



**Mwangi & another v Republic (Criminal Appeal E014 of 2024)  
[2025] KEHC 19043 (KLR) (16 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 19043 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL E014 OF 2024  
EM MURIITHI, J  
DECEMBER 16, 2025**

**BETWEEN**

**LUKE MURIMI MWANGI ..... 1<sup>ST</sup> APPELLANT**

**HARRISON WANJOHI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon. L.W. Kabaria (PM) in Gichugu criminal case No. 331 of 2019 delivered on 20/9/2023)*

**JUDGMENT**

1. The appellants herein were charged with robbery with violence contrary to section 296 (2) of the Penal Code. The particulars were that on the 11<sup>th</sup> day of April 2019 at Kanjuu shopping centre Kanjuu sub location Njukiini location within Kirinyaga East County jointly with others, while armed with dangerous weapons, namely a pistol, robbed Stephen Mwangi Muriithi a cash sum of Ksh. 150,000 and at or immediately before or immediately after the time of such robbery used actual violence to the said Stephen Mwangi Muriithi.
2. They denied the charges, but upon full trial, they were convicted and sentenced to 40 years imprisonment.

**The Appeal**

3. On appeal, the appellants raised 6 grounds of appeal as follows:
  1. The learned trial magistrate erred in law and fact by failing to put into consideration that Pw5 was not a credible witness.



2. The learned trial magistrate erred in law and fact by failing to put into consideration that no exhibits were recovered from the Appellants.
3. The learned trial magistrate erred in law and fact by not putting into consideration that the eye witnesses who were involved in the instant case gave lies and wrong information.
4. The learned trial magistrate erred in law and fact by failing to consider that the prosecution witnesses gave contradicted, uncorroborated and unreliable evidence and provoked Section 163 of the *Evidence Act*.
5. The learned trial magistrate erred in law and fact by rejected the Appellant's defence on weak reasons and thus provoking Section 168 (1) and Section 212 of the Penal Code.
6. The learned trial magistrate erred in law and fact by relying on circumstantial evidence adduced by the prosecution witnesses on passing the judgment upon the appellants which had no merits to hold any conviction.

### **Duty of Appellate Court**

4. The duty of this court as the first appellate court is to re-evaluate the evidence on record and draw its own independent conclusions, bearing in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. (See *Okeno v R* (1972) EA 32).

### **Evidence**

5. Stephen Mwangi Mureithi, the complainant herein, testified that, "I live in Kanjuu village. I run a retail and cereals shop. I did not know the three accused persons before the 11<sup>th</sup> April 2019. On the 11<sup>th</sup> April 2019 I woke up as was usual at 7 am which is the time I open the shop, I opened the shop and I began my work as was usual. That day I had maize I wanted to sell, but I was still selling in the shop. At about 3 pm there is a lorry that came to buy maize, I sold them thirty bags of maize which is about Kshs 90,000/-, after I sold to them I continued with my work selling in the shop. I close the shop at 9 pm because there are street lights that were put up, before that we used to close at 7 pm and sell from the window but because there were street lights I had not closed the doors that night. At about 8.45 pm, just as I was about to close the shop the last customer came I sold to him he left then I saw two other customers who I did not know two men, just as I was about to close the doors one of them told me he wanted to withdraw Kshs 500/- I asked him whether he had his national identification card, he told me he did. When he reached into his pocket instead of removing his ID what he removed was a gun a small gun like a pistol. When he removed the pistol, he told me to lie down I complied immediately, he told me bring the money and the phone I told him there they are. My shop is divided, people don't buy from the verandah the shop is portioned, so when he told me he wanted to withdraw money I had already entered through the small door, the money was just there because I wanted to close the shop, some of it was in the drawer and some was just there, the total was about Kshs 150.000/-. When they told me to lie down I found one had already come in when they told me they wanted to withdraw money I had gone inside when they showed me the pistol they ordered me to lie down, as I was lying down one came inside as well, they took the money and one phone belonging to a customer. The ones I saw were two, one who had a gun was standing at the door and the other who came to my side, the one who had a gun was near me just like you are right now (addressing prosecutor who is standing next to him in the dock) he was pointing the gun at me. My wife called Alice Ruguru was behind there we work together, she heard the voice of someone asking for money she peeped from a window that is there at the shop she saw like they were thieves and she ran from the back screaming, people started to gather then we heard gunshots and people dispersed. After about five seconds I continued



to lie down facing down I stood up and saw they had left. I was not able to recognize the two people who came to the shop but one was slender and short the other one was on other side I was not able to recognize him. I stood up and found people had left, I went outside and found members of the public were coming, when I looked up I saw two people because there were streetlights, at the end where the streetlights end there was a motorcycle waiting for them I yelled there are the thieves we tried to chase after them but they jumped onto the motorcycle and left in the direction of the forest. After that we went to Gathoge police patrol base to report then we came to Kianyaga the CID offices. They took the money; the phone was brought back to me the Mpesa phone it was recovered by people the next day in the direction where they had gone to and it was brought to me. I came and recorded my statement I was asked if there were witnesses I came with them the ones who were at the scene. We recorded our statements. We were called after three weeks we were told there were people who had been arrested we were told to come and try and identify them. We came to Kianyaga police station, we went in the police vehicle to Baricho police station a parade was done, it was of about fifteen people. We found they were already in the parade, I had not been shown the accused before. they were fifteen people standing in a line, when I saw them I was asked if I am able to identify any of them I said I was not able to identify them because I was not able to identify them when they came to my shop but they were being brought one by one they were in a line I was told to look at all of them and see if I recognized any of them I did not recognize any. After that we were taken to Kerugoya police station the same thing was done the people were different fifteen people were in the parade I still could not identify any of them you know you cannot identify someone if you don't see their face but the other people we were with were able to identify them. Myself I was not able to identify them but we were told they were arrested while stealing. That day I had sold maize it was collected in a lorry, they gave me in cash they do not give us receipts there is someone who was there when I was paid the money he is called Gerald Kariuki, Kshs 90,000/- was for the maize, Kshs 60,000/- were the sales.”

6. On cross examination, he stated that, “Yes, I know the reason I took an oath, yes, I know how to read, I have a general retail shop. I have documents to show it I have a license but I did not carry it. I have something to show I run an Mpesa shop it is together with the shop I did not carry the license. I don't have anything to show I had the money. (referred to his statement) I am not the one who wrote the statement it was being written for me. Yes, there is maize that was bought, the ones who came to buy the maize were sent by Anderson. Anderson and I do not know each other he just came to enquire if he could buy maize. He called me on phone. (asked to read his statement) ‘I called one Anderson through the number 0727458497’ he is the one who sent the ones who bought the maize. (continues to read) When I was asked if I suspected the ones who bought the maize I said I do not know if the one who bought maize from me is connected to the ones who came to steal from me. Yes, the nearby shop had CCTV surveillance, I looked at it but the faces were not clear their faces are a bit far. Yes, I am Steven (referred to his further statement page 2 - reads out loud) the suspect remain not known to me I cannot read the handwriting (read by court assistant) the suspect not known to me was placed amongst some people and I was able to identify.’ What I have read from the statement I have told you I am not the one who wrote the statement what I said is that only one of them I was able to identify his height. Yes, I have told the court the truth, I am not the one who was writing, there is no one who told me to say anything I don't know why it was written that way I have studied up to form four I can read and write, it is the police officer who was writing down. The signature is mine. This is written Kerugoya police station. When we came to go for the report we did not come one day and the suspects were not in one police station so we were coming here then we go to the police station, I recorded my statement at Kianyaga police station. What I have said is that there is no one I identified but he was of this height. No there is no one I touched and said it is this one. He came in and took the money he asked me for the money and phone. The money was taken violently, I did not give it out but they did not hit me. (referred to his statement-reads out loud) I have said here when he came he told me to bring



the money and the phone I told him they are there, then he took, I told him there it is and he took, some I told him there it is and some was hidden I removed it from where I had kept it and I gave him. Yes, some money was in the cash box some of it was hidden. I took the money and put it there and told him to take, the whole incidence took about three seconds you cannot identify someone that quickly and it is someone who has a gun. I gave some of the money over, I have said I was not able to identify anyone by face. I am not testifying out of fear. Yes, these are my signatures. Yes, I would want the court to look at my statements (statements marked DMFI-1a, 1b). The phone belongs to a customer called Kinyua. I do not know any of the accused, I was not able to identify the accused.”

