



REPUBLIC OF KENYA



**Republic v Mulemba & 3 others (Criminal Case 1250 of 2019)
[2025] KEMC 72 (KLR) (22 April 2025) (Judgment)**

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**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CRIMINAL CASE 1250 OF 2019
YA SHIKANDA, SPM
APRIL 22, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

MUSEMBI MULEMBA 1ST ACCUSED

TITUS MASUO MAITHA 2ND ACCUSED

PHILIP KAHINDI KAMULA 3RD ACCUSED

KOMU KINGOLI MAPENDI 4TH ACCUSED

JUDGMENT

1. The charge herein was amended on 29/10/2020 whereupon Musembi Mulemba, Titus Masuo Maitha, Philip Kahindi Kamula and Komu Kingoli Mapendi (hereinafter referred to as the 1st, 2nd, 3rd and 4th accused persons respectively) were charged with one count of Robbery contrary to section 296(2) of the Penal code. The particulars of the offence are that on 22/12/2019 at Nzambani village in Kibwezi Sub-county within Makueni County, the accused persons jointly with another not before court while armed with panga and rungu robbed Matheka Kitili Nzusu cash Ksh. 20,000/=, Oppo phone, Techno phone, wrist watch and solar radio, all valued at Ksh. 42,000/=, the property of Matheka Kitili Nzusu and at the time of the said robbery, used actual violence to the said Matheka Kitili Nzusu. All the accused persons denied the charge. By the time the charge was amended, three witnesses had testified on the part of the prosecution. The matter proceeded to hearing.



The Evidence

The Prosecution Case

2. The entire prosecution case and part of the defence case were taken by another Magistrate who was subsequently transferred. Directions were taken before me on 18/12/2024 whereupon the parties agreed to proceed from where the matter had reached. The court gave directions to that effect. I will thus rely entirely on the record as far as the prosecution case is concerned. The prosecution called a total of eight (8) witnesses in a bid to prove its case against the accused persons. PW 1 Matheka Kitili Nzusu (hereinafter referred to as the complainant) testified that on the night of 21/12/2019 he went to sleep at his house. While asleep with his wife, he was woken up by a loud bang at around 4:00 am (22/12/2019). The complainant got up and went to the sitting room. At the sitting room, he saw the 4th accused person. A torch was shone at the complainant.
3. The complainant further testified that he saw two other men whom he could not identify at that time. That the 4th accused person flashed a torch at the complainant then moved close to him. The complainant was ordered to keep quiet. The invaders ordered the complainant to give them money or else they would kill him. When he stated that he had no money, the 4th accused person hit him with a club on the head. The complainant fell on the ground. The invaders took the complainant's wife to the sitting room and assaulted her while demanding for money. The complainant stated that the invaders took money from his wife as well as Ksh. 20,000/= from his wallet. That he also lost a wrist watch and two phones. When the invaders left, the complainant realised that his main door had been broken down as well as the window grill.
4. The complainant went outside the house. The record indicates that the complainant found the 3rd accused person who was his employee of many years. The record is confusing as to where he found the 3rd accused person. That the complainant also found his other employee known as Mwanzia. Both Mwanzia and the 3rd accused person stated that they did not know what had happened and did not hear anything. The complainant used his wife's phone and called the area Chief and the police who later visited the scene. The complainant and his wife were taken to hospital. The complainant returned home in the company of the police. They followed some foot tracks which led them to the home of the 2nd accused person. The complainant later identified the 4th accused person at an identification parade. He was later told to take the 3rd accused person to the police station.
5. PW 2 Faith Mwangeli Mutua testified that on the material night, she was asleep in the complainant's house when she heard a loud knock on the bedroom door and a commotion in the sitting room. She shouted and screamed but was ordered to keep quiet. PW 2 testified that she heard the people demanding for money from the complainant and his wife. When the people left, the complainant knocked at PW 2's door. She saw him bleeding from his head. The police were called to the scene. Later, the witness went to the police station to record her statement. She was asked to identify some voices whereupon she identified one voice as the one she had heard on the material night. PW 3 Mercy Chumwa testified that she was in the complainant's house with two others on the material night when she heard footsteps on the corridor. The persons in the house ordered them to open the door but they did not open it. PW 3 and the others hid under the bed. She could hear the sound of people being beaten and money being demanded.
6. When it was calm, the complainant asked PW 3 to open the door. The door was opened and PW 3 noticed that the complainant was bleeding from his head. The police were called to the scene. The following day, PW 3 was called to participate in an identification parade but she could not identify anybody. PW 4 Rose Mumo testified that she was a clinical officer at Mtito Andei hospital. The



