bar on the left side of the head. PW11 screamed once then he heard a voice tell him rudi ulale na hutawai niona siku ingine. That Dickson and him were sleeping on the bed while Zack was sleeping on the floor. These people kept cutting Dickson and beating him up. They cut him seriously on the head. They were demanding money, electronics. They took their laptop and phones. PW11 was peeping through his sheet and could see them cutting Dickson and the people then left. After about 20 minutes him and Zack got out. Dickson could not move. They got out of room and found fellow students outside. Zack's ear was cut and jaws beaten. Zack and Dickson were carried in the landlord's vehicle. At this time, he was not able to speak. PW 11 fell so they were all taken to Level 5 Hospital on 16th at night. He saw two people that night. One was short and brown wearing a Marvin. He saw him well because he is the one who hit him. The other was tall and chocolate in complexion. He is the one who was cutting up Dickson. The room had lights. They had not switched off the lights. PW11 was admitted for two weeks. When PW11 regained consciousness. He was in the same room with Zack, he kept asking about Dickson. He later learnt that he passed on. Before PW11 recorded his statement, he attended an identification parade where he identified the man who was beating him. The identification parade was on 20/11/2017. The person he identified is in court (points at accused 2). That the parade had about 10 people.
59. In cross examination, he testified that they were three in their room. Zacchaeus slept on the floor while him and Dickson were on the bed. Their heads were on same side but he was the one facing the door. PW11 covered his head but kept peeping. He never uncovered his head fully. The person who was cutting Dickson was lying next to the wall. He was tall and chocolate in complexion. It is not true that the man who was cutting Dickson was short. PW11 recorded a statement on 10/1/2018. That the person who was beating Dickson was short in height. PW11 attended an identification parade in November. According to the PW11 he identified one man not two MFI 7 identification parade form, he was the 4th witness. He identified Benson Musyoki. MFI 6- Identification parade form, the suspects name is Elijah Videgede he was not a witness. He did not identify him. He did not record a statement after the identification parade. PW11 had never seen the 1st accused before. He was not in the identification parade. PW11 did not know how they were arrested. That people looked alike. The person did not have any special mark apart from his height and complexion. There is nothing peculiar about accused. The bulb was on. The room was about 10 x 10 feet.
60. Cross examination by accused 2. He identified parade Form that reads that PW11 identified 2nd Accused by touching. Testifying that at the time of the incident PW11 saw two people. He recorded his statement in January 2018. When he saw the 2nd accused on the night of the incident. He was still conscious. PW11 was confused but not unconscious. The lights were on. He indicated in his statement that the room was lit. (not in the statement). According to PW11 he lived in room 3 from the gate. He did not hear any commotion before he was attacked. He did not know how the attackers got into his room. He was able to identify the person who hit him by complexion and heights. The brown complexion was not unique nor the height. He could not remember what the attackers had on but the one who hit him had a Marvin. The one who was beating Dickson had a black jacket. That the P3 Form was filled on 30/11/2017 while the identification parade was on 20/11/2017. That he had fully recovered and experienced memory lapses up to early November.



