



**Republic v M’uguu & 5 others (Criminal Case 182 of 2019)
[2025] KEMC 17 (KLR) (14 January 2025) (Judgment)**

Neutral citation: [2025] KEMC 17 (KLR)

**REPUBLIC OF KENYA
IN THE SHANZU LAW COURTS
CRIMINAL CASE 182 OF 2019
YA SHIKANDA, SPM
JANUARY 14, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

JULIUS GITONGA M’MUGUU 1ST ACCUSED

JOSEPH AMWAYI MUKABANA 2ND ACCUSED

FLORENCE MBITHE MWANZA 3RD ACCUSED

JOSEPH SHOI CHOGE 4TH ACCUSED

CLEMENTINA NERIMA MUNDERA 5TH ACCUSED

MUASYA KITEME ALIAS MWA 6TH ACCUSED

JUDGMENT

Introduction

1. Jamhuri Day is one of the most important National holidays in Kenya, observed on the 12th day of December. The holiday formally marks the date of the country’s admittance in 1964 into the Commonwealth as a republic and takes its name from the Swahili word jamhuri (republic). 12th December is also the date when Kenya obtained its independence from Great Britain in 1963, after gaining internal self-rule on 1st June, 1963 (Madaraka Day) from Britain. Given that Jamhuri Day has such historical significance, virtually every Kenyan celebrates the holiday to some extent. Celebrations include feasts, political speeches, parades, and dancing.
2. However, for the family of Kenneth Mwakombo Kamto, the 12th day of December, 2018 marked the beginning of loss and a sorrowful journey. Instead of celebration, there was lamentation, instead of jubilation, there was despondency and instead of happiness, there was gloom. The late Kenneth



Mwakombo Kamto (hereinafter referred to as the deceased) was a political figure. He was the first Deputy Governor of Kilifi County and when news of his demise broke, there were speculations all over. When the news broke, I did not even imagine that I would be the one who would hear and determine the case. I was watching Television when I saw the announcement. I could remember the deceased as he once appeared before me at the Malindi court charged with a traffic offence. He was a serving Deputy Governor then and loved simplicity. I had not been transferred to Shanzu court yet, when his demise was announced. It has been a long journey in the corridors of justice. I am glad that finally, we have a decision.

3. Technology has become an integral part of modern society, affecting various aspects of our lives, such as communication, education, health, entertainment, and security. In the field of criminal justice, technological innovation has been one of the main driving forces leading to the continuous improvement of crime control and crime prevention strategies (e.g. GPS tracking and tagging, video surveillance, etc.) Technology can help law enforcement agencies in a number of ways, such as identifying and locating suspects, gathering and analyzing evidence, monitoring and responding to incidents, preventing and deterring crimes, and enhancing accountability and transparency.
4. This case is a classic example on the role of Information Communication Technology in the Criminal Justice System. Advanced technology has transformed the criminal justice field, bringing both new possibilities and challenges to the table. While modern offenders can use technology to commit sophisticated crimes and evade detection, law enforcement officials can also benefit from advanced technology as they uncover criminal activity and deliver justice. Technology can improve accuracy in investigations and policing, too, as many forensic solutions and emerging biometric systems are extremely reliable. These provide yet another source of evidence, plus the opportunity to organize and analyze other evidence more effectively.
5. The introduction and emergence of technology at the crime scene has enabled the crime investigation process to become a much more proactive one. Telecoms data can enable the police and other investigators to map and track the connections and activities of suspects, such as their call records, mobile phone usage, network equipment, server logs, and social network activity, which can be useful for investigating and preventing crimes. In the instant case, a mobile phone without a back cover, whose value was less than Ksh. 2,000/=, triggered a series of activities that led to the arrest of the accused persons herein. The hearing was hot and heavy. However, I wish to thank the parties for their patience and resilience. The matter has been in court for over five years. Several factors led to the delay but the wait is finally over.

Plea Bargaining

6. The 6th accused person entered a plea bargain with the prosecution. The Plea-bargaining agreement was admitted by the court whereupon the 6th accused person pleaded guilty to the charges against him. He was convicted and sentenced accordingly. As part of the plea agreement, the 6th accused person testified on behalf of the prosecution.

No Case To Answer

7. Upon closure of the prosecution case, the court delivered a Ruling on 30/11/2023 in which it found that the 4th and 5th accused persons had no case to answer. They were thus acquitted under section 210 of the *Criminal Procedure Code*. The 1st to 3rd accused persons were placed on their defence.



The Charge

8. This judgment is in respect of the charges facing Julius Gitonga M'muguu, Joseph Amwayi Mukabana and Florence Mbithe Mwanza (hereinafter referred to as the 1st, 2nd and 3rd accused persons respectively). The charges are as follows:

Count one: robbery with violence contrary to section 296(2) of the penal code.

9. This charge is against the 1st, 2nd and 6th accused persons. The particulars of the offence are that on 12/12/2018 in Nyali Sub-county within Mombasa County, the three accused persons jointly with others not before court, while armed with a pistol and metal bars, stole three mobile phones the property of Kenneth Mwakombo Kamto and immediately before the said robbery, fatally shot Kenneth Mwakombo Kamto.

Alternative charge to count one: handling stolen goods contrary to section 322(1) as read with section 322(2) of the penal code.

10. This charge is against the 1st accused person. The particulars of the charge are that on 6/1/2019 at Kadzandani area within Mombasa County, the 1st accused person, otherwise than in the course of stealing, dishonestly undertook the retention of three mobile phones, the property of Kenneth Mwakombo Kamto, knowing or having reason to believe them to be stolen property.

Count two: handling stolen goods contrary to section 322(1) as read with section 322(2) of the penal code.

11. This charge is against the 3rd accused person. The particulars of the offence are that on 6/1/2019 at Kadzandani area within Mombasa County, the 3rd accused person, otherwise than in the course of stealing, dishonestly undertook the retention of three mobile phones, the property of Kenneth Mwakombo Kamto, knowing or having reason to believe them to be stolen property.

Count three: robbery with violence contrary to section 296(2) of the penal code.

12. This charge is against the 1st, 2nd and 6th accused persons. The particulars of the charge are that on 12/12/2018 in Nyali Sub-county within Mombasa County, the three accused persons jointly with others not before court, while armed with a pistol and metal bars, stole one mobile phone, the property of Fawzia Dear Omar and at the time of such robbery, used actual violence to the said Fawzia Dear Omar.

Alternative charge to count three: handling stolen goods contrary to section 322(1) as read with section 322(2) of the penal code.

13. This charge is against the 1st accused person. The particulars of the charge are that on 6/1/2019 at Kadzandani area in Mombasa County, the 1st accused person, otherwise than in the course of stealing, dishonestly undertook the retention of a mobile phone, the property of Fawzia Dear Omar, knowing or having reason to believe it to be stolen property.

Count four: handling stolen goods contrary to section 322(1) as read with section 322(2) of the penal code.

14. This charge is against the 3rd accused person. The particulars of the charge are that on 6/1/2019 at Kadzandani area in Mombasa County, the 3rd accused person, otherwise than in the course of stealing,



dishonestly undertook the retention of a mobile phone, the property of Fawzia Dear Omar, knowing or having reason to believe it to be stolen property.

Count five: robbery with violence contrary to section 296(2) of the penal code.

15. This charge is against the 1st, 2nd and 6th accused persons. The particulars of the offence are that on 12/12/2018 in Nyali Sub-county within Mombasa County, the three accused persons jointly with others not before court, while armed with a pistol and metal bars, stole one mobile phone the property of Uchi Zuma Mkaha alias Amina and at the time of such robbery, threatened to use actual violence to the said Uchi Zuma Mkaha alias Amina.

Count eight: possession of a firearm without a valid firearm certificate contrary to section 4(1) as read with section 4(3)(a) of the *firearms act*.

16. This charge is against the 1st and 3rd accused persons. The particulars of the charge are that on 6/1/2019 at Kadzandani area within Mombasa County, the 1st and 3rd accused persons were jointly found in possession of a pistol make Glock, serial number PBZ816 without a valid certificate.

Count nine: possession of ammunition without a valid firearm certificate contrary to section 4(1) as read with section 4(3)(a) of the *firearms act*.

17. This charge is against the 1st and 3rd accused persons. The particulars of the charge are that on 6/1/2019 at Kadzandani area within Mombasa County, the 1st and 3rd accused persons were jointly found in possession of eighteen rounds of ammunition without a valid certificate.

The Evidence

The Prosecution Case

18. The prosecution called a total of twenty-four (24) witnesses in a bid to prove its case against the accused persons. PW 1 Muasya Kiteme was the 6th accused person herein. He testified that in 2016 he met the 2nd accused person at Kongowea Market in Mombasa. The 2nd accused person started buying clothes from PW 1 at the market and they became friends. PW 1 testified that on 10/12/2018 he was at Kongowea market when the 2nd accused person called him on phone. The two met later in the day whereupon the 2nd accused person informed PW 1 that he had some work for him. That the 2nd accused person revealed that he used to break into houses to steal property and wanted the witness to join him. In particular, the 2nd accused person mentioned a certain house in Nyali area belonging to one Indian. He took the witness to Nyali where he showed him the house. PW 1 agreed to join the 2nd accused person.
19. It was the evidence of PW 1 that the 2nd accused person mentioned that he usually worked with one Gitonga. Later in the evening, the 2nd accused person called the witness and asked him to meet him at 7:30 pm. He mentioned that Gitonga would be there. The 2nd accused person later called the witness at about 7:00 pm and informed him that Gitonga had arrived. PW 1 went ahead and met the 2nd accused person and Gitonga. He was introduced to Gitonga. As they planned to go to the target house, PW 1 grew cold feet and started that he did not want to proceed with the plan. They agreed to defer the mission to the following day. According to PW 1, he met the 2nd accused person and Gitonga the following day whereupon the 2nd accused person called a motorcyclist.
20. The witness identified the 1st accused person as Gitonga. They proceeded to Nyali at the house which had been shown to the witness by the 2nd accused person. This was at about 1:00 am. PW 1 stated that the 1st accused person had a gun. The three entered the compound but left later after realising that there