witness produced in evidence P3 forms filled in favour of the complainant and his wife. PW 5 Francis Mwendwa John testified that he was a Veterinary officer at Mtito Andei. That he was requested to visit the complainant's home and examine carcasses of two dogs. He visited the home and was able to observe the dogs. PW 5 concluded that the dogs had been poisoned although he did not take any samples for analysis.

7. PW 6 Jackson Mwanja Kiima testified that he was the Assistant Chief of Muthingini Sub-location. That on 22/12/2019 at about 6:00 am he was called on phone by a village elder and informed that a robbery had taken place at the complainant's home. He visited the scene and found the area Chief as well as the police. They followed foot tracks which led them to the home of the 2nd accused person. They did not find the 2nd accused person. The 2nd accused person was arrested later in Mombasa. The 3rd and 4th accused persons were also arrested through information that was allegedly given by the 2nd accused person. PW 7 Police Corporal Shem Asher testified that he was a forensic investigator. His evidence was that he received a Compact Disk containing photographs related to the robbery incident herein. That he processed 12 photographic prints. The witness produced the photographs as well as his report and certificate.
8. PW 8 Police Corporal Anabi Hamsa testified that on 22/12/2019 he was woken up by his in-charge who informed him that a robbery had taken place at Nzambani area. The police officers converged then proceeded to Kambu hospital where the victims were being treated. The officers later visited the home of the victims and saw signs of the home having been broken into. The police followed some foot tracks which led them to the fence. The barbed wire fence had been cut to gain entry into the compound. The police questioned the 2nd accused. The 1st accused person was later arrested. A search was conducted at his house and several items were recovered. He was found with wet slippers and taken to the scene.
9. The slippers were compared to the foot track and found to be a match. The police received information that Titus Masuo had been involved in the robbery but they did not find him at home. That a voice identification parade was conducted whereupon the 1st accused person was identified by PW 2. The 2nd accused person was later arrested in Mikindani. PW 8 stated that an identification parade was conducted whereupon the 4th accused person was identified by the complainant. The police interrogated the 3rd accused person and were convinced that he was involved in the robbery. He was then arrested and later charged.

The Defence Case

The 1st accused person's defence.

10. The 1st accused person testified as DW 1. He gave sworn testimony and denied the charge. The 1st accused person testified that on 22/12/2019 he was at Kambu town at his Grandfather's home. That on the same day while having breakfast with his family, he heard a knock at his door and a voice called out his name. Four men then entered the house. He was able to tell that they were police officers. The police officers asked him whether he had money. He stated that he did not have money. They further asked him about one Kamuti but he stated that he did not know who it was. A search was conducted at his house and the police took away some items. The 1st accused person was arrested. He later participated in a voice identification parade and was identified by one witness. It was the evidence of the 1st accused person that he did not know his co-accused persons. He urged the court to acquit him.



The 2nd accused person's defence

11. The 2nd accused person testified on oath as DW 2. He denied having committed the offence. The 2nd accused person stated that the complainant was his neighbour with whom they had a boundary dispute. The 2nd accused person further testified that on 22/12/2019 he was at his home in the morning when police officers appeared and asked him whether he had heard his neighbour screaming at 3:00 am. The 2nd accused person stated that he had not heard any screams. The police then left. The 2nd accused person was later arrested on 20/1/2020 and coerced into giving names of the persons he was with when they stole from the complainant. He claimed to have been assaulted by the police officers. The 2nd accused person stated that the complainant acted in cahoots with PW 6 to interfere with the boundary between his land and that of the complainant.