7. In re-examination, he stated that, “What I have told the court is the truth and also what I have seen written in the statements. I did not carry my license I run a business but there are witnesses who can show I run a business. There are witnesses who saw me sell the maize and they are in court and they know the quantity. Yes, there is no one I was able to identify, I said I did not identify anyone by face but I described his build.”
8. PW2 Alice Ruguru Njogu, testified that, “I live in Kanjuu. I am a businesswoman. I know the reason I am in court today. On that 10<sup>th</sup> April 2019 at 7:45 pm we were still at our place of business my husband was selling and I was at the rear feeding children. I heard it had suddenly gone silent and there are people that had entered into the shop, I peeped and saw there was someone inside, I just went outside and started to scream, that is when people came to see what was happening. I was very afraid I had left my husband behind in the shop I turned to go back that is when I heard something shot in the air I heard a pistol shot in the air, I went back running, many people came we stayed outside there for a while then when we went back to the shop we found there was nothing. My husband told me he was told to lie on the floor as they collected everything, they collected everything the money that is not the goods, the money they took everything they did not leave even a shilling behind. We saw the robbers as they were leaving they had a motorcycle. Then police officers came we called the police. I don't know who called the police I was very afraid I just saw police come and we stood outside they entered the shop and saw it was true, they collected the boroboro that had been shot in the air. The next day we went to Kianyaga to record a statement. I went and recorded a statement the following day on the 11<sup>th</sup>. I was at the rear of the shop when the incident happened. What I saw in the shop is just a person I cannot identify them because I was very afraid. No, I cannot identify him if I saw him today. Yes, the police officers came to court and collected the boroboro (translated as bullet) the one they shot in the air, the robbers shot in the air when people came to the scene. We looked for the bullet and we found it on the ground outside the shop. The shop is located in Kanjuu shopping centre. We reported the matter at Gathoge police post the chief is in the same area. I recorded my statement at Kianyaga. My husband is called Steven Mwangi. When the robbery was taking place, I had run off and left him.”
9. On cross examination, she stated that, “No, I don't know the robbers and I can't know them. I saw people I don't know. I did not suspect Cyprian and Gerald Njagi they are witnesses in this case and they are here. Yes, they left on one motorcycle. They were three on a motorcycle, very many people followed after them in a vehicle but they were not able to get them. In the CCTV you can't say it is this one or that one I can't say if it the accused or not.”
10. In re-examination, she stated that, “Yes, the 1<sup>st</sup> accused asked me about tracking a phone. I hear people are tracked using a phone so it according to what I hear that you can be tracked via phone, it is what I hear with Safaricom people that if your phone gets lost it can be tracked to where it is. I don't do the work of tracking phones. I can't remember the exact date I wrote my statement because I was working with Huduma number I was called from work I don't remember the date it could be the date in my statement. The day of the incident I need to look what I wrote in my statement, what is in my statement



is the correct date. (referred to her statement) it shows the date of the incidence was the 11<sup>th</sup> April 2019 at about 2050 hours.”

11. Gichugu CR 331 OF 2019

PW3 Beth Wambui Mbai, testified that, “I live in Kanjuu. I am a farmer. I don’t know the three accused persons. I know Steven Mwangi, he is a shopkeeper in Kanjuu town. He also buys cereals like maize and beans and he has an Mpesa. I recall the 12<sup>th</sup> April 2019 in the morning. It was about 5:30 am I had come from delivering milk along the Kanjuu forest road. As I was headed to the road I hit something on the ground it was a bit dark almost light I looked and saw it was a phone. I was able to see, I wondered to myself whose phone it was, I walked away then I thought let me just pick the phone and go with it maybe I might know the owner. The phone was on the road, the place is just called Kanjuu it is past the market as you head into the forest, it is like from her to past the stage a little bit (about 200 meters away) It was a small black phone I did not check the company I picked it up and put it on my kitchen table, I went to look for fodder for my cows. After I cooked tea I called my neighbor Rose I told her if she hears of anyone who had lost their phone to come I had found a phone. Then we heard there had been a theft in Mwangi’s home. We asked each other whether the phone could be his, we went to Mwangi’s and he confirmed he had been robbed in the evening, he told us the phone was his Mpesa phone he was very grateful. He told us he was robbed at about 7 pm that people came in and robbed him of money and the phone he did not tell us more. After that we parted ways and went home. On Saturday police officers came to him and asked to see me who found the phone, they came to where I was attending a function and because I had no ill intention in taking the phone I agreed to record a statement. The phone could be this one because I did not look at it too much it could be this one it looked exactly like this one. (black ITEL phone black in colour PMFI-1) Yes, I heard Mwangi had been robbed I was not involved in the robbery.”

12. On cross examination, she stated that, “Yes, I found the phone, yes it was a black phone. Yes, I am not certain the phone before court is the one I found. No when I went to Mwangi he did not give me a receipt to show he owned the phone. I don’t know if the phone was on or off I did not look at it too closely. I know that if you collect a phone you should take it to the police. I did not stay with it long. Yes, I know Cyrus mambo, we are not related we live in the same area. I don’t know Gerald Njagi. I did not talk long with Steven he just told me that phone is his. Yes, when I went to Steven I was with Rose.”

13. In re-examination, she stated that, “When we went to Stevens he told us he had been robbed when he looked at the phone he told us it is his, I don’t know how he identified it. He told us he was robbed of a lot of money but he did not tell us what else there were many people there so we left.”

14. PW4 Rose Wambui Gichobi, testified that, “I come from Kanjuu, I am a farmer. I don’t know any of the three accused. I know Steven Mwangi, he has a shop in Kanjuu. He sells everything in it oil sugar, I also know Beth Wambui, we are married by brothers. I recall the 12<sup>th</sup> April 2019 very well, it was the morning hours, I was at home, Beth went to sell milk early in the morning as was her usual on the way back she found a phone and she came home with it. She came and told me she had found a phone on the road she asked me what we do, I told her I had heard that Mwangi had been robbed the previous day, I told her we will go and find out if the phone was his. I accompanied her to Mwangi’s we found him she told him she found a phone, when she gave him he said it is his and he thanked us. After that he went and reported to the police he had already reported the robbery, he told us the phone was his Mpesa phone. It was a black phone. I saw the phone but I don’t know the make but he said he had marked the phone ‘MP’ I saw the mark it is on the back. The phone was his. He said the phone is his because he switched on the phone and the money in it was his and the names in it. When we gave him the phone I don’t know it if was on or off we did not investigate it much, Mwangi looked at it when we gave him he switched it on as he used to and confirmed it was his phone. This is the phone, it has



the mp at the back (referring to MFI-1). Mwangi told us he was robbed the previous evening he was happy the phone was recovered. I can't tell how the robbery was done I was not present when he was robbed. He told us people came at night about 8 and stole from him money I don't know how much. I was not involved in the robbery."

