REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO E033 OF 2024

GERALD MATHU

WANJIRU……APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(Appeal from Original Conviction and Sentence dated 24/05/2024 in Nanyuki

CM Criminal Case No E1059 of 2021– B. Mararo SPM)

J U D G M E N T

1. The Appellant, **GERALD MATHU WANJIRU** was convicted after trial of ***robbery with violence*** (count I) contrary to ***section 295*** as read with ***Section 296(2)*** of the ***Penal Code.***

2. The particulars were that on the 13th day of april,2021 at around 065 hrs at Baraka estate, Loisoi location in Kieni East sub county within Nyeri county, jointly with others not before court robbed Stanley Mwangi Gicharu a motor vehicle Reg/no KBR 255C Toyota corolla fielder white in colour, dell laptop s/no-bggwfri, sumsang tv 24 inches, two sets of eye glasses, white

sumsang microwave, techno N8S mobile phone imei-359395070191243, Sonny radio hoffer s/no-0063319, blue mattress 6*54, shell gas cylinder 13kgs, shell gas cylinder and burner 6kgs, sumsang dvd, sonar-hdt2f11, plates ten pieces, cups ten pieces, wristwatch, calculator make Casio, pair of safari boots, two thermos flasks 3 and 1.8 liters, half inches horse pipe sixty feet, frying pan wooden handle, lady pair of trousers, hammer metal handle, four leather belts three brown and one black, three chicken two brown hens and one brown cork, two kitchen knives, sharpening stone, two blue and green laptop bags, pocket umbrella, blue long raincoat, three shoes polishing brushes one brown and two black, two liters sun gold cooking oil, two kgs sugar, two torches, water drinking bottle, three rolls of toilet papers, nokia mobile phone imei-351930055893245, modem stick, big modem s/no-73335973, m-pesa cash withdrawn from number 0722481629, four thousand seven hundred and seventeen and cash eight thousand five hundred shillings all valued at ksh- 736,287/= immediately before the time of such robbery unlawfully injured the said Stanley Mwangi Gicharu.

3. He was also charged with an alternative count of ***handling stolen goods*** contrary to **section 322(1)** as read with **322(2)** of the **Penal Code.** The particulars were that on 22/04/2021 at Kiawara-Majengo estate, Nyeri town within Nyeri County, otherwise than in the course of stealing, dishonestly received or retained mobile phone make techno N8S gold in colour imei-359395070191243 knowing or having reason to believe them to be stolen goods.

4. He was tried and convicted and sentenced to twenty five (25) years imprisonment.

5. He was dissatisfied with the conviction and the sentence hence this appeal. He filed a petition of appeal challenging the conviction and the sentence on the following grounds;

i. The learned magistrate erred in convicting him on the charge of robbery with violence, having relied on evidence which he was not positively identified at all at the identification parade by PW1 (the complainant) and which was the backbone of the entire case.

ii. The learned Magistrate erred in convicting him whereas the evidence tendered by the prosecution in form of documentary evidence clearly exonerated him from the scene of the crime.

iii. The learned magistrate erred convicting him on evidence from a single witness, taking into consideration the circumstances and the time in which the offence took place and which was not corroborated at all.

iv. The learned magistrate erred in relying on a computer generated document that was not accompanied by a certificate in accordance to the provisions of **section 106B** of the **Evidence Act** to prove ownership of the Techno N8S gold by PW1.

v. The learned magistrate erred in not taking into consideration that he discharged his burden to the Honorable Court that the mobile phone in question Techno N8S gold in colour belonged to him and not to the complainant.

vi. The learned magistrate erred in failing to take into consideration that the evidence presented by the

prosecution was too weak to sustain a conviction and further failed to take into consideration that it was not one that was proven beyond reasonable doubt.

vii. The learned magistrate erred in failing to take into consideration his submissions and the defence tendered thus arriving at a wrong conclusion of the law.

6. The appeal was canvassed by way of written submissions. The Appellant submitted that PW1 never identified him as having been the one at the scene of the crime, nor the one who robbed him at his home. This was evident from the identification parade that was conducted 11 days after the alleged robbery which indicated that he was never identified by the complainant at the parade. The complainant having failed to positively identify him at the identification parade, he could not have then sought to recognize him at the dock as dock identification would generally be worthless. Further, if PW2 saw him in the light clearly, he should have been able to identify him in the parade, and not only in the dock.