The 3rd accused person's defence

12. By the time the 3rd accused person gave his evidence in defence, Pro bono Advocates had downed their tools for non-payment. The 3rd accused person opted to waive his right to legal representation. This was after the court explained to him that he had a right to legal representation. The 3rd accused person stated on oath that he was the complainant's employee at the material time. He was staying at the complainant's home and on 22/12/2019 at about 5:00 am he heard the complainant calling out his name. He got up and went to the door but found that it had been locked from the outside. The complainant opened it for him. The 3rd accused person saw the complainant bleeding from the head.
13. The complainant stated that he had been attacked by thugs. The 3rd accused person and a fellow employee accompanied the complainant to his house. The 3rd accused person noticed that the door to the house had been broken. The complainant and his wife were rushed to hospital. Later the complainant returned in the company of police officers. They started looking around and realised that the fence had been cut. They followed foot tracks which led to the complainant's farm and into the bushes and later to the Murram road. After one month, the complainant took the 3rd accused person to Mtito Andei police station. He was arrested and later charged. The 3rd accused person denied having committed the offence.

The 4th accused person's defence

14. The 4th accused person also gave sworn testimony. He testified as DW 4 and waived his right to legal representation. He explained how he was arrested on 22/1/2020 between 11:00 am and midnight. That he was arrested while at his house by the Assistant chief and others who were civilians. The Assistant chief conducted a search at the 4th accused person's house then asked him to accompany them. The 4th accused person was taken and placed in a motor vehicle. The Assistant Chief did not tell him why he had been arrested. He was taken to Nzambani market where the Assistant Chief took photos of him. The Assistant Chief then called the police who arrived and took the 4th accused person to Mtito Andei police station. The 4th accused person participated in an identification parade and was forced to sign a certain document. He denied having committed the offence.

Main Issues For Determination

15. Having considered the evidence on record, I find that the main issues for determination are as follows:
 1. Whether the complainant was robbed on 22/12/2019 or at all;
 2. Whether the accused persons were positively identified as part of the robbers;



3. Whether the prosecution has proven its case against the accused persons to the required standard.

Analysis And Determination

I have carefully considered the evidence on record as well as the law applicable. I now proceed to analyse and address the main issues as follows:

Whether the complainant was robbed on 22/12/2019 or at all

16. The particulars of the charge indicate that the complainant was robbed of cash Ksh. 20,000/=, Oppo phone, Techno phone, wrist watch and solar radio, all valued at Ksh. 42,000/=. 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.”

17. 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.

18. 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 v 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.”

19. From the entire evidence on record, I have no doubt that persons invaded the complainant’s home and attacked him on 22/12/2019. What is to be determined is whether the invaders stole the complainant’s property. The only direct evidence with regard to what was allegedly stolen was given by the complainant alone. His testimony was that:

“They took the money my wife had. They also took my money Ksh. 20,000/= which was inside a wallet which was on top of my table. I also lost wrist watch and an Oppo phone and Techno phone.”

20. 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.”

21. 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.
22. 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.”

23. In my view, for the court to find that the complainant was robbed of his money and items, there must be evidence to prove that the money and items and in particular the mobile phones, wrist watch and solar radio existed and were in the possession of the complainant 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.
24. The complainant did not even give a proper description of the items that were allegedly stolen. The models of the mobile phones were not given. The complainant did not state in his testimony that he lost a solar radio. No purchase receipts for the items were produced in evidence or any document to prove their existence. The investigating officer did not make any attempt to establish the existence and ownership of the items by the complainant. He merely took the complainant’s words as the gospel truth. There are various ways of proving existence of an item. For the phones, purchase receipts, packaging material and records from the mobile phone service providers can all prove existence and ownership. Furthermore, existence and ownership can also be proven by other corroborating oral testimony from persons who were aware that the complainant had such items.



