Republic v Muema (Criminal Case 286 of 2019)
[2023] KEMC 107 (KLR) (20 November 2023) (Judgment)

Neutral citation: [2023] KEMC 107 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

CRIMINAL CASE 286 OF 2019

CN ONDIEKI, PM

NOVEMBER 20, 2023

BETWEEN

REPUBLIC ..... PROSECUTION

AND

ABED MUEMA ALIAS KAUTA ..... ACCUSED

JUDGMENT

1. On 8th July 2019, the Accused was arraigned in Court and charged with two counts of the offence of known as robbery with violence contrary to section 296(2) of the Penal Code.

2. Under count I, it was claimed that on 18th May 2019 at Wamunyu market, Kyawango Sub-Location, Wamunyu Location, Mwala Sub-County within Machakos County, jointly with others not before this Court and while armed with a panga, the Accused robbed Josephine Mbula Mutisya Kshs. 21,400; one senator keg bump valued at Kshs. 25,000, all valued at Kshs. 46,400 and immediately after the robbery, threatened to cut the said Josephine Mbula Mutisya into pieces.

3. Under count II, it was claimed that on 18th May 2019 at Wamunyu market, Kyawango Sub-Location, Wamunyu Location, Mwala Sub-County within Machakos County, jointly with others not before this Court and while armed with a panga, the Accused robbed Eunice Nthambi Mutisya Kshs. 3,000; two mobile phones make techno valued at Kshs. 5,500 and Alcatel valued at Kshs. 1,500, all valued at Kshs. 10,000 and immediately aftr the robbery, threatened to kill the said Eunice Nthambi Mutisya.

4. The state called four witnesses. PW1, Josephine Mbula Mutisya, testified that on 18th May 2019, at around 10.30 pm, she left her business christened Mambaland Club for her house in the company of her business partner, Eunice Nthambi. She narrated that they were both ferried by one Mukoma on a bodaboda and dropped at the gate. She narrated that they opened the gate and entered the compound which is shared with other tenants, and she opened the house and placed her bag on the floor. She narrated that before settling, she saw someone known to her namely Abed Muema charging at her

while armed with a panga and that he threatened to cut her into pieces unless she surrendered money and the keg bump. She narrated that the said Muema picked the bag she had placed on the floor containing Kshs. 21,400 and the keg bump and threatened to cut her into pieces in the event she raised alarm. She narrated that the said Muema commanded them to lock the door and sleep and never disclose the incident to anyone, lest he kills them. She narrated that when he left, she reached out to her cousin one Charles Kasuki and narrated the story. She narrated that the said Charles Kasuki escorted them to the police to report. She narrated that when the incident happened, the security lights were on, and she could clearly recognize the face of Muema. She narrated that the following day at around 9 am, she received a call, and the voice was familiar being of that Abed Muema aka Kauta who informed her that the bump is useless, and he will return it to her compound at 3 am but the money was already spent. She narrated that a day after the said call, he called again and warned her against reporting him and that he had heard that Eunice was talking ill of him, and they would face consequences. He identified the person she called Abed Muema aka Kauta as the Accused in this case.

5. When PW1 was cross-examined by Mr. Langalanga representing the Accused, she stated that the name of the bodaboda rider who dropped them at the material night is called Mukoma. She stated that he dropped them at the gate and left immediately. She stated that when they were dropped, they found the gate unlocked. She stated that the incident happened at night but there were security lights. She stated that the Accused was known to her before that day. He stated that he had no headgear on the material night. She stated that the Accused called her out by name "Mbula". She stated that she had known the Accused for about 10 years but she could not tell where the Accused lives, but she knew that they both hail from Kyawango Sub-Location, Wamunyu Location. She stated that the Accused emerged from the direction of the common bathroom used by all tenants. She stated that there was no watchman. She stated that the cash he stole was the cash sales for the day. She stated that she had cash sale records, but they were not in Court. She stated that there was a phone in the bag. She stated that she received a call from the Accused, and he threatened her. She denied that she was falsely implicating the Accused to the offence.

6. In re-examination of PW1, she stated that in that compound, three families lived there. She stated that they may have heard her screams, but they feared to come out. She stated that in the name of God, she was not falsely implicating the Accused.