61. PW12 was Anthony Mwanguya. He testified that he is No. 74794 DCI Machakos. He works with the DCIO Machakos. He recalls that a report was made at the station that students had been attacked on the night of 15th -16th May, 2017. That the attack was at Kwa Mwalimu hostels in Kathemboni. The students in hostel suddenly heard a loud bang on the door and their windows being broken. He told the trial court that they were ordered to open the door or they be killed or harmed. In the hostel 1 Priscah lost Kshs 200/= they threatened to injure them. In hotel 2 the attackers ordered Kamau to open the door or they harm him. He lost an ITEL Phone and power bank. All these while the attackers were armed with iron rods and panga and were wearing marvins. Their faces were uncovered. In Hostel 3 there were three students Zacchaeus Mukabane, George Wabwire and Dickson Mwirika. The three were beaten seriously and harmed. The attackers appeared to be running in and out of the hostels whenever they stole. Dickson lost consciousness and a lot of blood. The other two were injured on the heads. George Wabwire lost his phone. In hostel 4 where Mary Nyambura and Patricia Mwikali were, Mary lost her phone ITEL, Kshs. 1,500/=. She was hit on the shoulder with an iron bar. In Hostel 5 where Moses Njenga was with Patricia Mwikali, Moses lost two phones make Nokia and Huawei, HP laptop and charger. After a short while, the police were informed and when they got to the scene, the attackers had left.
62. The students narrated to the police what had transpired. The three who were injured were taken to Machakos Level 5 hospital but later transferred to Kenyatta National Hospital in critical condition. They were admitted in ICU. On 17/5/2017 Dickson passed on. Postmortem was done on 22/5/2017. Later one suspect George Videgede was arrested. He was seen with another in kyumbi. Testifying that they identified the attackers at the identification parade though he was not present. That there are witnesses whom he had not availed to testify.
63. In cross examination, he told the trial court that the witnesses stated the attackers had a Kamba accent. He could say the 1st accused was brown. The 2nd accused was almost of the same complexion as the 1st accused. PW1 appeared in both identification parades. He identified the 1st accused by touching on 22/9/2017. In his statement he indicated that he could only identify one man. As witness 5 he identified another suspect. That PW2's statement was not recorded by him. He cannot remember who recorded it. He did not indicate if he could identify any of the attackers. He is a witness in the identification parade. Testifying further that PW3 John Kamau was able to see a muscular and light skin man. He did not indicate that he would be able to identify this man if he saw him. He did not participate in the parade. PW12 did not record PW1 and PW2's statement after the parade. PW4 Mary Nyambura did not give a number of how many attackers she could identify. She did not give specifics of how she could identify the attackers. She participated in both parades and identified both accused persons. PW5 Prisca stated that she could positively identify the attackers but did not give details. She participated in the identification parade.
64. In cross examination by the 2nd accused, it was testified that the 2nd accused was brought to the station on 19/11/2017. The identification parade conducted on 20/11/2017. That the attackers had marvins and heavy black jackets. The witnesses said the lights were on. He recorded in his statement that the lights were on.

Ruling on a case to answer

65. The Trial Court vide its Ruling dated 14/12/2021 by the Trial Court Hon. C. A. Ocharo SPM who took evidence of all Prosecution witnesses up to close of the Prosecution case found that a prima facie case had been established against both the accuseds and placed them on their defence.



The Appellant's Defence Case.

66. The Appellant testified as DW2. He testified that on the alleged date, he was not within Machakos Town. He was in Mombasa County. He was arrested on 20/11/2017 at around 6.00am. Those who arrested him were PC James Mwaura, PC Kemboi, PC Ngetich, Cpl Olekubuica and OCS Machakos Mr. Abdi. At the time of arrest, he heard a vehicle come stopped and he heard voices saying "hapa si kwa mama Dennis, ni pale mbele. He did not know the area was a changáa area. When the patrons of changáa saw police, they started running. As a cook knowing it was a crime, he also ran away.
67. The police gave a chase and he was arrested and asked the owner of the boma and he told them he had also ran away. The police entered the house and took the chang'aa jet pumps, and poured the alcohol and took a 20 litre jerrican with changáa. At the time of chase, he lost his phone and wallet with Kshs.200/-. He was then put in a police vehicle.
68. At the police station the OCS Abdi took his photo then PC Kithuka and Ngetich came to his isolated cell and asked him if he could get Kshs.200,000/- so that he could not be charged. He told them he could not get. They then told him to call his employer and he told them he had no phone. Later Abdi the OCS told him that if he could not raise the amount, he waits that the photo he took would be used. Later parade officer Simon Muinde Mutisya came and called him and told him to get out of the cell for identification. He asked if they are the same people the OCS had said he would send the photo to but he was told to get out. He asked why the people were to identify him and he was told it was for parade purposes. He refused to do the parade but Mutisya Simon forced him to do it. He forced him to stand between person 3 and 4. At the parade, those who came to identify him were among those who were in the cell and others picked from outside. They were 9 and were not similar at all.
69. He testified that he was denied the right to call a family member or advocate to witness. The parade officer told court that where a suspect requests to attend parade none will happen. He did not say why he proceeded when the Appellant had made a request. That the parade report shows that he did not sign and the same was produced as DExt.1. He further testified that people who identified him had his photo before the parade and that the case was a framed.
70. He stated that the OCS did not appear to testify why he was arrested. When the prosecution witness the Doctor testified, he produced the P3Form of Zacheus Mukabane where the discharge sheet showed the incident happened on 16/8 while the P3 form showed that the incident happened on 17/5/2027 whereas the incident occurred on 15/5/2017 at about 10.00pm. The same P3 shows that the injured Zacheus said that he could not identify the perpetrators. He produced the said P3 Form for Zacheus Mukabane dated 16/5/2017 as DExt.2. He testified that the P3 form for Mary Nyambura the incident date was not indicated and the date indicated was OB7. Part 2 showed Mary was attacked on 15/5/2017. He again produced the P3Form for Mary as DExt.3. He testified that the first report did not give description of the suspects. He stated that he was not one of the perpetrators and investigations in the matter was pre-determined. He produced bus receipts to show that on the material day he was away.
71. In cross examination he testified that he was a changáa brewer at the time of the incident, unlicensed. He said that the OCS had a grudge with him. He took his photo and showed it to the complainants. He stated that the P3 Forms were not truthful. He maintained that on the material day he had travelled to Mombasa to see a witch doctor.
72. None of the parties tendered any submissions and chose to rely on their evidence.