25. The complainant's wife who was present and even a victim of the incident was not called to testify and no reasons were given. She could have corroborated the complainant's testimony as to the existence of the money and items. PW 2 and PW 3 who lived in the complainant's house did not testify as to the existence of the items. The initial charge sheets contained a second count in which it had been alleged that the accused persons stole Ksh. 98,000/= from the complainant's wife. The investigating officer testified that the robbers stole Ksh. 68,000/= from the complainant's wife. The complainant testified that money was stolen or taken from his wife but he did not disclose how much it was. When the charge was amended for the final time, the second count was omitted. It is not clear why it was omitted but the inference that can reasonably be drawn is that no money was stolen from the complainant's wife.
26. Quite interestingly, the investigating officer testified that the police confirmed that the money and items were stolen from the victims. He did not state how the police confirmed the fact and neither did he produce evidence of such confirmation. The fact that there is a contradiction with respect to how much money was stolen and from whom raises doubt as to whether any money was stolen from the complainant. The prosecution is required to prove the fact of robbery beyond reasonable doubt. In my view, mere oral testimony cannot suffice, particularly where existence and ownership can be proven by other means. If every allegation is to be believed without proof, this will open a Pandora's Box which is likely to occasion a miscarriage of justice. I find that the prosecution has failed to prove existence and ownership of the money and items by the complainant. In the circumstances, I cannot hold with conviction that the complainant was robbed on 22/12/2019.

Whether the accused persons were positively identified as part of the robbers.

27. The prosecution case is that the accused persons were part of those who robbed the complainant on the fateful night. I have already made a finding that there is no sufficient evidence to prove robbery or theft of the complainant's alleged items. Assuming that there was a robbery, were the accused person's positively identified and placed at the scene of crime? The incident occurred in the wee hours of the night. In the case of *Anzaya v Republic* [1986] KLR 236, the Court of Appeal held that there is a danger in relying solely on the evidence of a single witness regarding identification, particularly when the identification is said to have occurred at night. In *Mwenda v Republic* [1989] KLR 464, the Court of Appeal held that whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, special need for caution before convicting in reliance on the correctness of the identification is necessary.
28. The Court of Appeal in the case of *Marube & Another v Republic* [1986] KLR 356 observed that in the evaluation of the evidence of the identifying witness, the court must ensure beyond all reasonable doubt that the witnesses were honest and unmistakable about their identification. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal was of the opinion that where the evidence relied upon to implicate an accused is entirely of identification, that evidence should be watertight to justify a conviction. A similar observation was made by the Court of Appeal in the case of *Wamunga v Republic* [1989] KLR 424 where the court held as follows:
- “Where the evidence against an accused is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction ”.
29. In the English case of *R v Turnbull & Others*, [1976] 3 ALL ER 549, it was held that the factors for consideration by the court on the question of identification are as follows:



- i. The distance between the witness and the suspect when he had him under observation;
 - ii. The length of time the witness saw the suspect; and
 - iii. The lapse of time between the date of the offence and the time the witness identified the suspect to the police.
30. Further, in the case of *Simiyu & Another v Republic* [2005] I KLR 192 at page 195 the Court of Appeal observed:-
- “In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought to be given first of all by person or persons who gave the description and purported to identify the accused and then by the persons or person to whom the description was given. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers’ identity.”
31. Similarly, in the case of *Francis Kariuki Njiru & 7 others v Republic* [2001] eKLR, the same court held:
- “The law on identification is well settled as this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification was positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witnesses gave a description of his or her attacker or attackers to the police at the earliest opportunity.” (Emphasis mine)
32. PW 2 and PW 3 were present at the house on the fateful night but did not see the invaders. The doors to their rooms were locked. The only persons who allegedly saw the invaders were the complainant and his wife. As already pointed out, the complainant’s wife, for reasons best known to the prosecution, was not called to testify. It was stated in evidence that identification parades were conducted whereupon the 1st accused person was identified by voice recognition by PW 2 and the 4th accused person was identified physically by the complainant. The police officer who allegedly conducted the identification parades was not called to testify and no identification parade forms were produced in evidence. In the circumstances, I find no sufficient evidence of such parades having been conducted and any testimony on the same is hereby disregarded.
33. Having disregarded the testimony concerning the alleged identification parades, it follows that there is absolutely no evidence of prior identification of the 1st accused person. The other witness who mentioned the 1st accused person was the investigating officer. His evidence was that the lead investigator one Chief Inspector Marete received information that the 1st accused person was a suspect and had been spotted at Kambu. The police then went and arrested the 1st accused person. It is not clear what information was received concerning the 1st accused person. The lead investigator who allegedly received the information was not called to testify. The investigating officer stated that the 1st accused person was found with slippers which were wet. That the prints on the slippers were compared with those on the foot track on the ground and found to resemble.
34. The police then arrested the 1st accused person. No forensic report of such comparison was produced in evidence. It is not even known who did the comparison. That was an extremely primitive way of conducting investigations. Nothing connected to the incident was found in possession to the 1st