7. PW2, Eunice Nthambi Nthenge, recalled that on 18th May 2019 at around 10.30 pm, in the company of her business partner Josephine Mbula, they left Mambaland Club in Wamunyu for the house. She narrated that she was the first to enter the house and PW1 followed. She related that PW1 pushed inside and upon turning back, he spotted Abed who demanded money from Mbula. She narrated that she told him that they left money in the club. She narrated that he was armed with a panga. She narrated that he picked Mbula's bag from the floor where she had placed it and threatened the against revealing what had transpired. She narrated that Mbula reached her cousin named Charles on phone who escorted to Masii police station where they reported the incident. She stated that there were security lights which enabled them to identify the person who attacked them as Abed. She stated that she recognized his face because she had known him since his childhood. She narrated that he had emerged from the bathroom. She narrated that he took Khs. 21,400, a keg bump, her two phones namely Alcatel and techno, and Kshs. 3,000 which was in her trench coat. He identified the person she called Abed Muema aka Kauta as the Accused in this case.

8. When PW2 was subjected to cross-examination by Mr. Langalanga for the Accused, she stated that PW1 was her business partner. She stated that she left work at around 10.30 pm. She stated that she entered the house first then Josephine followed. She stated that the Accused came from the direction of the common bathroom just outside the house. She stated that she did not confirm whether there

was a neighbour at that time. She stated that the Accused was armed with a panga. She stated that she recognized the Accused both by face and voice since she had known him since his childhood. She stated that security lights are located on the front facia of the house. She stated that the house lights were also on. She stated that she was the one who switched on the lights. She stated that the Accused is Abed Muema Kioko aka Toto aka Kauta. She stated that she did not have receipts for the two mobile phones.

9. PW3, Corporal Everlyne Naini based at DCI headquarters but who was based at Masii DCI at the material time was the Investigating Officer. she recalled that on 23rd November 2021, she took over from PC Alfed Kibiaso who was the initial Investigating Officer. She recalled that on 12th June 2019, together with PC Kibiaso, they were tasked to investigate an incident of robbery with violence. She recalled that the PW1 and PW2 recorded their statements. She narrated that PW1 lost Kshs. 21,400 in cash and a keg bump and PW2 lost two phones, a techno valued at Kshs. 5,500; and an Alcatel valued at Kshs. 1,500. She narrated that when they required PW1 and PW2 to give a special identity mark, they stated that he had a scar on the head and upon arrest, they took the Accused a photo which confirmed the scar. The photos were produced as exhibit 1.

10. For a long time, the advocates on pro bono scheme were on a go-slow. The advocate for the Accused was on that scheme. The Accused moved and persuaded this Court that he was capable of representing himself without suffering substantial injustice. It was thus granted.

11. And so, when PW3 was subjected to cross-examination by the Accused, she stated that she visited the scene. She stated that the scene had no crossed-circuit television. She stated that the Accused was well known to PW1 and PW2 and they thus recognized him well. She stated that she was satisfied that the scene had security lights. She stated that she had no information that Eunice was once his fiancée. She stated that the keg bump, money and phones were not recovered.

PART II: The Acccused's Case

12. The Accused was the only defence witness. In his Defence under oath, the Accused stated Eunice Nthambi was once her fiancée. He stated since his later mother was against their intention to marry, he decided to abandon the relationship and got married to a different lady with the result of animosity between the Accused and Eunice. He stated that he had built a good house for his new wife and Eunice threatened that she would make sure that he will never sleep in that house with the new wife. He thus stated that this case is a product of fabrication.

13. When he was subjected to cross-examination, the Accused stated that there was no other witness to corroborate his story.

PART III: Points for Determination

14. There are two primary components of robbery with violence. The first component is stealing. The second component has three alternatives as follows: (a) that at or immediately before or immediately after the time of stealing, the Accused either used or threatened to use any dangerous or offensive weapon/instrument on any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained; or (b) that the Accused was in company of one or more other offenders; or (c) that the Accused wounded, beat, struck or used any other personal violence to any person, to facilitate the stealing. See the Court of Appeal reasoning in Johana Ndungu vs. Republic [1996] eKLR; and Festus Kahindi Charo & 3 others vs. Republic [2014] eKLR.

15. However, recognizing the centrality of identification in a criminal case and for clarity and abundance of caution, I will package the questions for determination to include a component of identification. For each count, I have thus distilled three points as follows.