7. He submitted that there was no evidence laid before the court to show that the mobile phone Techno N8S gold

belonged to the complainant. The prosecution produced a computer generated document, referenced as "customer receipt" but it was not accompanied by a certificate in accordance to **Section 106B** of the **Evidence Act.** Further, during cross-examination, the complainant confirmed that the said receipt neither constituted a purchase receipt nor did it establish him as the owner of the said mobile phone. That the evidence by the complainant was not credible, was contradictory and was never corroborated by any other witness. Further, the circumstances surrounding the robbery were not safe for the complainant to have made a positive identification of the perpetrators since he mentioned that one of the perpetrators had a red mask on his face and at the same time noting that he was able to recognize him. On the other hand, he testified that the perpetrators threw clothes on him and covered him with a blanket and further stated that he could see them. The question that then arises is how he was able to recognize them yet he was covered with a blanket.

8. He submitted that he produced a purchase receipt during his defence for Tecno N8S for imei no.359395070191243 and it was his testimony that the mobile was his, having

purchased it for Kshs.9,000/= from digital world communication on 5th April 2020. That even though the said receipt bore the name Peter Kung'u, he explained that he had bought the phone with Peter and who eventually ended up having his name written on the receipt. That even after the prosecution was given time to investigate on its authenticity and to give the court a report, the prosecution never presented evidence contradicting the said receipt nor challenging its authenticity. It was thus evident that he proved the ownership of the said mobile phone.

9. That from the Safaricom data, it was clear that the data for the incoming and outgoing calls emanated from one Paul Tochukwu and not him. Secondly, the imei number displayed on the said data said to have been from the complainant's number was an imei Number ending with "240" and not "243" as was alleged by the complainant and the investigating officer. It was evident that it had no connection with him as his name never featured anywhere as the owner of the telephone No.0722516777. Further, the geographical location indicated on the data, where the said Paul Tochukwu was located was at Nyeri King'ong'o, an area that is completely different from where the

crime was committed at Kieni East, Loisoi Location at Baraka estate. Additionally, no certificate of electronic evidence accompanied the said data and was thus not admissible.

10. He submitted that the complainant failed to produce receipts in relation to all the items indicated in the inventory of 23rd April 2021 to prove ownership. In his defence, he produced a receipt for the items from Naivas Supermarket Nyeri to prove ownership noting that the items said to have been recovered from his house were normal household items like unga & blue band.

11. In rejoinder, the Respondent's counsel submitted that all ingredients of the offence were proved beyond reasonable doubt. Identification was supported by both direct evidence of positive identification as well as circumstantial evidence. With regards to positive identification, the offence took place in broad day light and PW1 was able to see the assailants among them was the Appellant. He positively identified him as the one who had asked him for his mobile phone PIN, he stood over him and took the car keys and covered his face that morning around 7.00 a.m. The identification evidence was also fortified by the evidence of recent possession since he was found with a mobile phone

make Techno N&S (P-Exhibit 5). He contended that the said mobile phone belonged to him but conceded he bought it with his friend Peter Kungu who was not brought as an alibi witness to verify the same. This was therefore an afterthought. Further, the conjunctive elements in a charge of assault were all proved and the evidence was consistent and corroborative hence sufficient to convict the Appellant for the offence.

12. On the sentence, he submitted that sentence is essentially an exercise of discretion and the learned trial Magistrate was fully aware of and applied his mind to consider both mitigating and aggravating factors. The sentence prescribed for the offence of robbery with violence is death hence the sentence of (25) years was not only lawful but lenient in the circumstances.

13. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. This duty was set out in ***Okeno vs. Republic [1972] EA*** by the Court of Appeal as follows;

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."***

14. Further illumination on the matter is found in ***Kiilu & Another vs. Republic [2005]1 KLR 174,*** the Court of Appeal stated thus:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court***

has had the advantage of hearing and seeing the witnesses."

15. To this end a summary of the evidence at trial would be a suitable point of departure.

16. PW1, the complainant testified that on 13.4.2021 at around 6:30am, he heard someone knocking at the gate. He met 2 men and one hit him on the head with a chuma. They were tall and medium in complexion. They sat on him as he screamed. They pulled him into the house and asked "wapi pesa". They took him to the bedroom and they demanded for money and car keys. He gave them car keys. They ransacked his bedroom and they covered his face but he could see them. They took his wallet with kshs.1,500/- and Kshs.700/- from a brief case. They took his Techno N85 phone and demanded PIN. His Mpesa had Kshs.4700/-. He gave them the PIN Certificate. There were 2 others talking. He heard them start the motor vehicle. One went and tied his hands/legs using belts/ties. They said they had been sent by his estranged wife.