accused person. There is absolutely no evidence identifying the 1st accused person as one of the persons who invaded the complainant's home. I do not find a basis upon which he was arrested. The evidence of the complainant indicates that the lights in his house were off. The only source of light was a torch which was in the possession of one of the invaders. According to the complainant, it was the 4th accused person who flashed the torch at him. I will address the evidence against the 4th accused person later.

35. The complainant further testified that he heard the voice of the 2nd accused person who was well known to him instructing one of the invaders to bring a gun. The complainant and the 2nd accused persons were close neighbours and known to each other. The complainant confirmed that he did not give out any names of suspects to the police and neither did he tell them that he suspected anybody. When the complainant was cross-examined by counsel for the defence, he stated that he identified the 2nd accused person by his voice. He however admitted that he did not mention the voice recognition to the police. The complainant also admitted that he did not tell any of his neighbours who knew the 2nd accused person that he had heard the latter's voice in his house. The investigating officer merely stated that they had information that the 2nd accused person was involved in the incident. He did not disclose the source of information or even the nature of the information that the police had on the 2nd accused person.
36. In the authority of *Mbelle v Republic* [1984] KECA 30 (KLR), the Court of Appeal laid down conditions for acceptance of evidence of voice recognition. That care would obviously be necessary to ensure:
 - a. that it was the accused person's voice;
 - b. that the witness was familiar with it and recognized it; and
 - c. that the conditions obtaining at the time it was made were such that there was no mistake in testifying to which was said and who said it.
37. The testimony of the complainant was that he was pushed towards his bed and hit with a club on the head. He then fell down. That his wife was dragged back to the sitting room and asked to give out money. It was at that point that he heard the 2nd accused person's voice shouting and asking one Corporal Rose to bring the gun. PW 2 and PW 3 who were in the house did not testify that they heard a voice calling out Corporal Rose and asking for a gun. The only strange voices they heard were demanding for money. It is also not clear whether the complainant was conscious when he allegedly heard the voice. His evidence is that he fell when he was hit on the head. He was lying on the floor after he was hit and until the invaders left the house.
38. At some point in his testimony in-chief, the complainant stated that he "got conscious and woke up." When the complainant was cross-examined by counsel for the defence, he stated as follows:

"They hit me with a rungu. When I was hit, I became unconscious.....I got conscious after thirty minutes."
39. When the complainant was re-examined by the prosecution, he stated that he became unconscious after he had been hit. It is not clear at what point the complainant heard the 2nd accused person's voice during the ordeal. He could not have heard anything while unconscious. From the evidence, I do not find that the circumstances were conducive for a proper voice recognition. It would also appear that the evidence of voice recognition was an afterthought on the part of the complainant.
40. There was also conflicting testimony in the prosecution evidence with regard to the presence of the 2nd accused person at his home when the police visited on the material morning. The complainant testified that he was in the company of the police when the foot tracks led them to the home of the 2nd accused



person. That they found the 2nd accused person asleep in his house. The complainant later stated that he did not accompany the police to the home of the 2nd accused person. That he had remained at his home. PW 6, the Assistant Chief testified that he was with the police when they followed the foot tracks. His evidence was that they did not find the 2nd accused at his home. The witness gave a lengthy testimony implicating the 2nd accused person. The first information was allegedly given by the 2nd accused person's family members. The information is on how the 2nd accused person and others planned the robbery.