16. Under Count I:

    i. First, whether the prosecution has proved beyond reasonable doubt that on 18th May 2019 at around 10.30 pm, at Wamunyu market, Kyawango Sub-Location, Wamunyu Location, Mwala Sub-County within Machakos County, Kshs. 21,400 and one senator keg bump were stolen from Josephine Mbula Mutisya at her residence.

    ii. Second, whether the prosecution has proved beyond reasonable doubt that the said property was stolen by the Accused herein.

    iii. Third, whether the prosecution has proved beyond reasonable doubt that either: (a) at or immediately before or immediately after the time of stealing, the Accused either used or threatened to use any dangerous or offensive weapon/instrument on any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained; or (b) the Accused was in company of one or more other offenders; or (c) the Accused wounded, beat, struck or used any other personal violence to any person, to facilitate the stealing.

17. Under Count II:

    i. First, whether the prosecution has proved beyond reasonable doubt that on 18th May 2019 at around 10.30 pm, at Wamunyu market, Kyawango Sub-Location, Wamunyu Location, Mwala Sub-County within Machakos County, Kshs. 3,000 and two mobile phones namely Alcatel and Techno were stolen from Eunice Nthambi Mutisya at her residence.

    ii. Second, whether the prosecution has proved beyond reasonable doubt that the said property was stolen by the Accused herein.

    iii. Third, whether the prosecution has proved beyond reasonable doubt that either: (a) at or immediately before or immediately after the time of stealing, the Accused either used or threatened to use any dangerous or offensive weapon/instrument on any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained; or (b) the Accused was in company of one or more other offenders; or (c) the Accused wounded, beat, struck or used any other personal violence to any person, to facilitate the stealing.

PART IV: Analysis of the Law; Examination of facts; Evaluation of Evidence; and Determination

18. Who bears the legal burden of proof in criminal cases? The legal burden of proof (onus probandi incumbit ei qui dicit, non ei qui negat) is the duty placed on the shoulders of a party in a dispute to provide sufficient proof and justification for the position taken. In criminal cases, this duty (otherwise originally known as brocard ei incumbit probatio qui dicit, non qui negat) is on the shoulders of the prosecution. It essentially means that the legal burden of proof rests on who asserts, not on who denies. This said legal burden draws impetus from a fair hearing principle now enshrined in Article 50(2)(a) of *the Constitution* that a person Accused of an offence ought to be presumed innocent until proven guilty.

19. Sections 107, 108 and 109 of the *Evidence Act* are germane in this discourse. Section 107 states thus: - "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." Section 108 states thus: - "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all

were given on either side." Section 109 states thus: - "The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

20. What then amounts to proof? In the Australian case of Britestone Pte Ltd vs. Smith & Associates Far East Ltd {2007} 4 SLR 855, which has been adopted in Kenya in inter alia Paul Thiga Ngamenya v Republic [2018] eKLR, V.K. Rajah, JA expressed a view that "The Court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms proved, disapproved, and not proved are statutory definitions contained in the *Evidence Act*. The term proof whenever it appears in the *Evidence Act* and unless the context otherwise suggests, means, the burden to satisfy the Court of the existence or non-existence of some fact."

21. The legal burden of proof in criminal cases, never leaves the prosecution's backyard, except on very rare occasions. In fact, acts or conduct or even legislation which has attempted to do has been sternly frowned upon. In Senator Johnstone Muthama vs. Director of Public Prosecutions & 3 Others [2020] eKLR, J. Lesiit, L. Kimaru & J. M. Mativo, JJ frowned upon section 96(a) of the Penal Code for shifting the burden of proof to the Accused and consequently declared it as offending the fair trial principle of being presumed innocent until proven guilty as enshrined under Article 50(2)(a) of *the Constitution* and the Constitutional guarantee against self-incrimination as enshrined under Article 49(1)(a)(ii), which act is further in flagrant violation of *the Constitution* which exempts, under Article 25 thereof, from limitation contemplated under Article 24 thereof of inter alia the fair trial principles enshrined under Article 50 thereof. The Court explained that the right to a fair trial was a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which were the right to life and liberty of the person. It was guaranteed under article 14 of the International Covenant on Civil and Political Rights (ICCPR). The fundamental importance of the right to fair trial was illustrated not only by the extensive body of interpretation it had generated worldwide but, by the fact that under article 25(c) of *the Constitution*, it was among the fundamental rights and freedoms that could not be limited or abridged.