15. On cross examination, she stated that, "Beth did not bring me the phone she told me she found the phone I told her I will take her to Mwangi to see if the phone was his. Yes, the phone I saw was black this one is black white and blue (shown MFI-1). I don't remember the make. This is the phone we had that day. That is the very phone we had that day. No Steven did not show us a receipt for the phone. He told us the phone is his. Yes, I was with Beth at Stevens she is the one who was carrying the phone I took her. I can't tell how the theft occurred I was not there. He is the one who told us he was robbed of money. I have not lied to the court. He did not tell us how many people robbed him. He did not tell us how the robbers were armed. There is nothing more I can tell of the matter."
16. In re-examination, she stated that, "Yes, this is the phone that Beth found and we took it to Mwangi we saw him open it and we saw how it looked like (referring to MFI-1) It has writings on the back 'mp' for Mpesa."
17. PW5 Newton Njagi, testified that, "I come from Kanjuu but currently I am in Thika. Yes, Kanjuu is in Kirinyaga East. I recall the 11/4/2019 I was in the town Kanjuu town. I had gone to the barbershop. I heard Mwangi's wife scream. Mwangi is a neighbour his shop faces where I was like where the accused are and where I am. When I heard the screaming I went outside the barbershop. I saw two people especially the one in the middle. I saw that another was on the motorbike. The ones I was able to identify are those two the ones in the middle and the 3<sup>rd</sup> one (referring to the 2<sup>nd</sup> and 3<sup>rd</sup> accused). The one on the motorbike I only saw him go round at that time he had a new motor cycle in the area I even saw the registration number of the motorcycle KMDU 925 N. The other two people is the one in the middle he had a gun (2<sup>nd</sup> accused) and that one (pointing at the 3<sup>rd</sup> accused) the one in glasses was coming out of the shop. The one who had a gun is the 2<sup>nd</sup> accused. I was able to see him there was light there is mulika mwizi in the town it is a floodlight the one the government puts up it makes the entire town bright I was able to see them well. I had not seen any of the three before that date. There is also CCTV there. The 3<sup>rd</sup> one I saw him leaving the shop. I saw him leave in a hurry. I didn't see him carrying anything. So, I witnessed that incident the 2<sup>nd</sup> accused shot in the air. We knew there was trouble. The motorcycle KMDU came with lights blazing after the gunshot and they went in the direction of the forest all three. The 1<sup>st</sup> accused was the motorcycle rider the motorcycle came slowly they boarded and left. The motorcycle was on standby slowly as the operation was ongoing after the operation and the gunshot the two came and boarded the motorcycle and they headed in the forest direction. Mwangi's wife came out of the shop screaming. She fell on the ground a crowd gathered. She was in that crowd. My pick up its there people said no these people cannot be stronger than us they carried stones and boarded my pick up we followed them to the forest but there are many paths in the forest we couldn't get them. We went back and found Mwangi stranded and looking shocked. I put him in my vehicle and took him to Gathoge police post. There were many people at the scene. We got there very many people from different places because that is the time people come in town. The incident took minutes. I can't say how long maybe at most 10 minutes. When the motorcycle came there it was just circling no one knew the intention until we heard the gunshot. My testimony is complete there is CCTV evidence if an expert can come they can extract the evidence. I am certain it is the 3 who committed the offence. Yes, I took Mwangi to Gathoge to report and we came back with officers. I recorded my statement at Kianyaga police station the next day. After that I was told they had been arrested. They called about twenty people. I was told to identify the ones I saw and I wasn't wrong. I was called later to Kerugoya again it was a group of people I identified the ones I saw and I wasn't wrong. I identified the 3<sup>rd</sup> accused



in Baricho the one in glasses, the 2<sup>nd</sup> accused in Kerugoya and the 1<sup>st</sup> accused I identified him in Kagio. There were many people there when I went to identify them. The complainant was there. Even when I went it is Mwangi who was being called I went with him to all the police station. Cyprian was also there. Each place we went we were kept separately a police officer comes for you, you are taken where there were many people in a line you are told to point who you saw. The person is marked then you are taken to a different place so that you don't signal the other person. We didn't mingle at all. On making the identification we were still been taken to different places none of us failed to identify who we saw and it isn't possible for all of us separately to wrongly identify the same people. There were more than twenty people of different sizes in the parade mixed up.”

18. On cross examination, he stated that, “Yes, I recorded a witness statement. Yes, I recorded the 3 witnesses before the court. I read and signed all 3 statements. Yes, I didn't know the accused before that day. Yes, I didn't see the one who came out of the shop come with anything because he came running. Yes, the one who was outside is the one who had a gun. He was guarding. Mwangi said he was robbed of money but I can't speak of it because I wasn't there but I saw the one who came out of the shop. Yes, I saw a motorcycle and the registration. I haven't seen that motorcycle here in court. (Referred to his statement undated page 2). I can't forget how they were dressed though it has been a while. The one who had a gun had a long black jacket, jeans trouser and army boots like those worn by police officers. It was white in colour. He was wearing them but now he is in different clothes. (Referred to page 3 paragraph 2 (2<sup>nd</sup> paragraph) (reads out loud) ‘the crowd...different directions while the thugs boarded two motor bikes’ there were two unfamiliar motorcycles in the town but the one we followed is the one they boarded. I haven't changed my testimony. The one who had a gun and the one from the shop and the 1<sup>st</sup> accused are the ones we chased after. It is the one carrying luggage. I followed the motor cycle I saw. The shop that had CCTV footage belongs to my family the police came and put the footage in a disk but even if the court wants the footage today and send an expert they can still retrieve the footage and it only has the 3 accused even how the one with the gun drew it. The CCTV footage is very clear. Everybody has different sight (put to him that a different witness said the footage was unclear). I recorded several statements everywhere I was called. I had never seen or known the accused before that date. (Referred to his statement of the 24/5/2019 (2<sup>nd</sup> page) (2<sup>nd</sup> paragraph) (Reads out loud by the court adm) ‘secondly is the other suspect who is well known to me as Muthike who is a brown boy with beards. He is medium sized and resides in Mwea....’ I recognized them when I went to identify them. (Referred to his statement of the 24/5/2019 page 3) (reads out loud) ‘the one who rode the motorcycle KMD 591 N green in colour was Dennis alias Deno and the two boarded I even heard one say Deno weka mafuta twende. I have said when I went to identify them that is when I came to know them. They were calling each other. I don't know if Denno is his nickname. I haven't lied to the court. I told the police one was slim another was big. Maybe they didn't write. I went to the ID parade. I identified the 1<sup>st</sup> accused there were many people. I didn't count them they were more than 10. They didn't look alike. I saw the ones I saw. I can't tell the court whether it was the same same people in all the three parades because once I did the identification I left. The 1<sup>st</sup> accused I can only describe him as I saw him I can say he has a wider face and wearing a red shirt he is also big in size. I told the court I found many people mixed up. (Referred to his statement). I have never worked in the police force. I have never touched a gun. When these people shot in the air one of them shouted “they are not many” that is why we followed them (referred to the undated statement page 4 1<sup>st</sup> 3 lines) “we were very close to catching up with them as they looked up to have run out of ammunition” I said this because Mwangi the owner of the shop when they came out after the shot in the air they said “let us flee” that is the reason we followed them without fearing the gun. Yes, all 3 of us identified the accused. I can't speak about Mwangi. But when we went outside I told Mambo who I had seen. I went to two parades we went to Kagio as he went to Baricho I went to a parade in Baricho and Kerugoya. I said we



were called in Baricho then we passed by Kagio that is where the one who was in a gun fight was in Baricho the other was in Kagio the other one in Kerugoya. Parades I attended were two in Kerugoya and Baricho. In Kagio we were told there was another one who was arrested there I was asked to look at him. I had come from a parade in Baricho we were told to go and see the one in Kagio. Then I attended a parade in Kerugoya. There is no one else I identified in the parade they are people I had never seen.”