41. None of these family members were called to testify. As such, such evidence is mere hearsay and is hereby disregarded. The 2nd information is that when the 2nd accused person was arrested, he confessed to having committed the offence and even mentioned the 3rd and 4th accused persons as his accomplices. That piece of evidence is to be disregarded for offending the rules of recording confessions. It is unfortunate that the court allowed such testimony to go on record. PW 6 stated that he was in the company of police officers when the information was being given by the 2nd accused person's relatives as well as the 2nd accused person. Quite interestingly, it is only PW 6 who purported to talk about it. The investigating officer did not allude to such information. The investigating officer testified that when they were following the foot tracks, they found the 2nd accused person and questioned him. That the 2nd accused person stated that he had not heard nor seen anything.
42. The prosecution witnesses further gave conflicting testimony with regard to where the foot tracks led. The complainant testified that the foot tracks led to the home of the 2nd accused person. His testimony suggested that he was in the company of the police when they followed the foot tracks up to the home of the 2nd accused person where they found sandals. The complainant later stated that he remained at his home and did not follow or accompany the police to the 2nd accused person's home. When the complainant was cross-examined by counsel for the defence, he stated that he followed the foot tracks up to the boundary between his land and that of the 2nd accused person.
43. When the complainant was recalled for further cross-examination on 9/9/2021, he stated in re-examination that when they followed the foot tracks, they led them to the house of the 2nd accused person. The witness further stated that the poison that was administered to his dogs was recovered from the home of the 2nd accused person. No other witness testified on any recovery from the house of the 2nd accused person. The investigating officer did not state that any poison was recovered from the house of the 2nd accused person and none was produced in evidence. If the complainant did not get to the 2nd accused person's house, where did he get the information on the recovery of poison?
44. PW 6 the Assistant Chief testified that he was with the police when they followed the foot tracks. His testimony was that the foot tracks led them to the home of the 2nd accused person and into the kitchen. That there were also foot tracks leading to Kambu. The investigating officer stated that the foot tracks led them to the barbed wire and chain link fence then to the outside. He did not state that the foot tracks led them to the home of the 2nd accused person. When the investigating officer was cross-examined by counsel for the defence, he stated that they lost the foot tracks because of the grass. In further cross-examination, the investigating officer stated that the foot tracks did not get to the 2nd accused person's home but got near his home and that is where they lost them.
45. Apart from merely stating that they had information on the involvement of the 2nd accused person in the incident, the investigating officer did not lay any basis for arresting the 2nd accused person. It is not known why he was charged. There is no evidence linking him to the incident complained of herein. There is no tangible evidence identifying him as one of those who invaded the complainant's home. The 3rd accused person was the complainant's employee. The complainant did not state that he saw him in his house when he was attacked. The evidence from both the prosecution and the defence



indicates that when the complainant went out of the house after the incident, he went to the house where the 3rd accused person stayed and found it locked from the outside. This implies that the 3rd accused person could not have gotten out of the house. There is no evidence to prove or even suggest that the 3rd accused person could have committed the offence then caused his accomplices to lock the door from the outside.