- was an alarm system. A motor vehicle appeared at a certain gate nearby, the 1st accused person suggested that they enter the compound together with the motor vehicle. When the motor vehicle entered the compound, the three jumped over the fence and got into the compound. The 1st accused person was ahead of the rest. He ordered the occupant of the car to stop but the latter rushed to the house and slammed the door. The 1st accused person fired a shot and the door opened. He fired two other shots. The 1st accused person entered the house and called his friends.
21. PW 1 saw the person who was driving the motor vehicle lying on his stomach in the house. There were lights at the parking lot and inside the house. The 1st accused person asked his friends to follow two people who had entered a certain room in the house. PW 1 and the 2nd accused person followed the two people. They found two women and took them out of the room. PW 1 and the 2nd accused person went upstairs to check for valuables. Later when they left the house, the 1st accused person stated that he had obtained Ksh. 9,000/= and mobile phones. He gave the witness and the 2nd accused Ksh. 3,000/= each. The 2nd accused person called a motor cyclist and when he arrived, the three of them boarded the motorcycle and left. The witness travelled to Mwingi the following day. After about two weeks, he was called on phone by the 2nd accused person and informed that the person that the 1st accused person had shot dead was a former Deputy Governor of Kilifi County. The witness was later informed that the 2nd accused person had been arrested. PW 1 was later arrested in March, 2019. According to him, he revealed to the police what had transpired on the fateful night.
22. PW 2 testified as a protected witness, although no protection order was furnished to court. He stated that he was a bodaboda motorcyclist. That the 2nd accused person was his customer and relative. The testimony of PW 2 was that on 11/12/2018 the 2nd accused person called him on phone at about 7:00 pm and asked him to go where he was. The witness borrowed a motorcycle and proceeded to Kidogo basi area where the 2nd accused person was. He found the 2nd accused person with the 1st accused person. Later, another man joined them. The 2nd accused person asked the witness to ferry the 1st accused person and the other person whom the witness identified as a Kamba man. The witness took the 1st accused person and the Kamba man to Mbuni road in Nyali.
23. PW 2 further testified that on 12/12/2018 at about 4:00 am the 2nd accused person called him on phone and asked him to go and pick them up from where he had dropped them. The witness went to Mbuni road but did not find the three accused persons. While moving around, PW 2 met a woman who appeared to be in distress. The woman stated that her husband had been hit and asked the witness to take her to the Police station. The witness took the lady to Nyali police station. The witness returned to Mbuni road and found the three accused persons. He took the 1st and 2nd accused persons to their destinations. Later, the 2nd accused person went to PW 2's house and gave him Ksh. 200/= and a phone to the witness. The witness used the phone briefly and later sold it to the 4th accused person herein.
24. PW 2 was later arrested in connection with the phone that was given to him by the 2nd accused person. He told the police what had transpired. PW 2 took the police to the 2nd accused person's home in Butere where he was arrested. PW 3 Adnan Chicheung Mahmoud Tong testified that on 27/9/2017 he was asleep at his house in Nyali. He was woken up by three people at about 4:00 am. The people wore ski masks and had a flash light. The people robbed him and his wife. Among the items that were robbed from PW 3 was a pistol and ammunition. The witness identified a pistol in court stating that it was the one that was robbed from him. It was later alleged that it was the same pistol that was used to kill the deceased herein.
25. PW 4 Fawzia Dear Omar testified that she was the widow of the deceased herein. That on the night of 11/12/2018 and 12/12/2018 she had dozed off while watching Television at her home. That between



- 3:00 am and 4:00 am she was woken up by her husband's voice calling her out stating that there were thieves at their home. PW 4 went towards the sitting room where her husband's voice was coming from. She could see a person standing behind the sitting room door although it was dark. PW 4 then heard a gunshot. PW 4 rushed to a room near the kitchen where the house help and her mother-in-law were. While in the room, people entered and ordered them to switch on the light. The house help switched on the light. The intruders led them to the sitting room.
26. PW 4 saw her husband lying on the floor and was groaning. One man wearing a ski mask had a gun and slasher. He ordered PW 4 to give him money. The man hit PW 4 on the back using the slasher. Some more people went downstairs from the upper rooms then went outside the house. The man with the gun followed them. He returned and asked for the car keys. He took the keys and went outside. After a while, PW 4 went outside and found the driver's door and boot of the car open. She entered but could not find the ignition key. She also realised that her phone was missing from her handbag. The keys to the gate were also missing. PW 4 jumped over the gate and left the compound. She saw a bodaboda motor cyclist and asked him to take her to Nyali police station. She was taken to the police station. The witness reported to the police what had happened. Three police officers accompanied her back to her home.
27. Other police officers joined their colleagues at PW 4's home. PW 4 was informed by the police officers that her husband was dead. The body was taken away by the police. Later in January, 2019 the witness was called by the police and informed that some items had been recovered. She went to the police station and was able to identify her Techno Tablet and three phones which were being used by her deceased husband. The house help was also able to identify her stolen phone. PW 5 Inspector of Police Mbalani Alfred Kahi testified that he was a Firearms Examiner and an expert in shooting crime scene reconstruction. His evidence was that he visited the scene of crime on 17/12/2018. Upon analysis, the witness concluded that gunshots were fired from a standing position close to the entrance of the house. He produced his report in evidence.
28. PW 6 Uchi Zuma Mkaha testified that at the material time, she was a house help at the deceased person's house. On the material night, she was woken up by the sound of gunshots. She then saw PW 4 rush into the room where PW 6 was. Two men entered the room and ordered them to switch on the light. PW 6 switched on the light. One of the men ordered her to surrender her phone, which she did. He then demanded for money. PW 6 gave the man Ksh. 6,000/= . PW 4 and PW 6 were taken out of the room. They went to the sitting room. PW 6 saw the deceased lying on the floor and was groaning. She was ordered to lie down. After the intruders had left, PW 6 assisted PW 4 to jump over the gate as the key to the gate could not be found. PW 4 left the compound. After a while, police officers visited the house. PW 6 identified a phone in court as the one which was stolen from her.
29. PW 7 Assistant Superintendent of Police Alex Chirchir testified that he was a Ballistics expert. That on 21/12/2018 he received three bullets, three cartridge cases, one pistol, a pistol magazine containing 18 bullets. He examined all the items and established that the pistol was a firearm of Glock model. It was functional and in good condition. He also established that the three bullets had been fired by one gun and that the three cartridges had been fired from the same gun. The witness further established that the bullets were ammunition as described by law. He produced his report in evidence. PW 8 Police Corporal Joseph Kimanzi testified that he visited the scene of crime in the company of other police officers. They broke the padlock at the gate then entered the house.
30. It was the testimony of PW 8 that he saw a body of a male person on the floor. The body had four bullet wounds. He also saw a bullet head. The witness took custody of the bullet head and broken padlock. They then took the body of the deceased to the mortuary. The witness later handed over the bullet head and broken padlock to the investigating officer herein. PW 9 Evan Mwanjala Kombo testified



- that he was an employee of the company that managed House No. 329 at Kadzandani area. That on 12/1/2019 he was called by DCI officers who requested records in respect of unit 2 on house No. 329. The witness testified that he knew the 1st accused person as the tenant of the house. He exhibited the tenancy agreement.
31. PW 10 Samson Chamanje Chai testified that the deceased herein was his cousin. He received information that his cousin had been shot. The witness proceeded to the deceased person's house at Nyali but found that the body had already been taken away. He went to the mortuary and was able to identify the body. Later, the witness attended the post-mortem exercise. PW 11 Police Constable Dennis Isemek testified that on 6/1/2019 he accompanied other police officers to Kwa Bullo area in Kadzandani. They raided unit No. 2 on house No. 329 and found a man and a woman. A search was conducted at the house. The witness recovered several mobile phones. He identified the 1st and 3rd accused persons as the ones the police found at the house.
 32. PW 12 Irene Mwaringa testified that she was a Government Analyst working at the Government Chemist in Mombasa. That on 14/12/2018 the Government Chemist received blood in two bottles, finger nails and clothes from the police for purposes of DNA analysis. On 12/4/2019, the Government Chemist received buccal swabs from the police for analysis. The buccal swabs were taken from the 1st and 2nd accused persons. Upon analysis, the witness found that the blood stains on the clothes tested positive for human blood. These were the clothes that were allegedly worn by the deceased when he was shot. The blood matched that of the deceased. There is a jacket whose DNA profile matched the buccal swab attributed to the 1st accused person. The witness produced her report in evidence.
 33. PW 13 Inspector of police Paul Chai testified that on 10/1/2019 he was requested to conduct an identification parade in respect of the 1st accused person herein. However, the 1st accused person declined to participate. The parade was thus not conducted. PW 14 Doctor Gabriel Mungola produced a P3 form and treatment notes in respect of PW 4, the deceased person's widow. PW 15 Inspector of police Michael Wachira Wanjohi testified that in December, 2018 he was at Nyali Police station when he was approached by the investigating officer herein and requested to facilitate the extraction of DNA samples from a suspect. The suspect was the 1st accused person herein. The witness explained to the 1st accused person the contents of the consent form for DNA sample extraction. That the 1st accused person appended his thumb print on the form.
 34. PW 16 Police Sergeant Stephen Nyamai testified that he was a scenes of crime officer. That on 12/12/2018 at about 5:30 am he visited a murder scene at Nyali area. He found the body lying on the floor. He examined the body and saw bullet wounds on the left side. The witness took photographs of the body and the scene. On 13/12/2018 the witness visited the mortuary where the deceased person's body was. He also took photographs during the post mortem exercise. The witness produced all the photographs taken together with his report and certificates. PW 17 Police Constable Kipkorir Langat testified that on 6/1/2019 he was instructed to join officers from the Homicide department of the DCI who were to arrest a suspect at Kwa Bullo area in Mombasa. The witness testified that when they reached the suspect's house, a search was conducted. The witness participated in the search and was able to recover a pistol and a magazine containing 14 rounds of ammunition. He also recovered 4 other rounds of ammunition. He identified the 1st and 3rd accused persons as the occupants of the house where the pistol and ammunition were found.
 35. PW 18 Inspector of Police Kennedy Karanji Wanyoike testified that he was a Cybercrime expert at the DCI. That on 10/1/2019 he received several cell phones for analysis. He was required to retrieve data from the phones. He retrieved the data and prepared his report which he produced in evidence. PW 19 Doctor Johansen Oduor testified that he was a Pathologist. That on 13/12/2018 he was at