The Submissions on appeal

73. The appeal was canvassed by way of written submissions. The Appellant filed his submissions dated 6th February 2025 while the Respondent's submissions are dated 7th February 2025.

Appellant's Submissions

74. The Appellant submitted that in identification based on criminal matters it is a cardinal principal that once a victim has purportedly identified and or recognized a suspect at the scene of crime such an ability need be reported to the Police at the earliest opportune time in order to assist the Police in lounging investigations with a view to making arrest of the culprit and thereafter test such ability on a well conducted Identification Parade.
75. He submitted that in this case the Identification Parade Report evidence PExt-7 by PW9 attributed to the Appellant was conducted on 20th November 2017 from 10.00am to 10.30am. The Identifying witnesses were attacked on the night of 15th and 16th May 2017 which is a duration of six months from date of alleged commission of crime.
76. The authenticity of the identification Parade evidence largely therefore ought to germinate from a well descriptive first report evidence made to Police. None however was confirmed to have been given to Police as stated by PW2. Albeit this the integrity of the identifying witnesses after such a prolonged duration escaped the attention of the learned Magistrate. That PWI confirmed this contention to the effect that, when he was recording his statement, he was still not very well so he could not write everything well. That PW11 on his part confirmed the attack's impact on his mental health that he had experienced memory lapses. He did not record the Appellant's description because he had just come from hospital and could not express himself.
77. That PW5 stated on her part in cross examination that, he gave his statement to the Police and said he could identify the attacker and thought he recorded in his statement. However, there was no description in statement.
78. That PW9 in his evidence stated that the identifying witnesses were numbering five and all allegedly identified the Appellant by touching. There were five witnesses present to do the identification parade. He picked eight persons from the cells. After they were put on line, he called the suspect and asked him to take a position that he wished. He stated that these people were of the same age, height, weight and appearance. The Appellant stood between No.3 & 4. Mary Nyambura identified the Appellant by touching the shoulder The Appellant said he would not change position throughout the parade. Moses Mwangi Njenga, Patricia Mwikali Mulinge, George Wambwire And Zachaeus, all identified him by touch.
79. The Appellant faults the in charge of the Identification Parade for failure to comply with the requirements of an Identification Parade. He did not state where in specific he had accommodated the witnesses in order to be gauged whether the witnesses could view the Person touched on the shoulder by PW4 and subsequently by others since the Appellant did not change positions.
80. Additionally, the Appellant submits that the members paraded did not wear jackets and or marvin in similarity with their version of story in evidence. That none gave a particular role after alleged touching as a major reason for the identification made. No evidence was stated either as to where the witnesses were accommodated after leaving the parade venue in order to minimize communication from one complainant to the other.