19. In re-examination, he stated that, “I recorded my statement at Kianyaga the following day. I recorded my second statement after I did the identification parade. Kagio I only passed by. In Kerugoya I identified one, Baricho I identified another. The 3<sup>rd</sup> one we only passed by to see in Kagio. I identified the 3<sup>rd</sup> accused the one in glasses in Baricho and the 2<sup>nd</sup> accused I identified him in Kerugoya.”
20. PW6 PC Benjamin Wangila, the investigating officer herein testified that, “At that time, I was serving at DCI Kirinyaga East. This matter was reported at the Gathoge police post on 11/4/2019 in the evening Gathoge is under Kianyaga police station. It was reported vide OB No 11/11/4/2019. The report was made by the complainant a shop keeper at Kanjuu market within Gichugu. He reported that while going about his business running the shop at around 8:45 pm three thugs entered the shop one was wielding a gun which he pointed at him. They robbed him of cash Kshs 150,000 and also took away his mobile phone of make ITEL that was being used for Mpesa purposes. We went to the scene the next day and gathered information from members of the public. We established the people who had witnessed the incident. The complainant mentioned that his wife Alice Ruguru was preparing dinner in the kitchen near the shop when the robbery took place. She sensed the robbery and raised alarm and members of public rushed to the scene there were eye witnesses who corroborated the testimony of the complainant. The wife recorded a statement. The wife after raising alarm members of the public rushed to the scene and witnessed three men who came out of shop with a firearm. One of them fired the firearm. They boarded one motorcycle which was on standby and escaped in the direction of Njukiini forest. One witness Newton Muriithi had a pick up KCK 346 Q some members of the public boarded the pickup and gave chase of the thugs upto Njukiini forest. Some witnesses were able to grasp the registration of the motorcycle being used by the robbers KMDU 591 N. After successfully escaping from the scene the members of the public returned. When we went there we picked a few who recorded statements one was Newton, Cyprian mabundo and the complainant’s wife. One week later we received report of 3 robbers that were being held at Kerugoya and Baricho we were informed there was a robbery on the 15/4/2022 that was committed at a marked center called Kaithaka within Mwea West Sub county and after the incident when they were sharing their loot they discharged the firearm accidentally shooting one of the robbers who is the 2<sup>nd</sup> accused. They ferried the victim to Nairobi Women hospital in Rongai from where alarm was raised and the accused arrested. The 2<sup>nd</sup> accused was arrested in Nairobi while seeking treatment for a gunshot wound. The 1<sup>st</sup> accused is the one who took him there. The 3<sup>rd</sup> accused also went to the hospital to check on his friend and was arrested. All 3 were escorted back. When we got this information and ongoing identification parade the one in Baricho was conducted on 24/5/2019 from 2:30 pm to 3:30 pm. The parade was presided over by Chief Inspector Mike K Turop of Baricho police station and the participants were Newton Njagi, the complainant Steven Mwangi and Cyprian mambo. The identification parades were conducted in which the 1<sup>st</sup> accused Jackson Gichangi was positively identified and the 3<sup>rd</sup> accused Harrison Wanjohi Migwi was identified in that parade. The last identification parade was conducted at Kerugoya where the 2<sup>nd</sup> accused Luke Murimi Mwangi was being held. It was presided over by Inspector Koech Kipting of Kerugoya police station the participants were Newton Muriithi, Stephen Mwangi and Cyprian mambo. I have the OB number to confirm the accused were held at those police stations. At Baricho they were being held vide CR 649/2019 and at Kerugoya police station the 2<sup>nd</sup> accused Luke was being held vide OB No 3/6/2019. After their positive applications we made application to arraign the accused persons before this court under section 292. On 12/4/2019 a day after the robbery the same



mobile phone stolen from the shop of the complainant was picked up by a lady Beth Wambui Mbai. We summoned her and she explained how she came by the phone as she took milk to the dairy. She picked it from the ground and later it was established to be the one belonging to the complainant. We visited the scene severally and in one of the visits we established that there was in one of the shops CCTV footage that revealed there was a commotion in the market where members of the public were chasing a group of men and the men shot in the air. The men escaped on a motorcycle. The number of the motorcycle was not clear. During the visit we also recovered one spent cartridge caliber 9mm normally used in firing a pistol we recovered it along the roadside at the market. We have made no recovery of the firearm to date although there in their own statements (stopped by the prosecution). I left the cartridge it was to be subjected to ballistic examination. I wish to produce the cartridge as an exhibit (cartridge produced as P Exb 2). I also wish to produce the recovered phone (PMFI produced as P Exb 1 - phone black ITEL with a blue back cover). During the scene visit we drew a sketch map from the Difathas side the shop from where the CCTV was installed is built about 10 meters from where the robbery happened. I don't recall if there are street lights. The center is well lit most of the shops are fitted with electricity there is sufficient light in the center. The CCTV we made an application to DCI Headquarters there is a department there that deals with CCTV evidence extraction an expert inspector Wanjohi went to the scene there is a report that was to be availed. There should be a follow up the CCTV surveillance is important. I wish to produce the sketch map. (sketch map produced as P Exb 1). The initial report was made on 11/4/2019 by the complainant himself Steven Mwangi Mureithi. Although he was panicked he was able to describe these people because they went to him they were unmasked and there was light in the shop. The report was a summary. The accused were not known to the complainant. The witnesses were residents of that area they may have known each other. The suspects were not known to the witnesses. I recorded some of the statements others I was assisted by other officers. The investigation took about two months at a point they were taken to kivute police station where they were being investigated for another robbery so it took a long time for Jackson and Gichangi and 3<sup>rd</sup> accused Harrison and also Luke we received their statements on 6/6/2019 at kimutie police station. There is a motorcycle that was mentioned and was captured in the CCTV camera but the registration is not clear but the witnesses were able to give the registration number. We made a letter to the Director NTSA Embu ref CIB/SEC/4/4/6/Vol VI11/56 dated 23<sup>rd</sup> January 2020 requesting for particulars of that registration KMDU 591 N which we were given a search certificate. It indicated that the motorcycle was by color red, TVS by make and it belonged to Car and General LTD. That company's registration number is 35354 and its pin is P0510962639. I handed over the file while this was still pending. There was intention to go to the company to see who they sold the motorcycle to. (Letter from the DCI to NSTA produced as P Exhb 4 and search certificate P Exb 5). The officer I handed over to was to follow up. I am not sure if they followed. We charged the accused under the direction of the ODPP because they were identified by the complainant and the witnesses. Even in their own statements EI confessed to owning a gun and that he was aware his gun was used in Kanjuu. The 2<sup>nd</sup> accused also wrote the statement that he is the owner of the motorcycle. They are all residents of Kirinyaga county. The 2<sup>nd</sup> accused said he lives in Kutus town, the 1<sup>st</sup> said he lives in kigwana village which I think is within Mwea and the 3<sup>rd</sup> accused Harrison is also a resident of Mwea. Yes, they were positively identified three of them of identification parade conducted at Baricho on 24/5/2019 and the 1<sup>st</sup> and 3<sup>rd</sup> accused were identified. In Kerugoya it was conducted on 3/6/2019 where the 3<sup>rd</sup> accused who had suffered a bullet wound was positively identified (parade reports 3 of them produced as P Exb 6-8). I confirm these are the accused we availed and charged. (statements under enquiry marked MFI 919-(C))."