22. Before I invoke an old English decision, I wish to restate that our criminal justice system did not start from scratch. We build our system on the English common law system. In Peter Wafula Juma & 2 Others vs. Republic [2014] eKLR, F. Gikonyo and A. Mabeya, JJ, had this to say about the legal burden of proof in criminal cases: "Kenya adopted common law tradition and the position on legal burden of proof in criminal cases is as stated by Viscount Sankey L.C (ibid); the prosecution bears the legal burden of proof throughout the trial. In Kenya, a statutory provision which shifts the legal burden of proof in criminal cases is unconstitutional except is so far as it creates only evidential burden, relates to acceptable exceptions such as the defence of insanity, or other rebuttable presumptions of law. This law is consistent with and upholds the Constitutional right of the Accused; presumption of innocence, not to give incriminating evidence and to remain silent..."

23. In the English cause celebre decision in Woolmington vs. DPP [1935] A.C 462, Lords Viscount Sankey, Hewart, Atkin, Tomlin and Wright laid the golden thread (presumption of innocence) principle in criminal cases. Reginald Woolmington had shot his wife after falling out and was therefore charged with murder of his wife. Wilmington's defence was that he did not intend to kill his wife and thus lacked the requisite mens rea. He told the jury that he had planned to scare her by threatening to kill himself if she refused to return and reunite with him and in the process, he had attempted to show her the gun which discharged accidentally, killing her instantly. Swift, J. ruled that the case was so strong against Woolmington that the burden of proof was on him to show that the shooting was accidental.

He was convicted and sentenced to death. It was upheld on appeal to the Court of Criminal Appeal on the premise of the statement of law in Foster's Crown Law that if a death occurred, it is presumed to be murder unless proved otherwise. He appealed to the House of Lords. The issue brought to the House of Lords was whether the statement of law in Foster's Crown Law, which the Court of Criminal Appeal applied, was correct when it said that if a death occurred, it is presumed to be murder unless proved otherwise. Viscount Sankey made a statement which was unanimously adopted by the rest in what has now come to be known as the 'Golden Thread' speech. At page 481, Viscount Sankey L.C. enunciated the law on legal burden of proof in criminal matters as follows: "Juries are always told that if conviction there is to be the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in the Court of Criminal Appeal in R. v. Davies (8 C.A.R. 211) the head-note of which correctly states that where intent is an ingredient of a crime there is no onus on the Defendant to prove that the act alleged was accidental. Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

24. It bears restating that this golden thread principle is now enshrined in our Constitution of Kenya 2010, under Article 50(2)(a) thereof, as part of the wider package of fair trial principles and in that regard, the holding in that decision holds true in Kenya. In Mkendeshwo vs. Republic [2002] 1 KLR 46, the Court of Appeal enunciated thus: "In criminal cases the burden is always on the prosecution to establish the guilt of the Accused beyond any reasonable doubt and generally, the Accused assumes no legal burden of establishing his innocence."

25. However, in considerably limited instances, once the onus of proof placed on the shoulders of the prosecution by dint of sections 107, 109 and 110 of the *Evidence Act* and the incidence of burden contemplated by section 108 thereof, is discharged, the evidential burden of proof shifts to the Accused Courtesy of and the limited circumstances outlined under section 111 of the said Act. Section 111 of the *Evidence Act* provides thus: "When a person is Accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the Court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist: Provided further that the person Accused shall be entitled to be acquitted of the offence with which he is charged if the Court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the Accused person in respect of that offence. (2) Nothing in this section shall - (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person Accused is charged; or (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or (c) affect the burden placed upon an Accused person to prove a defence of intoxication or insanity."

26. What is the standard of proof in criminal cases? In English cases of Re H (minors) sexual abuse; standard of proof {1996} AC 563 and 505 for the Home Department vs. Rehman {2003} 1 AC 153, which was adopted in Kenya in inter alia Paul Thiga Ngamenya vs. Republic [2018] eKLR, the House of Lords laid down a series of guiding principles on standards of proof for civil and criminal cases and their purport as follows: "(1). Where the matters in issue are facts, the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of

probability. (2). The balance of probability standard means that the Court must be satisfied that the event in question is more likely than not to have occurred. (3). The balance of probability standard is a flexible standard. This means that when assessing this probability, the Court will assume that some things are inherently more likely than others."