81. The Appellant also submitted that worse still PW9 did not state that he followed with strictness the parade conduct by dismantling members per each parade and soliciting others resembling the appellant as per each identifying witness.
82. The most pertinent evidential aspect for consideration, but was omitted was the possibility of photo exposure of appellant to the witnesses prior to identification parade conduct. The appellant was arrested on the strength of information received from un-known informer and given that PW9 clearly stated to have been looking for the Appellant on suspicion of various offences the only way these was possibly done was being aided with the Appellant's photo as well as personal documents. That PW9 in cross examination deposed that, they have looked for the Appellant for long and he had the records which he would produce in the high court. It remains in public domain that the Police whenever they conduct searches for a wanted suspect, they normally do so with the help of photographs of the particular suspect which was not an exception in the appellant's case as confirmed by PW8, when cross examined, she stated that the Appellant's picture was in the records of the Police. He was wanted.
83. The Appellant submitted that the victims' mental health challenge was prolonged until six months when the complainants could not be relied upon integrity-wise in respect to alleged identification Parade.
84. The Appellant submitted that there was no requisite corroboration on the complainants' alleged identification evidence and therefore rightly ought to be disregarded. Reliance was placed on the decision in the Case of Richard Ochieng v Republic[2009] eKLR where court considered the inconsistencies in the witness's testimony and the difficulties associated with night time identification. It emphasized the need for corroborative evidence to support the identification.
85. The same Court of Appeal held in Paul Kinyanjui v Republic[2010] eKLR that identification evidence made in poor lighting conditions must be treated with caution. It highlighted the need for corroborative evidence to bolster the credibility of such identification. Also, in Nelson Julius Irungu v Republic criminal Appeal No. 24 OF 2008, the Court held that when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses.
86. The Appellant submitted on the need to evaluate the complainants' perception of attackers armed with dangerous weapons specifically as reiterated in the research carried out in England by B.L Cutler And Sd Penrod- on mistaken identification the eye witness, psychology and the law [1995] 101-4 at Paragraph 2 it was stated in respect to the presence of a weapon thus:-

“Several investigations have posited that the presence of a weapon during a crime attracts the attention of the victims to the weapon, leaving less attention to the perpetrators racial and physical characteristics. This phenomenon often referred to as Weapon Focus. The notion is that when confronted with a handgun, a knife or another weapon, there is tendency to attend to primarily the weapon. One result of a weapon focus is that because less attention is paid to the perpetrator, identifications are less likely to be correct”

87. The Appellant submitted that he opted to give an alibi defence stating on oath all the whereabouts in relation to daily chores to the best of his knowledge and supported the defence evidence with DEX10 (a) and (b). The learned Magistrate in rejection his defence held that:-

“Second accused equally raised the defence of an alibi that on the material day he had travelled to Mombasa, he produced 2 bus travel receipts from executive special limited bus company Serial No. 178810n 12/05/2017 for going and 17996 for return on 16/05/2017. He did not



call anyone from the company to confirm the originality of these receipts or to confirm that such company even that such company existed. And further that, it was thus incumbent upon the Accused-2 to show what happened with the numbers by calling for the records from the bus company. He failed to discharge the burden. The authenticity of the receipts is doubtful in the circumstances”

88. It is the Appellant submission that the learned trial magistrate had formed an opinion to convict the appellant even in absentia of cogent tabled evidence from Prosecution. The burden of establishing innocence in criminal matters entirely rests on the Prosecution and such burden never shifts to the accused Person.
89. It was indeed expected for the Prosecution to investigate and establish the existence of the Executive Special Limited Bus company very easily from the Mombasa's office through google internet services and any other details pertaining to customers transacted with on the specified dates as per the Defence exhibited receipts if need be. The learned Magistrate further did not assess the demeanour of Prosecution witnesses as against that of the appellant having taken over from honourable Ocharo(S.P.M.) as they testified meaning the delivered judgment not anchored on broad based findings about the integrity of the Prosecution case thus accorded unjustified sentence when the Appellant's alibi was rejected. The Appellant cited the Court of Appeal case in Saidi v Republic[1963] EA 6 Page 8, where it was held that:
- “ An accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer.”
90. The Appellant contended that the trial Court failed to faithfully, impartially, objectively, dispassionately, and rationally analyse the evidence tendered at the trial as a whole to determine his criminal culpability. It is also submitted that in determination of the entire case, the sentence that was described by the trial court being death sentence was inhumane and does not promote one of the objectives of the sentence which in this case is rehabilitation and reintegration. It was a grievous misdirection for the learned Magistrate to infer that the defence never challenged possession of alleged robbed items when the Prosecution evidence was clear that nothing was actually recovered from the Appellant in this case.
91. The Appellant prays that this Court does find the death sentence in this case not build on cogent incriminating evidence thus praying for an acquittal forthwith unless otherwise lawfully held.