21. On cross examination, he stated that, "No, I am not the arresting officer. It is stated even in their statements that they were arrested on 16<sup>th</sup> in Nairobi. It is indicated in the covering report. There is a



record to the effect that the complainant made a positive identification. I was also present. That was out of foam she was also not in the shop (put to him that PW2 also denied identifying the accused. We recovered the phone. The motorcycle wasn't recovered but the 2<sup>nd</sup> accused confirmed he owned the motor cycle. The cloths were not recovered. The ballistics report can be obtained from Baricho. I only said the CCTV footage has yet to be produced. I have not followed the proceedings in the Baricho case but I have it on record that the 1<sup>st</sup> accused said he was in kakata in the robbery and he is the one who shot his accomplice. The phone produced is an ITEL. What is mentioned in the initial diary is a Techno but that might not be true. The phones are given by Safaricom. The simcard in the phone was the one being used by the complainant so there was no doubt it was his phone. The complainant identified it as his. The complainant didn't give the IMEI he was so terrified at the time he didn't have the IMEI. The Techno was recorded by the officer in Gathoge there was a follow up report. Beth Wambui Mbai gave a description on the phone she describes the phone as a small phone black in color. It has no white (referred to P Exb 1) the line in the middle is Khakish. She managed to describe it as a black phone even in the shops if you ask for a phone they will give you a black phone it may have other colors. The complainant had a license for his business I saw no reason to take it. (Referred to the statement of the complainant's wife) she only mentioned two of her employees who she had spent the day with she stated that the only persons who knew of the sale of the maize were the two but she didn't incriminate the two in fact the two are witnesses here. We didn't investigate them. In fact, one Cyprian mambo was part of those who identified the accused. Yes, there is CCTV footage. It has not been produced yet there is an expert who was summoned by the DCIO. After 2019 I was transferred to Kasarani I handed over the file to corporal Kosgey and Margaret Kinyua. They are the ones who should have made follow up. I mentioned the pickup used to ferry members of the public to chase after the thugs. I didn't produce the certificate of ownership but the owner is in court. The medical report of the 3<sup>rd</sup> accused are there it is the officers I handed over to who should have followed up. The accused has bullet wounds in his body. He should explain here he got them from. I found them in Baricho. That is the OB I have and that in Kerugoya. They lead back to Rongai. There is a bylaw that binds hospitals that to report criminal elements who go to seek treatment in their hospitals. This man went to seek treatment for a bullet wound and alarm was raised. The suspects were positively identified by the witnesses. I have produced evidence. They themselves recorded statements admitting taking part in the crime. I can't say the motorcycle doesn't belong to any of the accused. Car and General are dealers who import these motorcycles to sell. The motorcycle was imported to sell it wasn't transferred. I said we have yet to go to the company to check who it was sold to. From the search in evidence the vehicle belongs to Car & General. The witnesses from the case were there in numbers. These persons were mixed up with other remandees. Each was identified in different parades in each parade there is only one suspect. We have 3 ID parade forums before the court. Each of these forms was conducted by three witnesses. (Referred to ID parade of Jackson Gichangi P Exb 7 and P Exb 6 Harrison Wanjohi) I didn't know the accused at this point. I agree the two have distinct differences. For Jackson Gichangi there were 10 members in the parade P Exb 6 has 10 members plus the accused makes it eleven the first four members as Fedrick Mwaniki, Patrick Irungu, David Ndege and Jackson Gitari. P Exb 7 the first four members are the same names. It can be that the ID parade was improperly done (put it to him that it could be easy for one to note the new members). I never went to Kagio. We went to Baricho police station. That is where the ID parade was done. After the identification parade we recorded further witness statements of the witness and they indicated they had positively identified the accused. The ID parade took place on the 4<sup>th</sup>. (Referred to the further statement of Newton) the further statement was recorded on 24/5/2019 at 1930 hours. This other one is the same statement. I mentioned the different dates when the ID parade was done the 1<sup>st</sup> is 24/5/2019 at Baricho police station for the 1<sup>st</sup> and 3<sup>rd</sup> accused. The 2<sup>nd</sup> was done on 3/6/2019 at Kerugoya and a further statement was recorded from the witnesses. There is no anomaly.



Yes, none of the witnesses know the accused before the incident. I can't confirm whether any would be lying if they said they know the accused before."

22. In re-examination, he stated that, "There is no anomaly in the ID parade the parade was done for 2 suspects in the same station but three different person they never met they would identify and be taken to a different place. There was no objection. P Exb 6 Harrison was identified by Newton Njagi and the 3rd witness Cyprian mambo. It is well captured. P Exb 7 Jackson was identified by two witnesses Newton Njagi and Cyprian Mambo. The complainant in P Exb 7 didn't positively identify the suspects neither did he in P Exb 6. I was not involved in the Nairobi arrest by the time I got the information these people were already at Baricho. Care & General deal with motor cycles sales most are ought on 10 am that is why there is a delay in changing ownership."
23. PW7 Cyprian Magu Mugo testified that, "I am a farmer. I know Steven Mwangi. He gives me casual work. I have worked for him since 2015. The three accused I came to know them here in court. I did not know them prior. On the 11th April 2019 at about 9 am I was called by Steven Mwangi Mugo he wanted to give me some work. He has a shop in Kanjuu town. I knew he had maize I used to help him buy the maize. At that time, he had maize, he called me we go and pack the maize. We packed and filled 33 bags of 90 kgs each. We packed the maize together with Gerald Kariuki we left the maize in the store. He paid us Kshs 500/- each. He told us he would wait for a buyer. I went back to the work I was doing before he called me. That was about 1.30 pm. I don't recall the price of maize at the time. I stopped working at 5 pm then I went home and changed and went back to Mwangi's shop, he was farming vegetables, I went and picked a water pump and I went to sprinkle water on the vegetables. After I was done I went back to the shop Mwangi paid me Kshs 700/-. I left his shop and I went to eat in a hotel about 50-70 meters from Mwangi's shop. At about 8-8.30 pm while I was still eating and talking with others who were there we heard noise, some people went outside I remained inside they came back shouting there were people coming we all went out, I heard a sound qua qua there were people running people saying they had heard gunshots. A crowd gathered there. While we were there Mwangi's wife came screaming thieves, thieves that is when we realized the gunshots were by those robbers. We started going together towards Mwangi's shop there was a lot of light there, there are security lights in the town and near Mwangi's shop there is a streetlight so there is light. There are stairs from the road to the shop, when I was 10 meters from the shop we saw people coming out of Mwangi's shop, there was someone else on a motorcycle I saw them clearly, I know them well, I did not see them carrying anything I just saw them coming down the stairs. The first one was wearing a jacket leatherish a black one the second was wearing an overall bluish. They were young men. They boarded a motorcycle and went towards the forest. This was about 8.30 pm headed to 9 pm. We were more than fifty people there. Newton Muriithi was there with me. Mwangi's wife also went back with us. We did not enter the shop we stopped at the road, people gathered there at the road. We started to think Newton had parked his vehicle we agreed that we the young men go in his vehicle and give chase of the robbers. We went round to the forest then to Gathoge and through Kanjuu hoping to find them, we did not. We returned to the shop we found the police were already there. I told them I had seen the three very well and if they are arrested I am able to identify them. So, I went home. Mwangi was there he told us the robbers stole money from him and an Mpesa phone. He did not tell us how much was stolen. Yes, I had said I can identify the three. On the 12<sup>th</sup> April 2019 at about 1 pm my boss Steven Mwangi called me on phone he told me there were some people who had been arrested, he told me to accompany them we go and see them since I had said I can identify them. We came to the office of the DCI and recorded statements. We were told to go and identify the arrested persons. We went together, Mwangi, myself, DCI officer and Newton. We went together to Baricho, there were about ten arrested persons. When we got there, we were shown about 10 person we were each called separately I was called and asked to identify the persons I had seen leaving the shop, I was shown ten