27. The standard required to prove a criminal case is evidence which convinces the Court beyond reasonable doubt. The doubt referred to in this standard is the doubt that can be given, or a reason assigned as opposed to speculation. A person Accused of an offence is the most favourite child of the law. Adverting to the standard of proof in criminal cases, Mativo, J. says in Philip Muiruri Ndaruga vs. Republic [2016] eKLR that "To give an Accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an Accused is sufficient. The Accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An Accused person is the most favourite child of the law and every benefit of doubt goes to him. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the Court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

28. The meaning of the words 'beyond reasonable doubt' required in proving criminal offences has been attempted in multiple cases. In the case of Miller vs. Minister of Pensions [1947] 2 All ER 372, Denning J. who holds that "Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt . . . If the evidence is so strong as to leave only a remote possibility in the defendant's 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 would suffice."

29. And in Walters vs. R [1969] 2 AC 26, approved in R vs. Gray 58 Cr. App. R. 177 at 183, Lord Diplock attempted to define 'reasonable doubt' using the following words: "A reasonable doubt is that quality and kind of doubt which, when you are dealing with matters of importance in your own affairs, you allow you to influence you one way or the other."

30. What is the entry point in criminal trials? When hearing of the matter begins, the Court begins from a tabula rasa which is that the Accused is innocent and this state of affairs perpetuates itself throughout the trial proceedings until such time as the prosecution has put on the table evidence which satisfies the Court beyond reasonable doubt that the Accused is guilty. In 1997, the Supreme Court of Canada in R vs. Lifchus [1997] 3 SCR 320, suggested the following explanation: "The Accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the Accused is guilty. .....the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so ingrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the Accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the Accused and acquit because the crown has failed to satisfy you of the guilty of the Accused beyond a reasonable doubt. On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the Court, you are sure that the Accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

31. The standard is such that, in William Blackstone's formulation (in his seminal work, Commentaries on the Laws of England, published in the 1765) states that "It is better that ten guilty persons escape than that one innocent suffer." Blackstone holds a thesis that "All presumptive evidence of felony should be admitted cautiously; for the law holds it better that ten guilty persons escape, than that one innocent party suffer." Benjamin Franklin (in Benjamin Franklin, Works 293 (1970), Letter from Benjamin Franklin to Benjamin Vaughan [14 March 1785]), subscribes to the same school of thought (and thus echoes Blackstone's jurisprudence) and states that "It is better 100 guilty Persons should escape than that one innocent Person should suffer."

32. While defending British Soldiers who were charged with murder for their role in the Boston Massacre, John Adams also expanded upon the rationale behind Blackstone's Formulation when he stated that "It is more important that innocence should be protected, than it is, that guilt be punished; for guilt and crimes are so frequent in this world, that all of them cannot be punished.... when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, 'it is immaterial to me whether I behave well or ill, for virtue itself is no security.' And if such a sentiment as this were to take hold in the mind of the subject that would be the end of all security whatsoever."

33. And what is the volume of evidence required to prove a case and how is the evidence measured in civil cases? S.C. Sarkar in Hints of Modern Advocacy and Cross-examination (7th Edition, 1954, at page 16) reasons that evidence is weighed and not numbered. He argues that it is wrong to suppose that a point may be established if only a large number of witnesses can be called to prove it. Save for the requirement of corroboration under section 124 of the *Evidence Act*, this position ties well with section 143 of the *Evidence Act* which provides that "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact." Section 124 of the Evidence requires that before an Accused is convicted, the Court satisfies itself that the evidence of the victim is corroborated but in sexual offences, a window and exception to the general rule has been provided to take care of situations where the only evidence available is that of the alleged victim of the offence, in which case the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth. The text of section 124 of the *Evidence Act* reads as follows: "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the Accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

34. The standard of proof, as I discern it, is that though be some doubt, it should be of such measure that it cannot affect a reasonable person's belief regarding whether or not the Accused is guilty. It does not therefore mean that the proof must be beyond a shadow of a doubt. If it were so, it will be so high a standard that it may not be practically attained. It certainly does not mean that every peripheral fact has to be established up to this standard. What has to be proved is the body of material facts which make up the charge against the defendant.

35. Having discussed the broad framework within which this case will be determined, it's now time to embark on analysis of the law, examination and interrogation of facts and evaluation of evidence on each of the three questions of each count, seriatim. This Court will analyze each of the three questions on the two counts, simultaneously.