Respondent's Submissions

92. The Respondent submitted that in evaluating the evidence vis-a-vis the law the ingredients of the offence were proved beyond reasonable doubt thus no contradictions nor inconsistencies.
- Reliance was placed on the case of Jeremiah Odira v Republic [2018] eKLR Criminal Appeal No. 7 OF 2018 (Consolidated with High Court Criminal Petition No. 16 Of 2018) where A.C Mrima, J stated that:
- “ From the foregone legal provisions, it can be seen that the offence of robbery with violence is made up of two parts. The first part is the robbery and the other part is the violence”.
93. The Respondent submitted that robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen



- thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established; Theft and the use of or threat to use actual violence.
94. On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any of the following three ingredients are established: -
- (a) The offender is armed with any dangerous or offensive weapon or instrument, or
 - (b) The offender is in the company of one or more other person or persons, or
 - (c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.
95. Thus, to prove an offence of robbery with violence one has to prove robbery and violence and thus prove:
- a. theft
 - b. use of or threat to use actual violence
 - c. identity of the perpetrator
96. The Respondent submitted that PW1 stated on the fateful night he was with the Deceased Dickson Mwirikia and his girlfriend. He heard George scream and he was hit on the head using a metal bar. He opened his eyes and saw three people. He was hit on the mouth using metal bar. He had a dislocated jaw. he was also stabbed on the head. The deceased woke up and told the men to take everything. They took the phones, money and laptop. Thereafter, they cut Dickson all over, head and face. He was thus hit severally with a metal bar and he fell unconscious. he stayed at Kenyatta National Hospital. He saw the Appellant at a distance. he attended the ID Parade and he was able to identify the Appellant. PW1 also identified the Appellant while he testified in court. He identified the Appellant in the Identification parade by face. he made no mistake.
97. In cross-exam he stated that the lights in the room were on.
98. PW2 also testified that they were asleep when they heard noise in room 3. The men broke their window and they opened the door and switched on the light. The men took the laptop. They were holding crow bar and machete. PW2 was hit. The Appellant was handed over the material that was stolen. PW2 also attended the identification parade and was able to identify the Appellant. PW2 recognised the eyes as he looked straight into her eyes. PW2 indicated she saw them well and identified them when she gave her evidence in Court. In cross exam he indicated that the light was on.
99. PW4 testified that on that night the men broke the windows and they opened the door. PW4 was hit with a crowbar on the right shoulder. The men took the laptop, earrings and money. PW4 stated that the Appellant hit her. PW4 also attended an I.D parade and was able to identify the Appellant in the identification Parade. In cross examination, PW4 stated the light was on and was able to see the Appellant.
100. PW5 stated that on the said night the men broke their window and they were forced to open the door. PW5 stated that they took the laptop and the money and that the Appellant took her laptop. PW5 also attended the identification Parade and was able to identify the Appellant. In cross examination she confirmed that the lights were on in the room.
101. PW9 was the police officer who conducted the identification Parade. He indicated that he followed all the rules of confession. PW10 testified that the cause of death on the deceased was due to head injury caused by blunt trauma.