people and I was asked to identify who I had seen. I was able to identify one person that I had seen, the person I saw is the 3<sup>rd</sup> accused. I identified him because I had seen him well on that night. I looked at his face well because the light made it like it was day. After that I went outside everyone was taken to identify them. We went back to the vehicle, we were informed there were others arrested in Kerugoya. We were called one by one I went in there were more than fifteen persons all me, I was asked to identify who I had seen I went round them several times then I was able to identify the 2<sup>nd</sup> accused. From the stairs to where the shop was 10 meters I could see them clearly. I have very good memory I don't need to look at something twice. We were taken to Kagio as we arrived I said I had not seen him because the third person that night was on the motorcycle which was 50 meters away I could not identify him but I confirm there were three people. I cannot identify the motorcycle. I don't know if Newton and Mwangi identified the accused."

24. On cross examination, he stated that, "No there is no accused I knew before the incidence. I did not know there was a customer coming to buy maize. He told me to go help him weight the maize because he had found a customer I did not know the customer was coming that day. We weighed the maize three of us. I did not know the price of maize I only packed it. From Mwangi's shop to the hotel I was in was about three minutes' walk away. The shop is on the upper side the hotel is on the lower side. When you leave the hotel, you can see the shop. When I arrived, there was no one in the shop, I don't know if Mwangi was in shop. From the hotel the road is three steps away. Yes, Mwangi uses electricity. Yes, the home is lighted. Yes, I did not see the three carrying anything. I said they are thieves because they are the only ones we found there coming from the shop. Yes, Newton was in a nearby barber shop. We did not arrive there at the same time we got there many of us. When we heard the commotion some of us went outside they are the ones who saw the people who were coming. One would take about five seconds to come down the stairs. The accused were not running as they came from the shop they started to run when they got to the road. Yes, we followed them in Newton's car. We were not behind them they went off after boarding the motorcycle. We followed them and stated to look for them. Yes, I heard a gunshot I don't know whether the gun was fired outside or inside the shop. The gunshots we heard them while in the hotel. There is no time I saw them being shot at. I heard people had been arrested when I was recording my statement at the DCI Office. I did not ask where they were arrested. I saw the suspects after around 2-3 hours. (referred to a statement of his 1<sup>st</sup> statement) it read the 12<sup>th</sup>. (referred to a second one) This is also my statement, after 2-3 hours that is when the DCI people came for us. No, I did not to identify them the same day I wrote my statement. Yes, I knew Mwangi's wife well before that date. She can say I am the thief but I don't know why she would say that. When I recorded the statement, I did not give the police a description of the accused. Yes, I was first to identify the 3<sup>rd</sup> accused. He was not wearing spectacles at the time of the parade. No one was wearing spectacles. There was a mix of people at the parade, young or old, tall and short. At Baricho I did not see anyone before the parade I was only taken to a place with many people to identify. Yes, the identification parade of the three accused was done in three different police stations. No one asked me to lie to the court. Yes, the involved bodaboda was one. I don't know what was stolen from Mwangi he did not tell me what was stolen."
25. In re-examination, he stated that, "No, I had not told the police the description of the persons I saw before the parade. We went together with other people in the vehicle but I don't know if they identified anyone. I was with Newton and Steven and the DCI officer. I don't know if Steven had described the robbers. I saw them very well as they came down the stairs. I was standing somewhere I saw them for about five minutes. I was able to memorize their faces. I did not see them carry anything. As we came from the hotel to Mwangi's shop I saw three people but one was on the motorcycle he was not clearly visible. There were no other people there all of us came from down the hotel because the people who were their earlier came towards the hotel direction. Yes, I heard the gunshot, the sound I heard it while



I was in the hotel I cannot tell from which direction it came from because of the echo in the hotel. The parade had a mixture of people old and young but all were men. I was still able to identify the two accused. No one in the parade was wearing spectacles. Yes, the 3<sup>rd</sup> accused is wearing spectacles here in court. I am saying he is the one because I looked at his whole face not the spectacles even you (referring to the prosecutor) if I meet you without the spectacles you are wearing I will still identify you. I don't know what Mwangi's wife said about my involvement. I was not involved."

26. Luke Murimi Mwangi, the 1<sup>st</sup> appellant herein testified that, "Before I was arrested I was living in Mjini Kutus I was a hawker. I have a family I left two children and a pregnant wife we have a third child. There is someone who said I am a bodaboda operator not a businessperson I would like to produce documents to show I was a businessperson (Business permit no. 2018/9476 in the name of Luka Murimi Mwangi and Invoice dated 24<sup>th</sup> April 2018 for the County Government for Kshs 800/-, another dated 24<sup>th</sup> April 2018 for Kshs 2,800/- copies produced as D.exh.1-3). I recall the day I was arrested it was the 25<sup>th</sup> may a Saturday. I was at my place of work when I was almost closing a vehicle came and stopped I thought it is a client, they started to ask the prices of the clothes they asked me for the permit I told then I can get it from the house. They told me the clothes were stolen I told them I have receipts we can go home I give them. They told me to close the business we go to the house. I entered their vehicle but I was not taken home I was taken to Kerugoya police station. I remained there until Monday and in that time, there were people taking photos of me I don't know if they were police officers. They came telling me I was involved in the offence together with the two accused I told them it isn't true. On Monday I was taken to the Baricho court I was alone there then the officer asked to detain me for 14 days. I was taken back to Kerugoya. There are people who came saying I am the one who committed the offence they were told to leave the cells that I will be taken to them. In the afternoon I was taken behind the cells in a room there were other people there I saw people coming to do the parade it was the same people who had come in the morning. I later found myself charged in this court. I remember well the complainant told the court that he was attacked and robbed by two people in his shop. When he was asked by the advocate if the ones who assaulted him were in this court he said he does not know them and is not seeing them in court. PW2 his wife said she did not identify the robbers yet she is the one who peeped out of the shop. When she was asked about her statement she said she did not write it. She said she did not identify the perpetrators. PW4 told the court that while going to sell milk she collected a phone on the road and went home with it. She went and told Pw5 she had collected a phone. PW5 is the one who told her the phone is Mwangi's let us take it to him. PW3 is the one who said she found the phone and kept it in her house she told her neighbour about it who told her it is Mwangi's. From their testimony I cannot tell if it is true or false how could they have known the phone was Mwangi's so as to take it to him yet they found it on the road not the shop. Mwangi said the phone is not his it was a customer. When PW4 testified she said that when they took the phone to Mwangi and he was able to open it and put in the pin how could he have done that if the phone was not his. In my view they lied to the court. The investigating officer is a liar he told the court I am a bodaboda operator I have been in that business I sell clothes for a living. PW5 told the court he recognized the robbers he said we are the ones who robbed Mwangi. If that was true PW5 went with the complainant and Simeon and they went to Gathoge police post to report. They told the officers that Steven was robbed by two people who he did not know. I was surprised to then hear him testify that he knows us. If he knew us why did he not say so at the police station. Simeon who was there when the report was made was not called in this case. When I received the charges, I saw something about a CCTV I was happy because I knew if there is CCTV footage it will help exonerate me. I came and asked the court to have the CCTV footage brought, the investigating officer said he will bring. PW5 also asked the court to bring the CCTV footage. The investigating officer was asked about the CCTV by the court he said it was sent to the experts but the expert said he did not receive it. I realized the investigating officer was trying all means to convict me because if he was truthful he would have availed the CCTV footage. I denied