(i) Whether the prosecution has proved beyond reasonable doubt that on 18th May 2019 at around 10.30 pm, at Wamunyu market, Kyawango Sub-Location, Wamunyu Location, Mwala Sub-County within Machakos County, Kshs. 21,400 and one senator keg bump were stolen from Josephine Mbula Mutisya at her residence; and whether the prosecution has proved beyond reasonable doubt that on 18th May 2019 at around 10.30 pm, at Wamunyu market, Kyawango Sub-Location, Wamunyu Location, Mwala Sub-County within Machakos County, Kshs. 3,000 and two mobile phones namely Alcatel and Tecno were stolen from Eunice Nthambi Mutisya at her residence

36. This is a rare blend of a question of both law and fact. What amounts to stealing? Section 268 of the Penal Code gives a very comprehensive definition of stealing. It is vital to reproduce the definition for this purpose. Section 268 (1) thereof provides that "A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property." And section 275 of the Penal Code provides that "Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years."

37. Stealing is characterized as a felony. But what then is a felony? Section 4 of the Penal Code defines a "felony" to mean "an offence which is declared by law to be a felony or, if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more." The same section defines a misdemeanor to mean "any offence which is not a felony."

38. Section 268 (3), (4) and (5) provides as follows: "(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it. (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner and believes on reasonable grounds that the owner cannot be discovered. (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move." {Emphasis supplied}

39. The subject in this case was money, phones, and a keg bump. In the context of section 4 of the Penal Code, the three items come within the definition of "property" which includes "any description of movable or immovable property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

40. Through PW1, PW2 and PW3, the prosecution led oral evidence to the effect that on 18th May 2019 at around 10.30 pm, at Wamunyu market, Kyawango Sub-Location, Wamunyu Location, Mwala Sub-County within Machakos County, Kshs. 21,400 and one senator keg bump were stolen from Josephine Mbula Mutisya at her residence; and that on the same date, place, time, and residence, Kshs. 3,000 and two mobile phones, namely Alcatel and Tecno, were stolen from Eunice Nthambi Mutisya.

41. This particular fact was indirectly denied by the Accused having taken a position that this charge is a concoction.

42. Having observed PW1 and PW2 undergoing examination-in-chief, the intense cross-examination and re-examination, this Court found them consistent, free from material contradictions, and their demeanour was not questionable. This Court thus infers that they did not come across as incredible witnesses or witnesses of questionable character. Consequently, having subjected their evidence to the defence, this Court finds the prosecution evidence in this regard so strong and incapable of raising a reasonable doubt in the mind of this Court, which then leaves a remote possibility in favour of the Accused.

43. For the foregoing reasons, this Court concludes that the prosecution has proved beyond reasonable doubt that on 18th May 2019 at around 10.30 pm, at Wamunyu market, Kyawango Sub-Location, Wamunyu Location, Mwala Sub-County within Machakos County, Kshs. 21,400 and one senator keg bump were stolen from Josephine Mbula Mutisya at her residence; and that on the same date, time, place, and residence, Kshs. 3,000 and two mobile phones, namely Alcatel and Tecno, were stolen from Eunice Nthambi Mutisya.

(ii) Whether the prosecution has proved beyond reasonable doubt that the said property namely Kshs. 21,400; one senator keg bump; Kshs. and two mobile phones, namely Alcatel and Tecno, were stolen by the Accused herein.

44. This is a question of fact. Principles governing criminal liability underline certainty, precision, and specificity of the identity of the perpetrator of an offence. For this reason, cautionary principles have been developed to guide Courts in handling evidence purporting to lay a nexus between the offence alleged and the perpetrator. Before criminal liability attaches, therefore, the Court must caution itself accordingly and be satisfied beyond reasonable doubt that the perpetrator of the alleged offence has been properly and sufficiently identified. It is in this connection that the standard of identification evidence should rise to an altitude so as not to be effortlessly impeached and brought down. As already discussed, of course, this onus lies on the shoulders of the prosecution.

45. Proof of this fact was anchored on the oral evidence of PW1 and PW2. I wish first to test whether the testimonies of PW1 and PW2 surmount the test prescribed therefor. Section 62 of the *Evidence Act* states that "All facts, except the contents of documents, may be proved by oral evidence." Further, section 63(1) of the *Evidence Act* states that "Oral evidence must in all cases be direct evidence."