- Coast General hospital mortuary where he conducted a post-mortem examination on the body of the deceased herein. The pathologist was able to observe that the body had bullet wounds. He retrieved two bullet heads from the body. According to PW 19, the cause of death was as a result of bullet injuries which caused loss of blood.
36. PW 20 Chief Inspector of Police Beneutychous Wanjohi testified that he was a forensic imaging and acoustics expert. The witness testified that on 13/12/2018 he joined a team of investigators at the crime scene herein. He took photographs at the scene. He also accessed the CCTV camera from a neighbouring house as well as at a liquor bar where the deceased had gone to before returning home to meet his death. The witness played the CCTV footage of the crime scene and produced all the photographs that he took. He also produced the footages and reports in evidence. PW 21 Police Constable Ian Nahashon Mlamba testified that he was a DCI officer attached to the liaison office at Safaricom Limited. He further testified that he received a request to provide Mpesa statements for seven phone numbers as well as communication data. The witness took the court through the call data records. He produced the records as well as Mpesa statements.
 37. PW 22 Inspector of Police Peter Kamau testified that on 12/12/2018 he was instructed to travel to Mombasa to join the investigation team herein. He arrived at Mombasa on 13/12/2018. He visited the scene of crime and participated in conducting interviews as well as searches. On 18/12/2018 the police officers recovered three spent cartridges from a nearby bush. PW 22 was also involved in the arrest of six suspects and their interrogation. PW 23 Police Corporal Ventah Andayi testified that she was part of the investigating team herein. She was instrumental in the arrest and interrogation of some of the suspects. She also escorted some exhibits for analysis and processing.
 38. PW 24 Inspector of Police Raphael Wanjohi was the lead investigator herein. He testified that on 9/12/2018 he travelled to Mombasa to attend to a case at Shanzu court. That on 12/12/2018 he was at the hotel where he had lodged when he saw on Television that the former Deputy Governor Kilifi County had been killed that morning. Later in the day, PW 24 was instructed by his superiors to take over investigations in the matter. The investigating officer and his team visited the scene of crime. They were informed of what had transpired. The following day, PW 24 attended the post-mortem exercise of the body of the deceased.
 39. In the course of investigations, several theories came up and all of them were investigated. A CCTV footage from a nearby house was retrieved and analysed. This led to the retrieval of spent cartridges, a slasher and bunch of keys. Later when the investigators received the call data records for the victims, they realised that one of the stolen phones was being used. It was a Swiss plus one phone which was stolen from the deceased person's house help. The investigators obtained the IMEI history of the phone and were able to establish all the sim cards that had been used in the phone at the material time. This led to the arrest of PW 2, the 4th accused person and the 5th accused person. The phone was recovered from the 5th accused person.
 40. Further interrogations led to the arrest of the 2nd accused person. His call data record was also obtained. It was established that there had been phone communication between PW 2 and the 2nd accused person at the material time. Further investigations led to the arrest of the 1st and 3rd accused persons at a house in Kwa bullo area. The pistol that was allegedly used to kill the deceased herein was recovered from the said house. The mobile phones belonging to the deceased, his widow and the house help were also recovered from the same house, as per the investigating officer. The investigators were also able to establish that there was mobile phone communication between the 1st and 2nd accused persons. This was done through obtaining the call data records. The call data records also established that



there was mobile phone communication between the 2nd and 6th accused persons on 11/12/2018 and 12/12/2018.

41. PW 24 testified that from his investigations, he gathered that the 1st, 2nd and 6th accused persons were involved in the robbery that led to the death of the deceased herein. He based his findings on, inter alia, the fact that a bullet head was found at the scene of crime, spent cartridges were recovered from outside the compound of the deceased, two bullets were recovered from the body of the deceased. That the 1st accused person was found in possession of the gun that was used to kill the deceased. The investigating officer further stated that the 1st accused person was found in possession of the stolen phones, there is a witness who stated that he ferried the 1st and 2nd accused persons to the scene and an accomplice confessed then implicated the 1st and 2nd accused persons. Further, the call data records and signals placed the 1st and 2nd accused persons at the scene of crime. The investigating officer produced several items and documents in support of the prosecution case.

The Defence Case

The 1st accused person's defence.

42. The 1st accused person testified as DW 3. He testified that he stayed at Mabisini area in Kadzandani and not Kwa bullo area. The 1st accused person stated that his Landlord was one Joseph Karisa and that he paid a monthly rent of Ksh. 2,500/= . That no room at the premises where he stayed had a house number. The 1st accused person further stated that he last used a phone in 2016 when it got lost. It was the testimony of the 1st accused person that he did not know the 2nd accused person. That he first saw him in court. As for the 3rd accused person, the 1st accused person stated that he used to pay her for sex. The 1st accused person stated that on 12/12/2018 he was in Meru, having left Mombasa on 7/12/2018. That he left Meru on 5/1/2019 and arrived at Mombasa on 6/1/2019.
43. The 1st accused person testified that he was at his house with the 3rd accused person at about 4:00 pm when he heard a knock at the door. This was the house at Mabisini. When he opened the door, a gun was pointed at him and he was ordered to get back to the house. He was further ordered to sit down and handcuffed. His head was covered with a black bag so that he could not see what transpired in the house. According to the 1st accused person, the 3rd accused person was taken out of the house. The 1st accused person was later dragged out of the house and placed in a motor vehicle. He was taken to Mjambere Police station. The 1st accused person knew of what he was being accused of when he was taken to court. He stated that he did not know how to use a gun and had never owned one. The 1st accused person denied that he was found in possession of ammunition. He contended that he was framed up and his witnesses were threatened.

The 2nd accused person's defence

44. The 2nd accused person testified as DW 1. He testified that he did not commit the offences. That he was not found with any stolen item. It was the evidence of the 2nd accused person that PW 2 who is his brother in-law had a grudge against him. When the 2nd accused person was cross-examined by the prosecution counsel, he stated that on 12/12/2018 he was at Sabatia in Butere. He further stated in cross-examination that he did not give PW 2 any phone.

The 3rd accused person's defence

45. The 3rd accused person testified that she was a sex worker. She stated that she was with the 1st accused person at his house when they were arrested. That the 1st accused person was her client. The 3rd accused



person further stated that she was taken out of the house when the police entered and that they blindfolded the 1st accused person. That she was not connected to any gun nor aware that there was a gun at the 1st accused person's house. The 3rd accused person stated that it was the 1st accused person who requested her to be paying his rent using her Mpesa account. That she would pay the rent then the 1st accused person would refund.

Main Issues For Determination

46. Having considered the evidence on record, I find that the main issues for determination are as follows:
1. Whether the victims were robbed on 12/12/2018 or at all;
 2. Whether the 1st and 2nd accused persons were positively identified as part of the robbers;
 3. Whether the 3rd accused person handled stolen property;
 4. Whether the 1st and 3rd accused persons were found in possession of a firearm and ammunition without a valid firearm certificate;
 5. Whether the prosecution has proven its case against the 1st, 2nd and 3rd accused persons to the required standard.

Submissions On Behalf Of The 1st Accused

47. At the close of the defence case, the 1st accused person, through his counsel, filed written submissions. The 1st accused person submitted that the eye witnesses stated that the perpetrators wore masks that covered their faces and could therefore not be identified. That no DNA and finger print sampling was done at the scene of crime. That the 1st accused person is a stammerer yet the witnesses who were present during the incident testified that they did not hear him stammer. Counsel for the 1st accused person argued that no nexus was established between the 1st accused person and his co-accused persons. That no communication was established either through call logs or texts from the 1st accused person to his co-accused persons and that there was not a single mobile phone number registered in his name amongst all the mobile phone records produced in evidence.
48. The 1st accused person argued that the CCTV footage does not aid by way of evidence as it fails the test of veracity especially as relates to the manner in which it was obtained and does not clearly show the face of the 1st accused person anywhere. That none of the witnesses saw the 1st accused person shooting the deceased at any material time and it is not clear who shot the deceased or how he was shot. It was submitted that the confession obtained from the 6th accused person was suspect as it was obtained from an accused person who was at the time in prison facing probability of a lengthy prison time and therefore not capable of free will by any measure. The 1st accused person argued that the charge indicated that the accused persons were armed with metal bars and a pistol but PW 5 and PW 24 mentioned a slasher. That there was no mention of metal bars throughout the trial. According to the 1st accused person, the disconnect is telling.
49. It was submitted by the 1st accused person that the gun in issue belonged to a witness who testified herein and not the 1st accused person. That the ammunition that was allegedly used by the accused persons was incompatible with the pistol, as per the evidence of the Ballistics expert. The 1st accused person contended that since PW 5 did not see any blood when she went to examine her deceased husband's body, the indication was that no gun was used and if any was used, then it was not the gun produced in evidence herein. The 1st accused person argued that the crime scene was compromised as it was not cordoned off and the relatives and friends of the deceased went out their business while



forensic analysis was being carried out at the scene. For this reason, the 1st accused person contended that the evidence on scene reconstruction and forensic activity at the scene was null and void.

50. It was argued by the 1st accused person that the police officers involved in the investigations handled the evidence so casually without gloves or any precautionary measures. That the fact vitiated the veracity and sanctity of the evidence presented. The 1st accused person argued that there was nothing to show that the gun was last used by the 1st accused person. That no fingerprint impressions were taken and compared with a view to pinning the 1st accused person as having actually been the one who last used the gun. The 1st accused person contended that the prosecution failed to establish where he stayed. That PW 9 did not produce evidence to prove that he worked for Arkaan Properties. The 1st accused person wondered why the tenancy agreement was signed by the Landlord after the accused person had been arrested. That no single transaction involving house No. 329/02 was linked to the accused person and no neighbours were called to testify to the effect that the 1st accused person stayed in the house in issue.
51. The 1st accused person submitted that the prosecution failed to prove that the stolen items belonged to the complainants herein as well as the deceased. That no purchase receipts nor invoices were produced. The 1st accused person pointed out that the inventory of recovered items was not prepared at the scene of crime and no scenes of crime officer was invited to the scene. It was argued that the intention was to plant items at the house. That the 1st accused person was blindfolded during the search and arrest. The 1st accused person relied on his testimony and contended that it was too elaborate to be untrue. He also argued that the prosecution had failed to demonstrate that he knew or had reason to believe that the phones were stolen. That the 1st accused person was not the owner of the house wherein the phones were allegedly recovered from. The 1st accused person submitted that he was not found in possession of the firearm and ammunition nor did the prosecution prove that he knew that there was a gun in the house.
52. In conclusion, the 1st accused person argued that the prosecution evidence was circumstantial and full of contradictions. In particular, the 1st accused person argued that:
 - a. The circumstances from which the inference of the accused person's guilt is sought to be drawn have not been cogently and firmly established;
 - b. Those circumstances that the prosecution relies upon do not in any way establish a definite tendency pointing towards the guilt of the accused person;
 - c. There is no definite chain of probability so complete such as to pin down the accused to the exclusion of everyone else.
53. According to the 1st accused person, it would be unsafe to convict him. He urged the court to find him innocent and a victim of unfortunate circumstances.