- the charges against me because the weapon it is said we used should have been produced in evidence. Since my arrest I have been in custody my life stopped yet I was not involved in this crime. I ask the court to release me I go and build the economy and go on with my life.”
27. On cross examination, he stated that, “I have no relationship with the 1<sup>st</sup> or 3<sup>rd</sup> accused. I came to know them in this case I did not know them before. I sell clothes in Kutus. Muhidin Juma Musema ukweli is my wife. My wife is called Sandra. I don’t own a motorcycle. I have never been in Nairobi women’s hospital. I have not been in Rongai either. No, my wife and muhidin have not come for me there. I was taken to Kerugoya, then Baricho then Kiritini. My wife did not pay any hospital bill for me in Nairobi women’s hospital. (shown a statement) I am the one who signed it after I was forced there was a gun pointed at my head by the police officers who were present. They wrote what they wanted in my statement. If someone wants to trap you they will do whatever they can. I was brought papers that I signed and it was not one I signed many documents. When you are arrested you get visitors and you will be asked your names so they know the names. I was never shot. It is true I was in an ID parade. There are people who had come before the parade was done. Before I was taken to the parade there are people who came and said it is this one then I was taken to the parade and they came and said it is me. I don’t know about special ownership. The complainant told his truth he said the phone was not his. PW5 and 7 told the court they saw the robbers. Yes, they said there was also CCTV footage. I don’t know if what is in the CCTV footage. PW1 was also in the parade. I don’t know of PW1 said he was robbed in his shop of Kshs 150,000. Yes, that is what he told the court.”
28. In re-examination, he stated that, “Mwadini Juma is not a witness in this case. The arresting officer did not testify. There is nothing the prosecution has shown the court to show I was shot. The owner of the phone did not testify, the special owner did not testify. Yes, PW1 came to the ID parade. He did not identify me.”
29. DW3 Harrison Wanjohi Migwi, the 2<sup>nd</sup> appellant herein testified that, “I was born and raised in Kiandegwa. I am the welding business. I also have a club called Skylux also in Kiandegwa. I have a wife and two children. I was arrested on the 21<sup>st</sup> May 2019 at about 4 pm I was coming from school I was studying at Mucie wa Urata in Ngurubani I was studying welding. When I got home I found police officers there was an officer called Otieno. We had been having a land issue with my father our mother had passed on a long time ago I had a dispute with my father he wanted to sell the land where my mother was buried. The arresting officer took both of my phones we had no grudge, he put me in a vehicle and I was taken to Baricho police station with a lot of violence which I did not understand. I was taken outside the cells many photographs were taken of me I asked what they were for I did not get a response. I was taken to court the officer asked for 14 days that is where I met Jackson I did not know him before we don’t know each other and don’t come from the same place. To date I have asked for my phones I have not been given by anyone they were not brought here as evidence or even the data. Yes, I heard the testimony of PW1-7, PW1 Steven Mwangi told the court he can read and write he said he did not write anything at the station he said he was forced at the station by officers he said he was surprised that what was written was not written as it should have yet he is educated. Alice Waruguru his wife said she witnessed what transpired while in the kitchen she peered in a hole there was enough light but she said she was not able to identify the perpetrators. She went to the station she did not identify anyone. Her husband Steven also said he did not recognize any robber he said the incident took three second. He also said he went to the police station he did not recognize anyone. PW3 said she was going for milk in the morning and found a phone she did not know the make. She said she took it to a friend PW4 who said they go ask Steven because she had heard he was robbed. They went to Mr. Mwangi who said he had lost a phone a techno. The witnesses said Mwangi said the phone was his Mpesa phone. The phone produced here was an ITEL. In OB 11/4/2019 Steven confirmed the phone recorded there was a TECHNO but in court what was produced is an ITEL. Newton in his testimony said he had



CCTV footage in his shop but at the time of the incident he was in a nearby hotel. We have asked for that CCTV footage the court even issued an order but it was not produced for unknown reasons. The weapon it is said was used was not brought to court. Ballistic did not come to court to testify and confirm that the cartilage was collected at the scene no pictures were taken we have no way of knowing whether the cartilage came from the police or where it was gathered from. At the police station there is no statement I recorded otherwise I should have been shown. The only thing was the grudge back at home once I was arrested it became a good opportunity for my father and he sold the land. I ask the court I work for my own income I have never done such a thing I was born raised and I work in Kiangwaga. I ask the court to send the probation officer to confirm what I do for a living. I ask to be released so that I can take care of my children. If my children get a job as the court has I will be happy.”

30. On cross examination, he stated that, “Yes, an ID parade was done. The forms were brought. Yes, PW5 and PW7 took part in the parade. Yes, there was CCTV footage that Newton mentioned. Newton in the parade I did not know him I didn’t know him even when he came to testify. We had a dispute with Otieno the police officer he did not come and testify why he got me involved in this case. Grudges come up in many places. My father and this complainant don’t know each other. I cannot speak about the date of the incident because I know nothing about the incident (referred to a statement) I am not the one who signed it. I did not write any statement at the police station. There is nowhere I talked with police officers about the two accused. I did not tell the police that I went to see luka in hospital after he was accidentally shot. It is not true that I was arrested in the hospital and taken to Rongai. I don’t know who mutaro is.”
31. In re-examination, he stated that, “Yes, only PW1 and PW7 came to the identification parade. The CCTV footage was never produced. Otieno was called as witness he never came to testify.”

### **Submissions**

32. The 1<sup>st</sup> appellant urged that the identification parade clearly flouted the procedures set out in law, and relied on *Gideon Mwinga Ndung’u v Republic (2021) eKLR*, *Kiarie v Republic (1984) KLR* and *Cleophas Otieno Wamunga v R (1989) eKLR*. He urged the court to reconsider the evidence and draw its own conclusions, and cited *Njoroge v Republic (1987) KLR*.
33. The 2<sup>nd</sup> appellant urged that PW5 talked about one of the assailants by the name “Deno” who is neither of the accused persons, and cited *Wamunga v Republic (1989) eKLR*. He urged that the evidence against the appellants was largely circumstantial, which lacked the necessary cogency to meet the standard of proof in criminal trials, and cited *Joan Chebichii Sawe v Republic (2003) eKLR*. He urged that the failure to produce the crucial CCTV footage, which would have exonerated them, led to a gross miscarriage of justice. He urged that the identification parade was improperly conducted and irredeemably flawed, thus rendering the alleged identification of the appellants inadmissible and unreliable. He faulted the trial court for irregularly admitting his statement under inquiry without establishing its authenticity and voluntariness.
34. The respondent urged that it had proved beyond reasonable doubt all the elements of the offence as set out in *Oluoch v R (1985) eKLR* and *Dima Denge Dima v Republic (2013) eKLR*. It urged that the trial court relied on direct evidence from PW1-PW7 before convicting the appellants, and the appellants were positively identified by PW5 and PW7. It urged the court to dismiss the appeal as the sentence of 40 years imprisonment was lenient, reasonable and just in the circumstances.



## Analysis and Determination

35. From the grounds of appeal as framed, the issues for determination are whether the evidence led by the prosecution witnesses proved the offence beyond reasonable doubt; whether the appellant's defence was considered; and whether the sentence was justified.