46. And what amounts to direct evidence? Section 63 (2) thereof states that "For the purposes of subsection (1), "direct evidence" means- (a) with reference to a fact which could be seen, the evidence of a witness who says he saw it; (b) with reference to a fact which could be heard, the evidence of a witness who says he heard it; (c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner; (d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds: Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable. (3) If oral evidence refers to the existence or condition of any material thing, other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection."

47. In this case, the oral testimonies of PW1 and PW2, have passed the test of direct evidence.

48. No particular number of witnesses is required to prove a charge. Section 143 of the *Evidence Act* provides that "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

49. However, proceeding on the edict of criminal law that it is better that ten guilty persons escape than that one innocent suffer, section 143 of the *Evidence Act* notwithstanding, corroboration is required in all criminal cases except a few instances like sexual offences where it can be obviated backed with cogent reasons. See the Proviso to section 124 of the *Evidence Act*.

50. In this regard, the manner of approaching evidence of visual identification was enunciated by Lord Widgery C.J, in the case which has now become the locus classicus in this regard, of R vs. Turnbull [1976] 3 All E.R. 549 at page 552 where his Lordship expressed himself as follows: "Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made." This test was adopted in Anjononi vs. Republic [1980] KLR 59, where it was held that recognition is better than identification of a stranger.

51. However, although recognition is stronger than identification of a stranger, its strength may also be diminished and compromised by an honest mistaken identity or honest error. And cognitive of this, a cautionary principle on this was laid down in Wanjohi & 2 others vs. Republic [1989] KLR 415, at pages 418-419, Platt, Gachuhi & Masime JJA (as they then were) rendered themselves as follows: "In these circumstances, where the attack was swift rendering Nelson unconscious, the possibility of correct recognition is remote. It may well be that Nelson appeared to be an honest witness, and that his failure to identify the appellants David and Peter indicated that he was not prone to exaggeration. But that was the situation in Roria v Rep [1967] E.A. 583 where at page 584 the Court of Appeal remarked: - "In the present case the learned trial Judge thought Samaji an honest witness. We do not quarrel with his assessment of her honesty, but a witness may be honest yet mistaken, and in excluding the possibility of a mistake on her part, the learned Judge, with respect, erred in our view." It will be said that recognition is stronger than identification. That may be so; but an honest recognition, but yet be mistaken. The trial Court did not observe this distinction. The Court was impressed by the demeanour of Nelson, and although the "identification" was made at night, the Court had no hesitation in accepting that evidence. The trial Court approached the problem from the wrong angle. The High Court set out all the principles laid down in Abdullah Bin Wendo v R (1953) 20 E.A.C.A 166; Roria v Rep. (supra) and Turnbull v Reg C.A.R. (1976) Vol. 63, P. 1132 at P. 1137 and thus realized that the vital question upon which there is special need for caution is the correctness of the identification, i.e excluding any mistake. Unfortunately, the High Court devalued this principle in the following passage: "The trial magistrate was impressed by the quality of this evidence and therefore omitted any reference to the possibility of the appellants' identification as mistaken, though such a reference might have been desirable. We do not think that the omission or error resulted in any failure of justice. That is, with respect, wrong. It is not that a reference to mistaken identification is desirable. It is the vital question. It is the vital question which has to be answered beyond reasonable doubt. Was the appellant recognized beyond reasonable doubt? Whether the error caused a failure of justice is the next step." {Emphasis supplied}

52. In the foregoing connection, before convicting an Accused, a Court should warn itself against the danger convicting on uncorroborated identification evidence of a single witness, especially if it is oral evidence. See Marie & 3 others vs. Republic [1986] eKLR; Gikonyo Kuruma & Another vs. Republic [1977] eKLR and Njeri vs. Republic [1979] eKLR. The need for caution was also reiterated by the Court of Appeal for Eastern Africa in the case of Abdallah Bin Wendo vs. R 20 EACA 166 at page 168, where the Court expressed the following empathic view: "Subject to certain well-known exceptions it

is trite law that a fact may be proved by the testimony of a single witness but this rule 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 correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

53. Further, in the Court of Appeal decision in Wamunga vs. Republic [1989] KLR 424 at pages 426-427, Masime JA, Gicheru & Kwach Ag JJA (as they then were) laid the following test of identification evidence: "It is trite law that where the only evidence against a defendant 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 a conviction."