102. PW11 was with PW1 and the deceased. He was hit with an iron bar on the left side of the head. The men took the laptop he also saw the cut the deceased. He saw the Appellant attack and cut the deceased. he attended the identification parade and identified the Appellant. He further stated that the room had light thus he was able to see the Appellant well thus was able to identify him. The evidence of the witnesses proves that the Appellant stole several items and the witnesses were able to place him at the scene of crime and thus able to identify him well.
103. In light of the foregoing, the Respondent submitted that the prosecution discharged its burden of proof and that the Appellant was properly convicted of the offence of robbery with violence. The evidence by the prosecution witnesses was credible, consistent, reliable and well corroborated. All ingredients of the offence were established beyond reasonable doubt.
104. The Respondent further submitted that, PW9 testified that the identification parade was done according to the rules of identification Parades. He testified that the Appellant was not forced. The witnesses stated that the persons at the identification parade were of the same height and completion which PW9 also reiterated.
105. The Appellant is misinformed as the prosecution is not required to attend to the identification Parade. All the witnesses who attended the identification parade testified they were able to identify the Appellant from the identification parade. It was submitted that the identification parade was conducted fairly and according to the law as required.
106. The Respondent submitted that the Appellant was positively placed at the scene of crime and identified by the witnesses even during the identification Parade. PW1, PW2, PW4, PW5 and PW11, all stated that the Appellant was in their rooms hitting them and stole from them. They all stated that the lights in the rooms were on thus were clearly able to see the Appellant in the room Contrary to the Appellant submissions, the light was accounted for as it was the lights of the room that were on when the Appellant attacked the students. It was at midnight but the incident did not take place outside which is dark but, in the rooms, where the lights had been switched on.
107. That the matter was properly investigated and arrest carried out according to the law. PW6 and PW8 were the arresting officers and they were able to testify how they came about to arrest the Appellant. The fact that PW12 did not dust the scene does not negate the overwhelming evidence availed as against the Appellant.
108. On the defence of alibi, the Respondent submitted that, it is well known that the defence of alibi needs to be raised at the earliest possible during the trial case. The Appellant did not raise the aspect of Alibi evidence during the trial and raised the same at the tail end of the trial during his defence when the Prosecution had no opportunity to lead evidence to dislodge it. In *Victor Mwendwa Mulinge v Republic* KECA 710 (KLR) the Court of Appeal stated that:

“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution: see *Karanjav Republic*[1983] KLR 50. In *Karanjav Republic*(Supra), this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.



In this case, we do not know whether the appellant in his statement to the police had stated that on the material day and time he was in a college class. This is an issue that ought to have been dealt with by the trial court but that court failed to discharge that duty”.

109. Even assuming the appellant raised the defence of alibi for the first time while in court, as rightly submitted by Mr. Oguk, pursuant to the provisions of Section 309 of the Criminal Procedure Code the prosecution could have sought leave to adduce further evidence in reply to rebut the appellant’s defence. the section states as follows:-

“ 309. If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen. the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”

110. The Respondent observed that in his submissions the appellant contends that it was the Prosecution that was to verify the authenticity of the receipts. Section 309 of the CPC allows the Prosecution an opportunity to adduce evidence in reply to rebut. In this case, be that it may that the prosecution did not seek leave to put up a reply for the said evidence, the evidence adduced still could not disprove the alleged alibi. The Appellant needed to have raised the defence early enough in the trial. None of the witnesses were questioned on this fact including the police officer investigating the case.

111. The Respondent submitted that the appellant did not give notice to the prosecution early enough that he would raise the defence of alibi. The trial court considered this evidence and disregarded the same. This the Respondent submit that, that was an afterthought and further the defence raised on alibi did not outweigh the overwhelming evidence against the Appellant.

112. The Respondent urged this court to uphold the conviction and dismiss this appeal.

Analysis and determination

113. In a nutshell, I have carefully perused the trial court’s proceedings, the grounds of appeal and the Parties’ rival submissions. In this appeal, the issue for determination is whether the prosecution established the charge of robbery with violence contrary to Section 296(2) of the Penal Code to the required standard of proof beyond any reasonable doubt.