46. When the complainant was cross-examined by counsel for the defence, he stated that the 3rd accused person followed the foot tracks with the police and that he told the 2nd accused person to run away. That the 3rd accused person went round the house and told the 2nd accused person to escape. Firstly, the complainant did not give such evidence when he testified in-chief. Secondly, his testimony was that he did not accompany the police to the 2nd accused person's house. That being the case, when, how and where did he get the information? In his testimony in-chief, the complainant merely stated that the police asked him to take the 3rd accused person as he was involved in the incident. It is not clear whether the police explained to the complainant how the 3rd accused person was involved.
47. PW 6 stated that it was the 2nd accused person who mentioned to the police, in PW 6's presence that the 3rd accused person was also involved during the purported confession. PW 6 further stated that after the incident, he went to a bar and found the 3rd accused person who informed him that the 2nd accused person would buy him alcohol and ask him about the house plan of the complainant. The investigating officer merely testified that they interrogated the 3rd accused person and were convinced that he was involved in planning the robbery. The witness did not disclose how the 3rd accused person planned the robbery. He kept the information to himself and expects the court to believe him. I find that the prosecution has failed to identify the 3rd accused as one of the robbers nor establish his connection to the incident.
48. The evidence against the 4th accused person was given by the complainant, PW 6 and the investigating officer. The complainant testified that after hearing the loud bang, he went to the sitting room and saw the 4th accused person and a torch was flashed at him. The lights in his house were off. That it was the 4th accused person who had the torch and flashed it at him. The complainant stated that the 4th accused person moved closer to him and ordered him to keep quiet. The complainant further testified that it was the 4th accused person who hit him on the head using a club. That he later identified the 4th accused person at the identification parade. While concluding his evidence in-chief, the complainant stated that when the 4th accused person ordered him to give out money, he had a torch. That the complainant saw him clearly and could not confuse him with anybody else.
49. When the complainant was cross-examined by counsel for the defence, he stated that he did not have a torch and the lights in the house were off. That it was the invaders who had a torch. In further cross-examination, the complainant stated that the beam from the torch was bright and it was flashed in his eyes. That in less than three minutes, the complainant was pushed back to the bedroom and hit on the head. He then became unconscious. The complainant stated that he was able to see the 4th accused person through the beam from the torch. That he saw him when he was hit while in the bedroom. It was the complainant's testimony in cross-examination that the 4th accused person had a rungu (club) and that another invader had the torch.

When the complainant was re-examined by the prosecution, he stated that:

“I identified the person who had the torch as he held me and he ordered me to give them the money but I cannot tell the person who held the torch. The person I identified was not the other one who was holding the torch.”



50. The above statement does not make sense to me. It is quite confusing and contradictory. When the complainant was recalled for further cross-examination, he stated that he saw two people in his house. That one had a torch and the other a rungu. That he could not identify which one had the torch and which one had the rungu. That the one who had the rungu hit him and at the police station, he was able to identify the 4th accused person as the one who had hit him.
51. In *Maitanyi v Republic* [1986] KECA 39 (KLR), the Court of Appeal held as follows:
1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult;
 2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description;
 3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before decision is made;
 4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.
52. Being guided by the above authority, I hereby warn myself of the danger of relying on the evidence of a single identifying witness. Unfortunately, no inquiry was made by the then trial court into the nature of the light available at the time when the witness claimed to have identified the 4th accused person. Nevertheless, I have examined the testimony of the complainant and find it to be contradictory. At one point the complainant stated that it was the 4th accused person who held the torch and flashed it at him and at another point, he claimed that another person held the torch. Furthermore, the evidence indicates that the torch was flashed directly at the complainant's eyes. That should have surely blinded him and there is no way he could have seen clearly.
53. The complainant was also in a state of fright and the incident happened so fast. He was assaulted and lost consciousness. There was no other source of light in the house apart from the torch that was in possession of one of the invaders and flashed at the complainant. From the evidence on record, it would appear that the complainant had not known the 4th accused person before. That is why he was invited to identify him on a parade. It is evident that the circumstances were not conducive for a proper identification of a stranger. I have already found that there is no acceptable evidence to show that an identification parade was ever conducted. My view is that the 4th accused person was not positively identified as one of the invaders.
54. PW 6 stated that the 4th accused person was arrested after he had been mentioned by the 2nd accused person. The investigating officer did not state how and why the 4th accused person was arrested. He did not disclose the circumstances under which he was arrested. He only stated that the 4th accused person was identified by the complainant on an identification parade. The investigating officer did not establish any link between the 4th accused person and the incident. No basis for his arrest was established.