54. Further, but not in derogation from the test laid in Wamunga case, the Court of Appeal laid down guidelines to be applied in analysing identification evidence in Richard Mwaura Njuguna & Another vs. Republic [2019] eKLR, Karanja, JA, Visram & Koome, JJ.A (as they then were) while quoting with approval the locus classicus case in this regard of R vs. Turnbull & Others [1976] 3 All ER 549, stated: "First, wherever the case against an Accused depends wholly or substantially on the correctness of one or more identifications of the Accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the Accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the Accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the Accused before? How often? If only occasionally, had he any special reason for remembering the Accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the Accused given to the police by the witness when first seen by them and the actual appearance?"

55. See also Evans Odhiambo Anyanga vs. Republic [2015] eKLR, per Majanja, J.; Mwenda vs. Republic [1989] KLR 464, Masime JA, Gicheru & Kwach Ag JJA (as they then were); and Osiwa vs. Republic [1989] KLR 469, per Masime JA, Gicheru & Kwach Ag JJA (as they then were).

56. Faced with the visual and recognition evidence of the complaints only, this Court will turn to carefully and thoroughly analyze the evidence of PW1 and PW2.

57. First, the identification by the Complainants occurred at night at around 10.30 pm. PW1 and PW2 asserted that they were enabled to visually identify the Accused using security lights and lights in the house. The fact that the security lights and lights in the house were on was not displaced at all by the defence. This Court thus finds that the conditions were favourable for identification. This Court further infers that in the circumstances, the Accused was sufficiently identified, since the light was an enabler. Second, the time they spend together was sufficient to take notice of the appearance of the Accused. Third, since the Accused was known to PW1 and PW2 before the material time, recognition by voice as asserted by PW1 and PW2, will pass as well.

58. In sum, this Court infers that the visual identification of the Accused by the Complainants was to the highest extent, free from any possibility of error.

59. This Court has said herein above that having observed PW1 and PW2 undergoing examination-in-chief, the intense cross-examination and re-examination, this Court found them consistent, free from material contradictions, and their demeanour was not questionable. This Court thus inferred that they did not come across as incredible witnesses or witnesses of questionable character. Consequently, having subjected their evidence to the defence, this Court finds the prosecution evidence in this regard so strong and incapable of raising a reasonable doubt in the mind of this Court, which then leaves a remote possibility in favour of the Accused. The defence of concoction as raised by the Accused cannot survive the torrents of evidence in this regard. Beyond the mere assertion that this charge was concocted, the Accused placed no material before this Court to fortify this assertion.

60. The foregoing findings yield a conclusion that the prosecution has proved beyond reasonable doubt that the said property namely Kshs. 21,400; one senator keg bump; Kshs. and two mobile phones, namely Alcatel and Tecno, were stolen by the Accused herein.

(iii) Whether the prosecution has proved beyond reasonable doubt that either: (a) at or immediately before or immediately after the time of stealing, the Accused either used or threatened to use any dangerous or offensive weapon/instrument on any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained; or (b) the Accused was in company of one or more other offenders; or (c) the Accused wounded, beat, struck or used any other personal violence to any person, to facilitate the stealing, on each of the two Counts

61. It was the evidence of PW1 and PW2 that before, during and after, while the Accused was armed with a panga, they were threatened to be cut into pieces if they resisted and if they revealed the happenings of that night.

62. This was indirectly denied by the Accused, having taken a position that this charge is a concoction. This Court has already observed supra, that beyond the mere assertion that this charge was concocted, the Accused placed no material before this Court to fortify this assertion.

63. It is on basis of the foregoing reasons that this Court concludes that the prosecution has proved beyond reasonable doubt that at or immediately before or immediately after the time of the said stealing, the Accused threatened to use a dangerous and offensive weapon in order to obtain or retain the said stolen property and to prevent or overcome resistance.

PART V: Disposition

64. Consequent upon this Court finds the Accused guilty of the offence of robbery with violence contrary to section 295 read with section 296(2) of the Penal Code as charged under Counts I and II.

65. Accordingly, the Accused is convicted under section 215 of the Criminal Procedure Code for the two counts of robbery with violence.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 20TH DAY OF NOVEMBER 2023

.....

C.N. Ondieki

Principal Magistrate

In the presence of:

Prosecution Counsel:.....

Advocate for the Accused:.....

The Accused:.....

Court Assistant:.....