Submissions By The Prosecution

54. The prosecution filed written submissions. They relied on their earlier submissions made at the close of the prosecution case. In addition, the prosecution submitted that the 1st accused person failed to adduce any evidence in rebuttal of the overwhelming evidence placing him at the scene of crime. That the attempt to raise an alibi was an afterthought and not supported by any evidence. The prosecution argued that the alibi defence raised by the 1st accused person was rebutted by the overwhelming evidence placing him at the scene. The prosecution submitted that the 2nd accused person placed at the scene by call data records, accomplice evidence and entire evidence. The prosecution contended that the 2nd accused person failed to rebut the watertight evidence against him and dwelt on issues not in



question. On the 3rd accused person, the prosecution submitted that her defence was a mere denial. That her defence did not rebut the fact that she used to pay rent for the house where firearm and stolen items were recovered from. The prosecution contended that they had adduced watertight evidence and the 1st to 3rd accused person and urged the court to find them guilty as charged.

Analysis And Determination

55. I have carefully considered the evidence on record as well as the law applicable. I have further given due regard to the submissions made by the parties. I now proceed to analyse and address the main issues as follows:

Whether the victims were robbed on 12/12/2018 or at all

56. This issue relates to counts one, three and five and to the 1st and 2nd accused persons. I will analyse the evidence collectively since it was said that the offences were committed in the same transaction and at the same place, although there were different victims, including the deceased herein. Section 296(2) of the Penal code provides as follows:

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

57. In *Suleiman Kamau Nyambura v Republic* [2015] eKLR, the Court of Appeal held as follows:

“The case of *Johanna Ndung’u vs Republic - Criminal Appeal No. 116 of 2005*, (unreported) sets out the ingredients of robbery with violence pursuant to Section 296 (2) of the Penal code as follows: -

- a. If the offender is armed with any dangerous or offensive weapon or instrument, or;
- b. If he is in the company with one or more other person or persons, or;
- c. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

Proof of any one of the ingredients of robbery with violence is enough to sustain a conviction under Section 296 (2) of the *Penal Code*. See *Oluoch vs Republic* (1985) KLR 549. In addition, and what is crucial in a criminal trial is also the requirement to prove in addition to there being one of the set out ingredients of robbery with violence is the need to positively identify the assailant/s in question.”

58. The particulars of the charges in counts one, three and five indicate that on the material night, the 1st, 2nd and 6th accused persons while armed with a pistol and metal bars, stole from the victims and fatally shot the deceased herein. The direct evidence was given by PW 1, PW 4 and PW 6, with the last two being the alleged victims. There is sufficient evidence to prove that the deceased died during the incident. The police investigated the matter and established that there was a robbery at the deceased person’s house on the material night. The charges indicate that what was stolen were mobile phones belonging to the alleged victims.



59. In the case of Joshua Munyao Kiilu & another v Republic [2016] eKLR, the accused person had been charged and convicted of the offence of Robbery with violence contrary to section 296(2) of the Penal code. It was alleged that the robbers took Ksh. 5,000/= and a mobile phone from the complainant at the time of the alleged robbery. On appeal, Nyamweya J (as she then was) held as follows:

“The prosecution must therefore prove theft as a central element of the offence of robbery with violence, as the offence is basically an aggravated form of theft..... As regards the phone that was stolen, Charles did not provide any evidence of the existence of the phone or ownership of the same. The other witnesses did not give any evidence of the existence of the phone, other than the account given to them by Charles of the phone having been stolen..... This evidence by Charles as to the robbery is therefore uncorroborated, and in light of the gaps and irregularities noted in the evidence on the items that were alleged to have been stolen by the Appellants, this Court finds that the robbery was not proved beyond reasonable doubt.”

60. The court quashed the conviction of Robbery with violence and set aside the sentence and substituted the same with the offence of Assault causing actual bodily harm.

61. Similarly, in the case of Peter Munene v Republic [2009] eKLR, the accused was, inter alia, charged and convicted of the offence of stealing of a cell phone, wrist watch and money in cash. While quashing the conviction on the offence of stealing, J.B Ojwang J (as he then was) held as follows:

“Did the appellant also steal personal items and money from the complainant? Without necessarily doubting the single-witness evidence on the charge of theft, it is to be noted that the proof placed before the Court had focused on the first count of the charge, while little had been shown to prove the theft charge. No attempts were made to convince the Court that the items allegedly stolen had existed, or were in the complainant’s custody on the material night. The mode of proof, in his regard, conveys doubts which, by the standard practice in criminal law, will have to be resolved in favour of the appellant.”

62. I agree that for the court to find that the victims were robbed of their items, there must be evidence to prove that the items and in particular the mobile phones, existed and were in the possession of the victims at the material time. An accused person should not be found guilty of the offence of stealing just because the complainant alleges that he lost some property. Existence and prior possession of the property by the complainant ought to be established. Even where property said to have been stolen is recovered, there must be positive identification of the same by the complainant and proof that indeed the property was stolen. I am guided by the provisions of sections 107 and 109 of the Evidence Act which basically provide that the burden of proof lies on the person who alleges the existence of facts upon which he desires the court to give judgment in his favour. It is not enough to allege that items were stolen, the allegation must be proved. The court must be convinced beyond reasonable doubt that the complainant had the items and the same were stolen.

63. The 1st accused person argued that no purchase receipts or any documents were produced by the prosecution to prove that the mobile phones belonged to the victims. Indeed, no ownership documents of any kind were produced in evidence by the prosecution. Does this mean that existence and possession of the phones by the victims was not proven? At this juncture, I must point out that in my view, it is not mandatory to prove that the mobile phones belonged to the victims. What ought to be proven is that the mobile phones existed and were in the custody or possession of the victims at the time of robbery. A person can be robbed of an item that does not belong to them, provided they are in possession of the item at the time of offence.



64. It was stated in the prosecution evidence that the deceased was fatally shot and three mobile phones which were in his possession stolen. The mobile phones were described as follows in the particulars of the charge:
- a. Oppo IMEI No. 865265037028894/865265037028886;
 - b. Xtigi IMEI No. 355940087120182/355940087120190;
 - c. Xtigi IMEI No. 354733052255724/354733052255732.
65. The prosecution evidence further shows that the Oppo mobile phone described above was recovered. The same was produced in evidence as Prosecution exhibit No. 11. The two Xtigi mobile phones were also recovered and produced in evidence as Prosecution exhibits numbers 9 and 10 respectively.
66. Production of the phones in evidence proves their existence. The deceased person's widow who testified as PW 4 identified the three phones mentioned above as those that were being used by the deceased. The evidence of PW 4 was that the Oppo phone belonged to her son but was being used by the deceased. PW 21 produced in evidence Safaricom call data records of the deceased for the period between 1/12/2018 and 12/12/2018. This was produced as prosecution exhibit 63. According to the call data records, the deceased used two mobile phones with IMEI numbers 865265037028890 and 355940087120190. The Oppo phone that was produced in evidence and said to have belonged to the deceased was IMEI number 865265037028894. The last digit is different from the IMEI number of the mobile phone that he deceased used on 12/12/2018 just before the incident.
67. Was the Oppo phone produced in evidence the same as what the deceased used prior to his death? I have already pointed out that the IMEI number of the phone produced in evidence differs with that described in the deceased person's call data records as far as the last digit of the IMEI number is concerned. In order to answer the question posed hereinabove, there is need to understand the whole concept of IMEI allocation. I have done my research on the same. An International Mobile Equipment Identity (IMEI) number is a globally unique identifier assigned to individual mobile devices. IMEI numbers are tied to the mobile device, not to the SIM card. The IMEI number consists of 15 decimal digits, ranging from 0 to 9. The Global System for Mobile communication Association (GSMA), oversees the assigning of IMEI numbers to mobile device models.
68. The IMEI number is comprised of the following:
1. Type Allocation Code (TAC). This refers to the first eight (8) digits of the IMEI number. The TAC is made up of; Reporting Body Identifier – first 2 Digits. These digits indicate which Reporting Body issued the IMEI; Model Number Identifier – the next 6 Digits. These 6 digits together with the Reporting Body 2-digit identifier uniquely identify each Mobile equipment (ME) Model;
 2. Serial Number – 6 Digits. This is used to uniquely identify each individual ME of a particular Model. Each ME of each ME Model must have a unique Serial Number for a given TAC code. This implies that no two or more devices can share a serial number;
 3. Check Digit – 1 Digit. This is a function of all other digits in the IMEI. The purpose of the Check Digit is to help guard against the possibility of incorrect entries to the Central Equipment Identity Register (CEIR) and Equipment Identity Register (EIR) equipment or for detecting mistakes in reading or manual transcription of the IMEI.
69. The IMEI uniquely identifies an individual mobile device. It is unique to every mobile equipment and thereby provides a means for controlling access to GSM networks based on ME Model or individual



units. One interesting thing about the check digit is that it is only stored in the device. A zero (0) is always transmitted during network transmission. This implies that in the call data record for a particular phone, the last or check digit will always appear as 0. This explains why the IMEI number of the last phone that the deceased used appears in the call data record as 865265037028890 yet the phone produced in evidence was IMEI number 865265037028894. All the other digits, including those representing the serial number are the same. It is therefore not in doubt that the Oppo phone produced in evidence belonged to or was used by the deceased prior to the incident. Furthermore, data was extracted from the phone and there were messages indicating financial transactions between the deceased and his Widow.