114. This court has re-evaluated and re-analysed the evidence adduced before the trial court. It was evident from the facts that the trial court relied on the evidence of identification and the doubtful defence of alibi by the appellant to convict the Appellant

115. In Johana Ndungu v Republic, Criminal Appeal No. 116 Of 1995, the ingredients for the charge of robbery with violence were stated to be:

- i. If the offender is armed with any dangerous or offensive weapon or instrument; or
- ii. If he is in company with one or more other person or persons; or
- iii. if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or used any other violence to any person.

116. Thus, to prove an offence of robbery with violence one has to prove robbery and violence and thus prove:

- a. theft



- b. use of or threat to use actual violence
 - c. identity of the perpetrator
117. This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submissions made by the parties to this appeal. It is evident from the facts that the trial court relied on the evidence of identification and doubt in the appellant's defence of alibi to convict of the Appellant.
118. It is not in dispute from the facts of this case that theft occurred since the complainants are said to have lost laptops, money, phones and other items.
119. It is also not in dispute that one of the victims died as result of the injuries he sustained from the robbers and the rest suffered serious bodily injuries an indication that the attackers were armed with any dangerous or offensive weapon or instrument and used actual violence on the victims.
120. The only major issue, I have to determine is whether the appellant herein was positively identified as the perpetrator.

Identification parade

121. Identification based on criminal matters it is a cardinal principal that once a victim has purportedly identified and or recognized a suspect at the scene of crime such an ability need be reported to the Police at the earliest opportune time in order to assist the Police in louning investigations with a view to making arrest of the culprit and thereafter test such ability on a well conducted Identification Parade. None of the witnesses confirmed to have given this first report to Police and or given any detailed description of the assailants.
122. In this case the Identification Parade Report PExt-7 produced by PW9 show that the identification parade was conducted on 20th November 2017 from 10.00am to 10.30am. The identifying witnesses were attacked on the night of 15th and 16th May 2017 which is a duration of about six months from date of alleged commission of crime.
123. The authenticity of the identification Parade evidence largely therefore ought to germinate from a well descriptive first report evidence made to Police. Albeit this, the integrity of the identifying witnesses after such a prolonged duration seems to have escaped the attention of the trial court.
124. The Appellant in his submissions raised an issue of the manner in which the identification was conducted. The Appellant contended that since there were 8 people on the parade and that the complainants identified the Appellant by touching, they did not indicate anywhere that they would identify the Appellant by touching. Further, the Appellant faults the Identification Parade for failure to comply with the requirements of an Identification Parade.
125. The Officer in charge of the Identification Parade did not state where in specific he had accommodated the witnesses in order to be shielded from viewing the other witnesses as they identified the Appellant since the Appellant did not change positions.
126. That no evidence was given as to where the witnesses were accommodated after leaving the parade venue in order to minimize communication from one complainant to the other.
127. The Appellant also submitted that PW9 failed to follow the strictness requirements of conducting the identification parade . by dismantling members after each parade and soliciting others resembling the appellant as per each identifying witness.



128. The most pertinent evidential aspect for consideration, but which omitted was the possibility of photo exposure of appellant to the witnesses prior to identification parade conduct. The appellant stated that he was arrested on the strength of information received from un-known informer and given that PW9 clearly stated to have been looking for the appellant on suspicion of various offences the only way these was possibly done was being aided with the appellant's photo as well as personal documents. That PW9 in cross examination deposed that, they have looked for the appellant for long and he had the records which he would produce in the high court. It remains in public domain that the Police whenever they conduct searches for a wanted suspect, they normally do so with the help of photographs of the particular suspect which was not an exception in the appellant's case as confirmed by PW8. When cross examined, she stated that the appellant's picture was in the records of the Police as wanted.
129. Chapter 42 paragraph 7 of the National Police Service Standing Orders provides for the procedure of conducting identification parade.
130. For the evidence of identification to have some probative value, the identification parade must comply with the laid down procedure. The Court of Appeal in *David Mwita Wanja & 2 others v Republic* [2007] eKLR emphasized the importance of a properly conducted identification parade and expressed itself as follows:
- “The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders.
131. The Court of Appeal in *John Mwangi Kamau v Republic* KLR stated as follows concerning identification parades:
- “The identification parades are meant to test the correctness of a witness' identification of a suspect. See this court's decision in *John Kamau Wametu v Republic* CRA 68 & 69/2008. In this case, Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that PW1, Cpl John Makumi in producing the Occurrence Book, testified that the incident was recorded as O.B. No.45 of 24/6/2003; the assailants were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police.
- a. In *Gabriel K Njoroge v Republic* (1982 – 1988) I KAR 1134 this court observed: “A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”
132. No doubt then, from the foregoing, a witness ideally ought to give the description of the assailant for purposes of the police mounting an identification parade. In this case, there is no evidence that either PW1 gave the description of the robber to the police.