Whether the prosecution has proven its case

55. It is trite law that the onus is on the prosecution to prove its case against the accused persons beyond reasonable doubt. I am alive to the fact that the accused persons are not duty bound to prove their defence or innocence. 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:
56. 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."
57. 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:
58. 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."
59. In *Bakare v State* [1987] 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:
60. 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)
61. I have considered the accused persons' defence. The prosecution evidence does not prove that the complainant lost the items mentioned and the identification of the accused persons was not positive. The accused persons are jointly charged with committing the offence. Section 21 of the *Penal Code* provides as follows:
62. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."
63. The essence of the doctrine was aptly stated by the East African Court of Appeal in *Wanjiru d/o Wamerio vs. R* 22 EACA 521 as follows:-
64. Common intention generally implies premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with"



65. The essential ingredients which give rise to the doctrine of common intention were enunciated by the Court of Appeal in *Eunice Musenya Ndui v Republic* [2011] KECA 401 (KLR) as herein under:
- a. There must be two or more persons;
 - b. The persons must form a common intention;
 - c. The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;
 - d. An offence must be committed in the process;
 - e. The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.
66. The prosecution evidence does not provide any link between the accused persons. The investigating officer did not even bother to establish whether the accused persons knew one another. He did not bother to establish the whereabouts of the accused persons on the material night and whether they were together at some point. It would appear that the police acted on rumours and proceeded to arrest the accused persons. The investigations, if any, were shoddy. The investigators did not move to establish the authenticity or otherwise of the rumours. There was lack of seriousness on the part of the investigating officer. It is unfortunate that even the prosecution fell into the trap. They did not guide and advise the investigators.
67. As already indicated, the onus is on the Prosecution to prove its case against the accused persons beyond reasonable doubt. The standard of proof "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (see *Clarence Victor, Petitioner 92-8894 v. Nebraska*, 511 U.S. 1 [1994]; *Rex v Summers*, [1952] 36 Cr App R 14; *Rex v. Kritz*, [1949] 33 Cr App R 169, [1950] 1 KB 82 and *R. v Hepworth*, *R. v Feamley*, [1955] 2 All E.R. 918).
68. Beyond reasonable doubt is proof that leaves the court firmly convinced that the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt. The complainant was the key witness but he kept giving contradictory evidence.
69. In the authority of *Joseph Ndungu Kimanyi v Republic* [1979] KECA 5 (KLR), the Court of Appeal observed thus:
- “A witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”



Similarly, in *Peter Maina Njeri v Republic* [2016] KEHC 2800 (KLR), the court held as follows:

70. Where a witness is found to have been insincere or untruthful in parts of her evidence then her entire evidence is placed in doubt. A witness cannot be found truthful in certain aspects but untruthful in others. The veracity of her entire evidence is placed in doubt.”
71. The complainant and PW 6 did not strike me as being truthful. The testimony of the complainant was contradictory in itself and also contradicted the other prosecution evidence on record. My assessment of the prosecution case is that the investigating officer appears to have relied on PW 6 in arresting the accused persons. The investigations had no clear direction and all the police wanted was for some people to be charged. PW 6 then went for the people he believed had criminal records and adverse reports. They were lumped up together and charged without proper investigations. It is not the duty of the court to investigate and establish whether the accused persons were involved. Having analysed the prosecution evidence on record, I find that reasonable doubt has been cast on the prosecution case. As a matter of law, the doubt must be resolved in favour of the accused persons.

Disposition

72. The upshot of the above considerations is as follows:
 - a. The prosecution has failed to prove its case beyond reasonable doubt against the accused persons with respect to the offence of Robbery contrary to section 296(2) of the *Penal Code*;
 - b. As the glove does not fit, I find each of the accused persons NOT GUILTY and proceed to Acquit them accordingly;
 - c. The accused persons in custody be released forthwith, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 22ND DAY OF APRIL, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

HON Y.A. SHIKANDA