70. The call data records further reveal that the deceased used a mobile phone with IMEI number 355940087120190 between 10/11/2018 and 15/11/2018. This is the black Xtigi phone that was described in the particulars of the charge and produced in evidence as prosecution exhibit number 9. It can safely be stated that mobile phone IMEI 355940087120190 belonged to or was being used by the deceased person at the material time. As for the second Xtigi phone IMEI number 354733052255724/354733052255732, there are no records or other evidence positively linking the same to the deceased. The prosecution evidence indicates that 18 mobile phones were recovered from the 1st accused person. It was therefore incumbent upon the prosecution to positively identify and link the phones to the deceased, to the exclusion of any other person. In my view, mere oral testimony cannot suffice. I cannot hold with certainty that the green Xtigi phone belonged to or was used by the deceased prior to his demise.
71. Nevertheless, there is sufficient evidence to prove that the deceased used at least two mobile phones prior to his death. The two phones were positively identified and produced in evidence. I have no doubt that the deceased was robbed on the material day. It does not matter that not all the stolen phones may not have been recovered. The third count indicates that Fawzia Dear Omar was robbed of a Techno mobile phone IMEI number 357005088525926/357005088525934. The same phone was produced in evidence and it was alleged that it had been recovered from the 1st accused person. Fawzia testified as PW 4. Her testimony was that her phone was in her handbag. The handbag was on the seat in the living room. When the intruders were in the house, PW 4 noticed that the handbag had been emptied and when they left, she realized that her phone was missing from the handbag.
72. PW 4 further testified that later, she was able to identify her Techno Tablet. She identified the Techo Tablet that was produced in evidence as prosecution exhibit 8. In support of the allegation that the Techno tablet belonged to PW 4, the prosecution produced in evidence PW 4's call data records. These were produced as prosecution exhibit 56. The records run from 1/11/2018 to 16/12/2018. According to the call data records, PW 4 was subscribed to Safaricom number 0702767637. The records further indicate that PW 4 used mobile phone IMEI number 357005088525920 from 1/11/2018 to 11/12/2018 at 8:14 pm. I have already explained the issue of the check digit appearing as "0" in the call data records. The data extracted from the Techno tablet indicates that it contained photographs of PW 4. I am convinced that the Techno tablet belonged to PW 4. The call data records indicate that PW 4 last used her phone in Nyali and that after 11/12/2018, all calls to her number were forwarded until 14/12/2018 when she started using a different phone. This implies that she could not be reached during that period. This lends credence to the fact that she had lost her phone.
73. The particulars of the fifth count indicate that Uchi Zuma Mkaha was robbed of her phone Swiss + one of IMEI number 353590068517104. Uchi testified as PW 6. Her testimony was that two men entered the room where she had rushed to hide. One of the men ordered them to switch on the light and when PW 6 switched on the light, the man ordered her to give him her phone. She obliged. PW 6 identified a Swiss + one phone that was later produced in evidence as the phone that was stolen from



her. It was produced in evidence as prosecution exhibit 4. The IMEI number of the phone that was produced in evidence is 353590068517104. It is the same phone that was described in the particulars of the charge. PW 21 produced the call data records for PW 6. The records show that PW 6 was subscribed to Safaricom number 0713113008 and used a mobile phone IMEI number 353590068517100 from 1/12/2018 to 12/12/2018. I find that there is sufficient evidence to prove that the Swiss + one phone produced in evidence belonged to PW 6 or that she was using it prior to the incident.

74. The prosecution produced in evidence the call data records for PW 2 as prosecution exhibit 60. The records show that from 17/12/2018 to 18/12/2018, PW 2 used the mobile phone belonging to PW 6. The call data record for the 4th accused person was also produced in evidence as prosecution exhibit 58. The same indicates that from 18/12/2018 to 25/12/2018 with a break in between, the 4th accused person used the mobile phone belonging to PW 6. Further, the call data records for the 5th accused person were produced as prosecution exhibit 59. They indicate that from 25/12/2018 to 3/1/2019, the 5th accused person used the mobile phone belonging to PW 6. The evidence indicates that the police recovered the phone from the 5th accused person. Having analysed the evidence on record, I hold with conviction that the three victims were robbed of their mobile phones on the material night. There is also sufficient evidence to prove that Kenneth Mwakombo Kamto lost his life during the robbery incident. Photographs and a post mortem report were produced in evidence.

Whether the 1st and 2nd accused persons were positively identified as part of the robbers.

75. The prosecution case is that the 1st and 2nd accused persons were part of those who robbed the victims on the fateful night. PW 4 and PW 6 who were the victims of the incident were categorical that they could not identify the robbers since they were wearing ski masks. However, they were sure that the robbers were three men. They were also sure that one of them had a pistol, which was used to end the life of the deceased herein. The evidence against the 1st and 2nd accused persons is comprised of both direct and circumstantial evidence. The direct evidence was given by PW 1 who was the 6th accused person herein. As already pointed out, the 6th accused person entered into a plea agreement with the prosecution. He is therefore an accomplice witness. Before the plea agreement was admitted by the court, the court examined the 6th accused person to satisfy itself that he understood the implications of the plea agreement and that no coercion or undue influence had been used to secure the agreement.
76. Following the examination and other procedures as well as perusal of the plea agreement, the court was convinced that there existed a factual basis for the plea agreement, that at the time of making the plea agreement, the 6th accused person was competent, of sound mind and acted voluntarily. I have already highlighted the 6th accused person's testimony hereinabove. The gist of his testimony is that he was with the 1st and 2nd accused persons on the material night and that the three of them broke into the house of the victims and robbed them as was alleged. In their defence, the 1st and 2nd accused persons did not say anything concerning the testimony of the 6th accused person. They merely stated that they were not in Mombasa on the material day/night.
77. Section 141 of the *Evidence Act* provides as follows on accomplice evidence:

“An accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice.”



78. In *Rex v Ndara s/o Kariuki and six Others* [1945] 12 EACA 84, the Court at page 86 enunciated the correct approach to accomplice evidence thus:

“A point which is sometimes lost sight of in considering accomplice evidence is that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence, feels that it cannot believe the accomplice it must reject his evidence; and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If however the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending to connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment whether or not it regards the accomplice as worthy of belief. (See also *Kinyua v Republic* [2002] 1 KLR 256)”.

79. Similarly, in *Michael Murithi Kinyua v Republic* [2002] eKLR, the Court of Appeal explained the approach as regards accomplice evidence in the following terms:

“Under section 141 of the *Evidence Act*, Cap 80 Laws of Kenya an accomplice is a competent witness and a conviction based on his evidence is not necessarily illegal or irregular. However, there is a firm rule of practice that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if satisfied that the accomplice witness is telling nothing but the whole truth, and upon the court duly warning itself and the assessors, where the trial is with the aid of assessors, on the dangers of doing so. Before corroboration can be considered however, a court of law dealing with accomplice witnesses must first make a finding as to the credibility of the witnesses. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence, and unless there is some other evidence, the prosecution must fail. If the court decides that the witness, though an accomplice witness, is credible, then the court goes further to decide whether the court is prepared to base a conviction on the evidence of the accomplice witness without corroboration. If this is so, the court must direct and warn itself accordingly. On the other hand, if the court decides that the accomplice witness, though credible, requires corroboration, the court must look for, find, and identify the corroborative evidence.”

80. Being guided by the above authorities, I hereby warn myself that although an accomplice is a competent witness and his evidence need not be corroborated, there is need for caution before relying on the uncorroborated evidence of an accomplice. Was PW 1 (the 6th accused person) a credible witness? There is no particular formula for evaluating the truthfulness and accuracy of a witness testimony. When assessing the credibility of a witness, the court can consider the following non-exhaustive factors: Consistency: Check if the statements and behaviour of the witness are consistent. You can compare what they say with what they have written in reports, emails, or other records. You can also cross-check their accounts with other witnesses. Evidence: Consider if the evidence of the witness matches up with other independent evidence that has been accepted. Demeanour: Consider the overall demeanour of the witness. Motive: Consider if the witness has a motive to lie. Reasonableness: Consider if the testimony of the witness seems unreasonable, unlikely, or impossible. Changes: Consider if the witness changes their testimony during cross-examination and direct examination.



81. I have carefully considered the testimony of PW 1 or the 6th accused person. The witness was represented by counsel and he confirmed to court that he consulted his counsel and was duly advised before he entered into the plea agreement. He understood his right to a plea of not guilty and the right to be presumed innocent. When the court examined the witness before admitting the plea agreement, the witness confirmed that he was aware of his right not to give self-incriminating evidence or information and the right to a full trial. The witness also understood that the offence of Robbery attracted a death penalty upon conviction. He further informed the court that he was neither tortured, coerced nor intimidated and that he gave the information to the police voluntarily. The witness further informed the court that he was ready to accept any punishment as would be given by the court.
82. The testimony of PW 1 was consistent and was not shaken even in cross-examination. There was nothing untoward with respect to his demeanour. As already stated, neither the 1st nor the 2nd accused person rebutted the testimony of PW 1. None of them mentioned PW 1 in their defence. There is absolutely nothing to suggest that PW 1 had an ill motive against the 1st and 2nd accused persons. His testimony was reasonable. I have no reason to doubt the credibility of PW 1.
83. Was the evidence of PW 1 corroborated by independent testimony or evidence? Having analyzed the prosecution evidence, I find that the testimony of PW 1 was corroborated in material particulars with the testimonies of the victims, being PW 4 and PW 6. Further corroboration was given by PW 2 who was a witness under protection. PW 2 was the brother-in-law to the 2nd accused person. This fact was confirmed by the 2nd accused person in his testimony in defence. PW 2 explained how he ferried the 1st and 6th accused person (PW 1) to Nyali and later went to pick the 1st, 2nd and 6th accused persons up after the incident. Part of the evidence of PW 2 was that he was the one who took PW 4 to Nyali Police station to report the incident. This fact was confirmed by PW 4 in her testimony.
84. PW 2 further testified that he was given a mobile phone by the 2nd accused person. This was the phone that was robbed from PW 6. The testimony of PW 2 concerning the mobile phone was corroborated by the call data records of PW 6, the 4th and 5th accused persons as well as those of PW 2. As already indicated hereinabove, the call data records show that from 17/12/2018 to 18/12/2018, PW 2 used the mobile phone belonging to PW 6, from 18/12/2018 to 25/12/2018 with a break in between, the 4th accused person used the mobile phone belonging to PW 6 and from 25/12/2018 to 3/1/2019, the 5th accused person used the same mobile phone until it was recovered from her. The 2nd accused person testified that PW 2 had a grudge against him involving a family dispute. This was not raised during cross-examination of PW 2 by counsel for the defence. When the 2nd accused person was cross-examined by the prosecution counsel, he stated that he did not inform his counsel about the grudge.
85. However, the testimony of PW 2 concerning the involvement of the 2nd accused person was corroborated by PW 1. It was further corroborated by the call data records produced in evidence. I have carefully perused the call data records for PW 2 and those of the 2nd accused person produced as prosecution exhibit 62. Both records show that there was communication between PW 2 and the 2nd accused person as follows:
- a. On 9/12/2018 at 9:01 pm, the 2nd accused person called PW 2 on phone;
 - b. On 10/12/2018 at 6:59 pm, the 2nd accused person called PW 2 on phone;
 - c. On 11/12/2018 at 7:23 pm, PW 2 called the 2nd accused person on phone;
 - d. On 11/12/2018 at 7:32 pm, the 2nd accused person called PW 2 on phone;
 - e. On 11/12/2018 at 7:39 pm, the 2nd accused person called PW 2 on phone;