133. Does the failure of the identification parade vitiate the other evidence concerning the offence? my answer would be Yes. If the appellant has not been identified as the perpetrator, he cannot possibly have committed the offence.
134. From the above evidence it appears undoubtedly clear that the appellant was not properly identified through the parade.

Defence of alibi

135. I have established that the appellant opted to give an alibi defence stating on oath all the whereabouts in relation to daily chores to the best of his knowledge and supported the defence evidence with production of bus travel receipts as DEX10(a) and (b). A perusal at the trial court's judgement in regard to the appellant's defence of alibi reveal that the learned Magistrate in rejection the appellant's defence held that:-

“Second accused equally raised the defence of an alibi that on the material day he had travelled to Mombasa, he produced 2 bus travel receipts from executive special limited bus company Serial No. 178810n 12/05/2017 for going and 17996 for return on 16/05/2017. He did not call anyone from the company to confirm the originality of these receipts or to confirm that such company even that such company existed. And further that, it was thus incumbent upon the Accused-2 to show what happened with the numbers by calling for the records from the bus company. He failed to discharge the burden. The authenticity of the receipts is doubtful in the circumstances”

136. A further perusal at the proceedings at page 137 shows that after the appellant closed his case, Mr. Makundi advocate inquired if the prosecutor could confirm whether they wanted to rebut the defence evidence and if not parties to file submissions.
137. The prosecutor then responded that she had been advised by his senior that it would be prudent to liaise with the investigating officer to establish if they could get a nearer date. She only wanted to probe the receipts further.
138. The trial court noted that the prosecutor had prayed to probe and rebut the evidence of alibi and proceeded to give a mention date on 4/7/2022. Come the mention date, the prosecutor informed court that they had been given 7 days to probe the receipts and it seemed it would take long. The prosecutor opted to proceed with the matter without probing the receipts.
139. It is trite law that the burden of establishing innocence in criminal matters entirely rests on the Prosecution and such burden never shifts to the accused Person.
140. It is also trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution. see *KARANJA v REPUBLIC* [1983] KLR 50
141. In this case, it is my considered view that the prosecution ought to have sought for court's indulgence in addition of more time to probe the bus receipts produced by the Appellant considering the nature of the offence the prosecution was expected to prove beyond reasonable doubt. The said receipts having been admitted in evidence amounted to crucial evidence that would outweigh the prosecution's case, if not rebutted.
142. On the foregoing, it is my finding that the prosecution having been accorded an opportunity to rebut the appellant's defence of alibi and them having chosen not to do so, the appellants defence of alibi



remained unchallenged and it can only be concluded that the appellant was not present at the scene of the unfortunate incident herein.

143. Last but not least, the trial magistrate in her judgement held that the authenticity of the appellant's bus receipts was doubtful in the circumstances. To my mind, and as acknowledged by the trial magistrate, the defence raised by the appellant raises reasonable doubts on the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.
144. From the totality of the evidence, I find that this is a case where Appellant ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case does not require many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right.

Disposition

145. In the end, the appeal succeeds and it is hereby ordered that:
- a. The conviction of the Appellant was unsafe and it is hereby quashed;
 - b. The sentence against Appellant is set aside;
 - c. Unless the police would wish to charge the appellant with other offences that are said to have been committed by him prior to his arrest in this case and unless the appellant otherwise lawfully held, it is ordered that the Appellant shall be set at liberty.
146. It is hereby so ordered.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 7TH OCTOBER 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 7TH OCTOBER 2025

In the presence of :

In person..... for Appellant

Agatha..... for Respondent

Milly Grace..... Court Assistant