## Proof of the offence

36. The elements of robbery with violence, which the prosecution needed to prove beyond reasonable doubt are stipulated under section 296 (2) of the Penal Code as follows:

“(2) 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.”

37. On the material day, the complainant, while in his shop at about 3 p.m, a lorry came and purchased 30 bags of maize at Ksh. 90,000. At about 8.45 pm, just as he was about to close, two men who were unknown to him came to the shop, and one told to him that he wanted to withdraw Kshs 500/-. When the man reached for his pockets to remove his national identification card, he removed a gun resembling a pistol. They ordered him to lie down, took about Ksh. 150,000 and an Mpesa phone. Upon hearing the commotion, his wife, PW2, peeped through the shop's window, and ran through the back screaming. Gunshots were fired to disperse the people who had begun to gather, after which the men left. Although he saw the two assailants with the aid of the streetlights as they came to the shop, he was unable to recognize them. When they attempted to pursue them, they boarded a getaway motorcycle and escaped. The Mpesa phone, which PW3 later recovered on the road, was brought to him the following day by PW3 and PW4. He attended the identification parades but was unable to identify any of the assailants, because he did not see their faces clearly during the incident.
38. PW5 was at a barbershop adjacent to PW1's shop on the material day when he heard PW2 scream. Upon checking, he saw two people, who he identified at the dock as the appellants, and with the aid of the streetlight, he saw the 1<sup>st</sup> appellant holding a gun, while the 2<sup>nd</sup> appellant emerged from the shop empty handed. He further witnessed the 1<sup>st</sup> appellant fire a shot in the air, signaling imminent danger. Moments thereafter, a getaway motorcycle came with its lights on, and the appellants boarded and fled. Although they pursued them, the appellants disappeared into the forest. He thereafter escorted the complainant to Gathoge police post, where a report was made, and he subsequently attended the identification parade at which he positively identified the appellants.
39. On cross examination, he stated that, “Yes, I recorded a witness statement. Yes, I recorded the 3 witnesses before the court. I read and signed all 3 statements. Yes, I didn't know the accused before that day. Yes, I didn't see the one who came out of the shop come with anything because he came running. Yes, the one who was outside is the one who had a gun. He was guarding. I can't forget how they were dressed though it has been a while. The one who had a gun had a long black jacket, jeans trouser and army boots like those worn by police officers. It was white in color. He was wearing them but now he is in different clothes. There were two unfamiliar motorcycles in the town but the one we followed is the one they boarded. The one who had a gun and the one from the shop and the 1<sup>st</sup> accused are the ones we chased after. It is the one carrying luggage. I followed the motor cycle I saw. The CCTV footage is very clear. The one who rode the motorcycle KMD 591 N green in color was Dennis alias



Deno and the two boarded I even heard one say Deno weka mafuta twende. I don't know if Denno is his nickname. Yes, all 3 of us identified the accused.”

40. PW6 stated that during the Identification Parade conducted by Chief Inspector Mike K. Turop of Baricho police station, on 24/5/2019, the 2<sup>nd</sup> appellant was positively identified, while the 1<sup>st</sup> appellant was identified at a subsequent Identification Parade conducted at Kerugoya. Upon visiting the scene, they established that one of the shops had CCTV footage showing a commotion in the market, during which members of the public were seen pursuing a group of men who fired shots in the air, before fleeing on a motorcycle. The motorcycle's registration was unclear, and during the visit they also recovered a spent cartridge caliber 9mm, ordinarily used in firing a pistol.
41. PW7 testified that, “I left his shop and I went to eat in a hotel about 50-70 meters from Mwangi's shop. At about 8-8.30 pm while I was still eating and talking with others who were there we heard noise, some people went outside I remained inside they came back shouting there were people coming we all went out, I heard a sound qua qua there were people running people saying they had heard gunshots. A crowd gathered there. While we were there Mwangi's wife came screaming thieves, thieves that is when we realized the gunshots were by those robbers. We started going together towards Mwangi's shop there was a lot of light there, there are security lights in the town and near Mwangi's shop there is a streetlight so there is light. There are stairs from the road to the shop, when I was 10 meters from the shop we saw people coming out of Mwangi's shop, there was someone else on a motorcycle I saw them clearly, I know them well, I did not see them carrying anything I just saw them coming down the stairs. The first one was wearing a jacket leatherish a black one the second was wearing an overall bluish. They were young men. They boarded a motorcycle and went towards the forest. We were told to go and identify the arrested persons. We went together, Mwangi, myself, DCI officer and Newton. I was shown ten people and I was asked to identify who I had seen. The person I saw is the 3<sup>rd</sup> accused. I identified him because I had seen him well on that night. I looked at his face well because the light made it like it was day. I was asked to identify who I had seen I went round them several times then I was able to identify the 2<sup>nd</sup> accused. From the stairs to where the shop was 10 meters I could see them clearly. I have very good memory I don't need to look at something twice.”
42. In his sworn defense, the 1<sup>st</sup> appellant denied ownership of any motorcycle and refuted having sustained any gunshot wounds. He maintained that the production of the CCTV footage would have exonerated him and further denied any acquaintance with the 2<sup>nd</sup> appellant.
43. On his part, the 2<sup>nd</sup> appellant equally denied any involvement in the robbery, asserting that his arrest was actuated by a grudge between his father and police officer namely Otieno concerning a land dispute.
44. Evidently, there was no direct evidence linking the appellants to the commission of the offence. The evidence that the court relied on to convict them was solely circumstantial. The crucial evidence on identification was led by PW5 and PW7, as PW1 and PW2 were unable to identify the appellants either at the time of the offence or during the subsequent Identification parades.
45. According to PW5, he heard one of the appellants refer to the other as “Denno” during the altercation at the time of the offence, whilst PW7 used his photographic memory to identify the appellants, after allegedly seeing them, under streetlight, descending the stairs.
46. It must, however, be emphasized that the appellants were admittedly complete strangers to both PW5 and PW7 and the identification parades were conducted several weeks after the incident. PW6 categorically stated that the 1<sup>st</sup> appellant was apprehended in connection with an unrelated robbery at Nairobi Women's Hospital, where he had purportedly sought treatment for gunshot wounds.



Nonetheless, the 1<sup>st</sup> appellant denied ever sustaining gunshot injuries or seeking medical attention at said hospital.

47. This court finds that the circumstantial evidence led by the prosecution was too weak to found a conviction. There was no nexus between either appellant with the nickname “Denno” and there was no proof that the 1<sup>st</sup> appellant had any gunshot wounds at the time of his arrest. The alleged CCTV footage, numerous referred to, was unknown reason not produced as an exhibit.
48. This court, therefore, finds that the Prosecution failed to prove its case against the appellants beyond reasonable doubt, making their convictions unsafe. Had the trial court subjected the evidence adduced into a wholesome scrutiny, it would have undoubtedly arrived at a different conclusion.

### **Orders**

49. Accordingly, for the reasons set out above, the Court finds that the appellants’ appeal has merit, and it is allowed.
50. The appellants’ conviction for the offence of robbery with violence contrary to section 296 (2) of the penal Code is quashed and sentences set aside.
51. The appellants shall be set free forthwith unless they are otherwise lawfully held.

Order accordingly.

**DATED AND DELIVERED THIS 16<sup>TH</sup> DAY OF DECEMBER 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Macharia Wambui for the 1<sup>st</sup> for the Appellant.

M/S Muchangi Gichugu & Co. Advocates for the 2<sup>nd</sup> Appellant.

Mr. Mamba & Mr. Moseki Douglas for the DPP/Respondent.

4