- f. On 11/12/2018 at 8:06 pm, the 2nd accused person called PW 2 on phone;
 - g. On 12/12/2018 at 4:10 am, the 2nd accused person called PW 2 on phone;
 - h. On 12/12/2018 at 4:23 am, PW 2 called the 2nd accused person on phone;
 - i. On 12/12/2018 at 4:28 am, PW 2 called the 2nd accused person on phone;
 - j. On 12/12/2018 at 4:31 am, PW 2 called the 2nd accused person on phone;
 - k. On 12/12/2018 at 7:07 pm, PW 2 called the 2nd accused person on phone;
 - l. On 12/12/2018 at 7:37 pm, the 2nd accused person called PW 2 on phone;
 - m. On 15/12/2018 at 2:58 pm, the 2nd accused person called PW 2 on phone;
 - n. On 16/12/2018 at 8:56 am, PW 2 called the 2nd accused person on phone;
 - o. On 17/12/2018 at 11:08 am, the 2nd accused person sent a SMS to PW 2 on phone;
 - p. On 17/12/2018 at 11:17 am, PW 2 called the 2nd accused person on phone.
86. If at all PW 2 and the 2nd accused persons were not in good terms, the court wonders the nature of the conversations they were having when they called each other. Were they quarrelling on phone? It is worth noting that the two were in communication before, at the time of and after the incident complained of herein. Key to note is that there was communication between the two on 12/12/2018 between 4:10 am and 4:31 am. This was shortly after the offence had been committed. The call data records buttress the testimony of PW 2. The allegation that PW 2 had a grudge against the 2nd accused person and thus framed him up holds no water. In his defence, the 1st accused person did not rebut the testimony of PW 2 that the latter took them to Nyalı and picked them up later. The 1st accused person was categorical that he did not know the 2nd, 4th and 5th accused persons but chose to say nothing against or concerning PW 2. I do not mean to say that the 1st accused person admitted what PW 2 stated. My point is that with the omission by the 1st accused person to specifically mention PW 2, the testimony of the latter becomes unrebutted or unchallenged. The credibility of PW 2 was not impeached at all.
87. The 1st accused person submitted that the victims were not able to identify him. That no DNA and fingerprint sampling was done at the scene and on the soda bottle and weapon allegedly used by the 1st accused person. That the 1st accused person was a stammerer yet the victims testified that they did not hear him stammer. The fact that no DNA and fingerprint sampling was done at the scene or on the soda bottle does not vitiate the prosecution evidence, particularly where there is direct evidence linking the 1st and 2nd accused persons to the offence. From the record, the question of whether or not the victims heard one of the intruders stammering was not put to them either in examination in-chief or cross-examination. The witnesses cannot therefore be blamed for failing to state that one of the intruders was a Stammerer.
88. There is sufficient evidence to prove that the deceased herein died of gunshot wounds. Bullet heads were retrieved from the house and body of the deceased and taken for analysis-Prosecution exhibits 17(a), 17(b) and 17(c). Three spent cartridges (prosecution exhibits 18(a), 18(b) and 18(c)) were also recovered from bushes near the deceased person's house after CCTV footage showed one of the intruders throwing something in the bush. These were also analysed. The prosecution evidence indicates that a pistol was recovered from the 1st accused person's house. The pistol was described as Glock serial number PBZ816 and the same was produced in evidence as prosecution exhibit 2 and the magazine as prosecution exhibit 21. PW 7 Superintendent of Police Alex Chirchir, a Ballistics expert



- conducted examination on the pistol as well as the bullet heads. He confirmed that the bullets whose heads were retrieved from the body of the deceased and the bullet head recovered from the house of the deceased were fired by the Glock pistol that was produced in evidence. The witness produced his report as prosecution exhibit 24.
89. The foregoing implies that whoever was in possession of the Glock pistol on the material night killed the deceased and committed the robbery. The prosecution evidence indicates that the Glock pistol was recovered from the house of the 1st accused person. The 1st accused person admitted that he was arrested at his house while in the company of the 3rd accused person. The 3rd accused person also admitted that she was arrested at the 1st accused person's house. However, the 1st accused person denied that he was arrested at the house that was referred to by the arresting officers. PW 9 Evan Mwanjala Kombo testified that he was a Field officer at Arkaan Properties, which managed the house where the 1st accused person was allegedly found.
90. PW 9 stated that the 1st accused person was a tenant at unit 2 on house No. 329. The tenancy agreement was produced in evidence as prosecution exhibit 28. The same shows the 1st accused person as the tenant of the house. The defence made a frail attempt to raise an argument concerning the numbering of the house but I find the argument to be implausible. The prosecution made a proper and reasonable description of the house wherein the 1st and 3rd accused persons were found. The defence further submitted that the witnesses in another case facing the 1st accused person had given a different name of the Landlord of the house. The proceedings of the other case were not produced herein as evidence and as such, the allegation cannot be confirmed. Nevertheless, the fact as to who was the 1st accused person's Landlord at the material time is not an issue herein. The issue is whether the 1st accused person was a tenant or residing at the house where he was found.
91. PW 9 further testified that the 1st accused person paid rent via Mpesa through phone number 0728664002 and the last payment was made on 20/12/2018. The prosecution produced in evidence Mpesa statements for Arkaan Properties as prosecution exhibit 65 and those for phone/account number 0728664002 as prosecution exhibit 66. Both statements confirm that periodic payments of Ksh. 3,500/= were being made to the account of Arkaan Properties. The Mpesa statement for account number 0728664002, the subscriber details produced in evidence as prosecution exhibit 68 as well as the call data records for Safaricom number 0728664002 all show that the phone/account number was registered in the name of the 3rd accused person. In her defence, the 3rd accused person admitted that she used to pay rent on behalf of the 1st accused person. The 1st accused person did not deny that fact. He even acknowledged knowing the 3rd accused person.
92. With the evidence on record, I am convinced that the 1st accused person was a tenant or resided at the house described by PW 9 and not any other imaginary house as was suggested by the 1st accused person. It is not in dispute that when the police went to arrest the 1st accused person, a search was conducted at the house. As already pointed out, the prosecution evidence is that the Glock pistol and mobile phones belonging to the deceased and PW 4, among other things, were recovered from the 1st accused person's house. PW 11 Police Constable Dennis Isemek testified that he was the one who recovered the mobile phones. The witness described where he recovered the phones from.
93. PW 17 Police Constable Kipkorir Langat testified that he was the one who recovered the Glock pistol. He too described how and where he recovered it from. An inventory of the recovered items was produced in evidence as prosecution exhibit 43. The inventory was signed by the police officers involved in the arrest and search as well as the 1st and 3rd accused persons who used their thumb print impressions. There was no indication or even an allegation that the 1st and 3rd accused persons were coerced into appending their thumb print impressions. The defence argued that the inventory did not



- bear the service numbers of the police officers. There is no standard format for preparing an inventory. What matters is that the inventory indicates the date, place, items recovered and the persons who were present. In any event, the officers involved attended court and confirmed that they signed the inventory.
94. PW 3 Adnan Chicheung Mahmoud Tong testified that he was the licensed owner of the Glock pistol herein and that it was stolen from his house on 27/9/2017. He identified the pistol. His firearm licence was produced in evidence as prosecution exhibit 5 and 6. The evidence of the arresting officers on how the pistol was recovered was consistent. There is no indication that the pistol could have been recovered elsewhere other than from the house of the 1st accused person. There is also no evidence to suggest that the pistol could have been planted at the 1st accused person's house. There is clear evidence as to how the investigators got to the 1st accused person's house. The prosecution evidence indicates that the main aim of going to the 1st accused person's house was to arrest him and not to search for the gun. In the circumstances, I do not think that the police required a search warrant before going to the 1st accused person's house.
95. Once a suspect is found in a house, it is only reasonable that the police would conduct a search at the premises, given the nature of the charges against the 1st accused person. It would have been unreasonable for the investigators to arrest the 1st accused person first then later go to court to obtain a search warrant. Such an act would have put the scene at the risk of interference. Since the mission of the police was to arrest the 1st accused person, an act for which no warrant of arrest was required, I find it difficult to even suspect that the pistol was planted in the 1st accused person's house. This is not just any other pistol, but the one that was used to kill the deceased herein.
96. It is obvious to me that whoever killed the deceased must have had possession of the gun. According to PW 1, it was the 1st accused person who shot and killed the deceased. I have already made a finding that PW 1 was a credible witness. It is therefore reasonably expected that the gun would be in the custody of the 1st accused person after the incident. That is why the police declared the 1st accused person as armed and dangerous and took the necessary precautions before moving to arrest him. The 1st accused person stated that his head and face had been covered during the search at his house. The 3rd accused person stated that she had been taken out of the house. However, the prosecution produced in evidence photographs taken at the 1st accused person's house during the arrest and search.
97. One of the photos bears the images of the 1st and 3rd accused persons. It shows them in the house while the search was going on. The head of the 1st accused person was not covered. The 1st accused person confirmed that photos were taken during the incident. He did not allege that the 3rd accused person was returned to the house and that his face was uncovered for purposes of taking photographs. I refuse the invitation to accept the allegation that the police could have planted the same gun that was used to kill the deceased, in the house of the very person who was mentioned by an accomplice that he shot and killed the deceased. I see no reason as to why the police would want to frame up the 1st accused person. None of the police officers who visited the 1st accused person's house had known him before. It is my finding that the Glock pistol produced in evidence was found in the 1st accused person's house.
98. The 1st and 2nd accused persons raised the defence of alibi. The 1st accused person testified that on 12/12/2018 he was in Meru. That he left Mombasa on 7/12/2018 and arrived in Meru on 8/12/2018. The 1st accused person further testified that he left Meru for Mombasa on 5/1/2019 and arrived on 6/1/2019 in the morning. The 2nd accused person testified that he was in Sabatia, Butere on 12/12/2018 when the incident occurred. In the case of *Chabah & Another v Republic* [1988] KLR 1, the Court of Appeal held that the onus is on the prosecution to displace the alibi after the defence



raises it. In *Wong'oribe v R* [1980] KLR 149 Madan JA (as he then was) in delivering the judgment of the court at page 151 letter G & H stated:

“The defence of alibi was put forward for the first time some months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible.Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it.”

99. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal held thus:

“An alibi raises a specific defence and 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 and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable”.

100. In the case of *Karanja v Republic* [1983] KLR 501, the Court of Appeal had this to say:

“Nevertheless, we agree with the observations of the Court of Appeal for Eastern Africa in *R v Ahmed Bin Abdul Hafid* (1934) 1 EACA 76, and with those of the former Court of Criminal Appeal in *R v Little boy*, [1934] 2 KB 413, that in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought”.

101. In the case of *Kossam Ukiru v R* [2014] eKLR, the Court of Appeal held that the defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and where, when weighed against all the other evidence, it is established that the accused person's guilt has been proven. The court observed thus:

“We are fully alive to the principle that an accused person who sets up an alibi does not assume any burden to prove the same (see *Karanja vs Republic* [1983] KLR 501). In this case, however, the two courts below rejected the appellant's alibi defence on the basis first, that it had not been raised at the earliest opportunity in the proceedings and second, that weighing the defence with all the other evidence adduced, the appellant's guilt was established beyond all reasonable doubt. The appellant's complaint that his defence was not considered is therefore without merit and we reject it.”

102. Has the prosecution evidence displaced the defence of alibi and placed the 1st and 2nd accused persons at the scene of crime? The defence was raised by the 1st accused person for the first time when he was giving his defence. The same applies to the 2nd accused person. In fact, the 2nd accused person raised the alibi when he was cross-examined by the Prosecution counsel. He did not raise it when he gave his evidence in-chief. I have carefully, in my view, analysed the prosecution evidence and weighed the defence of alibi as well as the entire defence as given by the 1st and 2nd accused persons. I am alive to the fact that the accused persons are not duty bound to prove their defence or innocence. As already indicated, it is the duty of the prosecution to dislodge the alibi. The onus is also on the prosecution to prove its case against the accused persons beyond reasonable doubt.



103. It matters not that the accused persons may not have told the truth. In Philip Nzaka Watu v Republic [2006] eKLR, it was held that to find a conviction in a criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in Stephen Nguli Mulili v Republic [2014] eKLR:

“It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V Woolmington, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See Festus Mukati Murwa V R, [2013] eKLR.”

104. In the famous case of Miller v Ministry of Pensions [1947] 2 All ER 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

105. In Bakare v State (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.” (emphasis mine)

106. The testimony of PW 1 placed the 1st and 2nd accused persons at the scene. The testimony was not rebutted at all. The testimony of PW 2 placed the 1st and 2nd accused persons in Nyali, on the material night. The prosecution produced in evidence the call data record for PW 1 as prosecution exhibit 61. At the material time, PW 1 was using Safaricom phone number 0790012479. The record runs from 6/12/2018 to 16/1/2019. The record indicates that there was phone communication between PW 1 and the 2nd accused person on several occasions between 7/12/2018 and 2/1/2019. The same is reflected in the call data record for the 2nd accused person. The call data record for the 2nd accused person indicates that he was within Nyali area on 11/12/2018 and 12/12/2018. It is worth noting that according to the call data record, the geolocation data of the 2nd accused person placed him at 13070 CO EL2961-Nyali Beach Hotel MGF on 12/12/2018 at 4:10 am. This was shortly after the incident herein.

107. The above location was the Best Transmitting Station (BTS). The best transmitting station for mobile devices is considered to be the cellular tower base station located closest to your phone, as it requires the least transmission power to reach your device due to its proximity, resulting in the strongest signal and best connection quality. Between 4:23 am and 4:31 am on 12/12/2018, the geolocation data placed



the 2nd accused person him at 18074 Co E15499-crossroads Church Nyali MGF. When the 2nd accused person was cross-examined by counsel for the prosecution, he stated that his national identity number was 13303002. That is the same identity number that appears in the call data record together with the full name of the 2nd accused person. There is no doubt that the call data relates to a phone number that was being used by the 2nd accused person at the material time. In essence, the prosecution has managed to dislodge the 2nd accused person's alibi and placed him in Nyali at the time of incident.

108. The investigating officer testified that when they arrested the 1st accused person, he was in possession of a Samsung phone paired with two Sim cards. One was for Airtel and the other for Telkom. The IMEI number for the phone was given as 354608084143033 and 354609084143031. The phone was produced in evidence as prosecution exhibit 92. The phone number for the Telkom sim card was 0773719608 whereas that for Airtel was 07892522008. The call data record for Telkom was produced in evidence as prosecution exhibit 106 whereas the call data record for the Airtel number was produced in evidence as prosecution exhibit 101. The call data for Telkom indicates that the registered subscriber for the number was Ronald Mwangulu Mwakio.
109. It would appear that the investigators did not bother to find out who Ronald was and establish his relationship with the 1st accused person or establish how or why the 1st accused person was using a phone number not registered in his name. The call data record for the Airtel number does not indicate the name of the registered subscriber nor the national identity card number. The investigators recovered the 1st accused person's national identity card and were able to verify the details at the National registration bureau. However, they did not go further to establish whether the identity card had been used to register any sim card with any mobile phone service provider. I have perused the call data record for Telkom. The record shows that the person who was using the Telkom number communicated with the 3rd accused person on 6/12/2018 and 3/1/2019.
110. The call data record for the Telkom number further shows that the person using it communicated with the 2nd accused person on several occasions between 1/12/2018 and 12/12/2018. The last communication was made on 12/12/2018 at 7:51 pm. The call data record for the Airtel number shows that whoever was using it communicated with the 3rd accused person on several occasions between 2/12/2018 and 30/12/2018. The person also communicated with the 2nd accused person on several occasions between 5/12/2018 and 15/12/2018. The call data record further indicates that the user of the phone was at Mombasa Mtopanga 23 between 5:57 pm and 9:38 pm. It is obvious that the user of the phone was a mutual friend of the 2nd and 3rd accused persons. The person was also in Mombasa at the time of the robbery. The call data record also indicates that the said person was in Nyali, Mombasa at 7:29 pm on 11/12/2018.
111. The report from the National Registration Bureau indicates that the home location for the 1st accused person is Kangeta in Meru County. The call data record for the Airtel number places the user of the phone at Kangeta, Nyambene, Kathelwa and Maua in Meru from 1/12/2018 to 6/12/2018 and from 20/12/2018 to 30/12/2018. Most of the time, the user of the phone was located at Kangeta. The Samsung phone said to have been found in possession of the 1st accused person was listed in the inventory of the items that were recovered from the 1st accused person's house. It is not unusual for a person to use phone numbers not registered in his name, particularly when the person is keen on hiding their true identity. I doubt that the police could have picked or collected the phone from elsewhere and coincidentally, it emerges that the user of the phone is a mutual friend of the 2nd and 3rd accused persons.
112. The evidence reveals that the 1st and 2nd accused persons were well known to each other prior to the incident. The 1st and 3rd accused persons were also well known to each other prior to the incident. Given the circumstances, I have reason to believe that the Samsung phone was being used by the 1st



accused person. The totality of the prosecution evidence places the 1st accused person in Mombasa on 12/12/2018. As already indicated, the call data records for the 2nd accused person place him at 13070 CO EL2961 Nyali Beach Hotel MGF on 12/12/2018 at 4:10 am. According to the call data for the deceased person, this was the same location he was when he last used his phone on 12/12/2018 at 3:31 am. It is also the same location where PW 4' s stolen phone was last used on 11/12/2018 at 8:14 pm and where the stolen phone belonging to PW 6 was last used on 12/12/2018 at 12:05 am. It is thus safe to conclude that the 2nd accused and the victims herein were within reach of the same BTS in Nyali, Mombasa on the material night.

113. In view of the foregoing, I find that there is sufficient evidence to corroborate the testimony of PW 1 that the 1st and 2nd accused persons were part of those who broke into the house of the deceased and robbed the victims therein. The direct and circumstantial evidence on record positively identifies the 1st and 2nd accused persons as those who committed the robbery at the house of the deceased, in the company of PW 1 (6th accused person). The evidence further proves that it was the 1st accused person who shot and killed the deceased herein. The prosecution evidence has satisfied the key ingredients of the offence of robbery under section 296(2) of the Penal code.

The 3rd Accused person

114. According to counts two and four of the charge sheet, the 3rd accused person is charged with handling stolen property contrary to section 322(1) as read with 322(2) of the Penal code. It was alleged that the 3rd accused person, otherwise than in the course of stealing, dishonestly retained mobile phones belonging to the deceased and Fawzia Dear Omar, knowing or having reason to believe that the property was stolen. It is not in dispute that the 3rd accused person was found in the same house with the 1st accused person. It has been established that the 1st accused person was the recognized tenant of the house. The evidence shows that rent was being paid by the 3rd accused person. The 3rd accused person explained in her defence why she paid the rent on behalf of the 1st accused person.
115. The 3rd accused person further explained why she was found in the same house with the 1st accused person. She stated that she was a sex worker and the 1st accused person was her client. The testimony of the 1st accused person suggests that the 3rd accused person was not staying at the house in issue. The tenancy agreement indicates the 1st accused person as the tenant and a different woman as his wife or next of kin. In Collingwood, Criminal Law Of East And Central Africa (1968) at page 268, the following are listed as conditions precedent to a conviction on a charge of receiving stolen property and that of retaining the same property:
- i. The prosecution must prove a theft or obtaining by some other felony;
 - ii. The prosecution must prove the receipt of the stolen property by the accused person (who is not the thief or a party to the theft); and
 - iii. The accused person's guilty knowledge at the time of receipt or even after receipt for the offence of retaining stolen property.
116. This implies that the burden remains upon the prosecution throughout and does not shift. In the case of *Mzalia bin Luziro v Republic* [1944] 7 ZLR 9 it was held thus:

“In a charge of receiving stolen property, as in a charge of any other offence, the burden of proving every fact which is essential to constitute the offence is upon the prosecution and it is incumbent upon them to prove each of the facts beyond reasonable doubt”.



117. The mobile phones were not recovered from the person of the 3rd accused person but in the house of the 1st accused person. They were not at an open place in the house. The 3rd accused person testified that she stayed in Bombolulu. Indeed, even her call data record produced in evidence by the prosecution located her at Bombolulu most of the time.
118. Apart from merely showing that the 3rd accused person paid the rent for the house occupied by the 1st accused person and that she was found there at the time of arrest, the investigating officer did not state that the 3rd accused person stayed there. The investigating officer did not seek to establish whether or not the 3rd accused person stayed in that house. There is no evidence to show that anything belonging to the 3rd accused person such as clothing or other property was found in the house. In a nutshell, there is absolutely no evidence to show that the 3rd accused person had any proprietary interest in the house. Without such proof, it cannot be assumed that the 3rd accused person was aware of what was in the house.
119. The offence was committed on 12/12/2018. The investigating officer confirmed that on that day, the 3rd accused person was in Meru. Indeed, the call data records for the 3rd accused person indicate that she was in Meru and elsewhere out of Mombasa from 3/12/2018 to 22/12/2018. She returned to Mombasa on 23/12/2018. The call data records further reveal that the 1st accused person called the 3rd accused person on phone using his Airtel number aforementioned on 6/1/2019 at 7:26 am. This is the day the two were arrested. The implication is that the two were not initially together on 6/1/2019. I doubt that the 1st accused person would have called the 3rd accused person on phone if at all they were together at that time. I agree with the allegation that the 1st accused person could have invited the 3rd accused person to his house on 6/1/2019 when they were arrested.
120. There is absolutely no evidence to show that the 3rd accused person was aware of the existence of the mobile phones and that the same had been stolen or unlawfully obtained. It cannot be said that the 3rd accused person dishonestly retained the mobile phones, yet the house did not belong to her and there is no evidence to show that she stayed there. I find that the prosecution has failed to establish the key ingredients of the offence. The 3rd accused person further faces the charge of being in possession of a firearm and ammunition without a valid Firearm certificate. The charges are contained in counts eight and nine and are in respect of the Glock pistol and eighteen rounds of ammunition. For the reasons given while analyzing the other charges against the 3rd accused person, I find no reason to hold her culpable of the offences contained in counts eight and nine. For avoidance of doubt, there is no evidence to show that the 3rd accused person had any proprietary interest in the house and that she had knowledge of the existence of the pistol and ammunition. No link was established between the 3rd accused person and whatever that was recovered from the house. The 3rd accused person cannot be said to have been in possession of the pistol and ammunition.

Whether the 1st accused person was found in possession of the firearm and ammunition without a valid certificate

121. Section 4(1) of the *Firearms Act* provides that:

“Subject to this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time.”

122. Subsection (2)(a) therefore stipulates:

“If any person—



- (a) purchases, acquires or has in his possession any firearm or ammunition without holding a firearm certificate in force at the time, or otherwise than as authorized by a certificate, or, in the case of ammunition, in quantities in excess of those so authorized;

he shall, subject to this Act, be guilty of an offence.”

123. Section 2 of the Act defines the term "ammunition" as any cartridge, whether a blank, tracer, explosive, incendiary, gas-diffusing, signalling or any other cartridge of any other kind capable of being discharged from or used with a firearm and includes—

- a. any grenade, bomb or other missile whether explosive or not and whether or not capable of or intended for use with a firearm;
- b. any mine whether for use on land or at sea, depth-charge or other explosive charge;
- c. any other container or thing designed or adapted for use in or as weapon for the discharge of any noxious liquid, gas or other substance;
- d. any projectile, powder or other charge, primer, fuse or bursting charge forming part of any cartridge or any component part thereof; and
- e. any ammunition or pellets for use in an airgun, air rifle or air pistol.

124. The same provision defines the term "firearm" as a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any shot, bullet or other missile and includes—

1. a weapon of any description designed or intended to discharge—
 - (i) any noxious liquid, noxious gas or other noxious substance; or
 - (ii) an electrical charge which when it strikes any person or animal is of sufficient strength to stun and temporarily disable the person or animal struck (such weapon being commonly known as a "stun gun" or "electronic paralysers");
2. any airgun, air rifle, air pistol, revolver, crossbow, laser gun or any other similar weapon;
3. the barrel, bolt, chamber, silencer, muffler, flash-guard or any other accessory designed or adapted to diminish the noise or flash caused by firing a weapon and also other essential component part of any weapon;
4. any weapon or other device or apparatus which may be specified by the Cabinet Secretary by order published in the Gazette to be a firearm for the purposes of this Act; and
5. gunsight, muffers, bulletproof gear, night vision devices and other similar accessories.

125. Section 2 aforementioned further defines "possession" in the following terms—

- a. includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use of benefit of oneself or of any other person and the expressions "be in possession" or "have in possession" shall be construed accordingly; and



- b. if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.
126. I have already analysed the evidence with regard to what was recovered from the house of the 1st accused person. I have already made a finding that the pistol was recovered from the house of the 1st accused person. The same applies to the ammunition. PW 7 examined the pistol and bullets and confirmed that the same were functional. He confirmed that the pistol and bullets were a firearm and ammunition respectively, as defined by law. The witness produced his report in evidence as prosecution exhibit 24. There is sufficient evidence to prove positive possession of the firearm and ammunition by the 1st accused person. Furthermore, there is sufficient evidence linking the 1st accused person to the use of the firearm and similar ammunition on 12/12/2018. There is no evidence to show that the 1st accused person was a licensed gun holder at the material time.

Conduct of the investigations herein

127. Before concluding this judgment, I must, as I hereby do, commend the investigators for a job well done. The investigations were thorough and zealously conducted. From the weight of the evidence, it is clear that the investigators were keen on securing justice for the victims of the crime. I must confess that for the years that I have served on the bench, this is the first time I have encountered a properly and thoroughly investigated case. The investigators were rigorous in evidence collection, case and evidence analysis, action in identifying and arresting of suspects, crime scene investigation, witness interview as well as laboratory and forensic analysis of the evidence. There were a few pitfalls. The result of the investigations depicts great collaboration and teamwork amongst the investigators and relevant agencies. This kind of attitude should be reflected in all cases, particularly those involving serious crimes.

Disposition

128. The upshot of the above considerations is as follows:
- a. The prosecution has proven its case beyond reasonable doubt, against the 1st and 2nd accused persons in respect of count one. I find them guilty of the offence of robbery contrary to section 296(2) of the *Penal Code* and proceed to convict them accordingly;
 - b. Having found the 1st accused person guilty in respect of count one, I make No Finding with respect to the alternative charge of handling stolen goods contrary to section 322(1) as read with 322(2) of the Penal code;
 - c. The prosecution has failed to prove its case beyond reasonable doubt against the 3rd accused person with respect to the second count of handling stolen goods contrary to section 322(1) as read with 322(2) of the Penal code. I find the 3rd accused person not guilty and proceed to acquit her accordingly;
 - d. The prosecution has proven its case beyond reasonable doubt, against the 1st and 2nd accused persons in respect of count three. I find them guilty of the offence of robbery contrary to section 296(2) of the *Penal Code* and proceed to convict them accordingly;
 - e. Having found the 1st accused person guilty in respect of count three, I make NO FINDING with respect to the alternative charge of handling stolen goods contrary to section 322(1) as read with 322(2) of the Penal code;



- f. The prosecution has failed to prove its case beyond reasonable doubt against the 3rd accused person with respect to the fourth count of handling stolen goods contrary to section 322(1) as read with 322(2) of the Penal code. I find the 3rd accused person not guilty and proceed to acquit her accordingly;
- g. The prosecution has proven its case beyond reasonable doubt, against the 1st and 2nd accused persons in respect of count five. I find them guilty of the offence of robbery contrary to section 296(2) of the Penal Code and proceed to convict them accordingly;
- h. The prosecution has proven its case beyond reasonable doubt, against the 1st accused person in respect of count eight. I find him guilty of the offence of being in possession of a firearm without a valid firearm certificate contrary to section 4(1) as read with 4(3)(a) of the Firearms Act and proceed to convict him accordingly;
- i. The prosecution has failed to prove its case beyond reasonable doubt against the 3rd accused person with respect to the eighth count of being in possession of a firearm without a valid firearm certificate contrary to section 4(1) as read with 4(3)(a) of the Firearms Act. I find the 3rd accused person not guilty and proceed to acquit her accordingly;
- j. The prosecution has proven its case beyond reasonable doubt, against the 1st accused person in respect of count nine. I find him guilty of the offence of being in possession of ammunition without a valid firearm certificate contrary to section 4(1) as read with 4(3)(a) of the Firearms Act and proceed to convict him accordingly;
- k. The prosecution has failed to prove its case beyond reasonable doubt against the 3rd accused person with respect to the ninth count of being in possession of ammunition without a valid firearm certificate contrary to section 4(1) as read with 4(3)(a) of the Firearms Act. I find the 3rd accused person not guilty and proceed to acquit her accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT VIA MICROSOFT TEAMS
AT MAKINDU THIS 14TH DAY OF JANUARY, 2025.**

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