17. He heard his car go out the gate and he managed to free himself. He went out slowly and started screaming. He found his neighbour Maina and he was taken to hospital. He was in ICU

for two days. He was treated for 10 days and later discharged and returned home where he checked what was missing and prepared a list. That he lost Toyota corolla KBR 255 C – fielder, Techno NS Mobile phone IMEI 359395070191243 value 15000 /=, 2 litre sungold cooking oil 500, among other items as listed in the charge sheet. He produced a log book as Pexhibit1 and a receipt for techno phone as Pexhibit 2. He was called to the station to identify some items and he identified Techno phone and 2 Litres of sungold which he had used once. He identified the Appellant and testified that he saw him on 13.4.21 and he was the one who asked for PIN. He stood guard over him and he took his car keys. He covered his face with clothes. It was in the morning. It was about 7.00 a.m. They stayed till past 7.00 a.m. They stayed for over 1 hour. He was called to police to identify some people and he saw the Appellant but he did not identify him. He saw him the 2nd time in the parade. He feared for his life. Appellant was one of the people who robbed him.

18. On cross examination by Appellant's counsel, he testified that Identification parade was done but he did not identify the Appellant as he was scared. He saw 2 and heard

another 2. One had a red mask and he could recognize them. He did not know him but he was sure Appellant was there. They covered him with a blanket but he could see them. Total cash was Kshs.8500=. Mpesa statement read Kshs.7,000=. He lost Tecno N2S IMEI No. last number 243. He was shown the inventory dated 22.04.21 and stated that last number was 242. The cooking oil had no unique factors. He had used it once. He did not have a receipt. He did not have receipts of items stolen. The seller was not a witness. Neighbours could not access his house as he left the keys with his daughter.

19. On re-examination, he testified that the recovered phone had IMEI 359395070191243. He stayed with culprits for about 1 hour. He saw them and the amount from briefcase was Kshs.7,000/=.

20. PW2 testified that he was PW1's neighbour. On 13.4.21 at about 8.00, he saw PW 1 calling out his name using signs. He went where he was and saw he was bleeding. He screamed and neighbours responded and they took him to Kiganjo health centre. He told him that he had been attacked, hit on the head and his hands had been bound. When he returned home, he found police

and there was a lady called Rose Wagithi who was closing the house. Police went and opened the house. The daughter arrived after they had left. He saw a motor vehicle heading towards town. He said he lost his motor vehicle and things and have never seen it again. He did not know Appellant.

21. On cross examination, he testified that he did not see the Appellant and he did not hear screams. He saw a motor vehicle on the road. It was not in the sketch.

22. PW3, complainant's daughter testified that she received a call from a person called Nderitu who told her that PW1 had been attacked by robbers, beaten up and his car stolen. He was bleeding but was stable and they took him to Outspan hospital where he was admitted in HDU. He was taken to theatre where the wound was assessed and stitched. She went home where she met blood flowing outside his room. She cleaned the area. There was no one there. The police had already visited the scene. Everything was in shambles and some items including microwave, cylinders, radio were missing. His Toyota fielder KBR was also missing. After 3 days, a colleague told her that she had found an ID outside the hospital. She called the investigating officer. PW1

had a Techno phone which she was told was recovered from a man. She did not know the Appellant.

23. On cross examination, she testified that the motor vehicle was KBR 255 C but her statement read 253C. It was not counter signed. That she recorded a further statement. She did not find the stolen items. Statement read items were there. Items were not in the house.

24. On re-examination, she testified that the house was in a mess and items like T.V, microwave, mattress, DVDs, utensils were missing. PW1 told her that his phone was also stolen.

25. PW 4, PC Wafula testified that on 22.4.21, they were briefed that there was a suspect within their area and he was wanted by DCI Kieni East and they were to assist in effecting arrest with help of informers' intelligence. They proceeded to Majengo area and at around 2000hrs, they managed to arrest the Appellant. A search was conducted in his house and they recovered 3 phones and a Police angola smocking jacket. The Techno phone IMEI No. 359395070191243 was recovered and it had 2 IMEI no with the last no being 369. They also recovered an Itel phone.

26. On cross examination, he testified that they recovered 3 phones. The briefing he had been given was that there was a stolen phone with the suspects. He did not get receipts from the complainant regarding the phone. He was present during recovery.

27. PW5, scene of crime personnel produced photographs of the scene as Exhibit7A-K and certificate of photographic prints as Pexhibit7a.

28. PW6 testified that on 13.4.2021, he was instructed by Deputy DCIO to accompany him to a scene of crime at Baraka estate. Upon arrival, it was established that PW1 had been robbed of his motor vehicle white, Toyota fielder KBR 255C. They established that PW1 was assaulted by robbers and he sustained injuries and he was rushed to hospital. Officers from DCI processed the scene and investigations launched. Complainant's house had blood stains on the floor. Some TV, suitcases had been wrapped up. Robbers managed to make away with household goods belonging to the complainant. On 23.4.2021, they escorted Appellant from Naromoru police station to Nyeri. He had been arrested for robbery. They went to his house and recovered the

goods as stated in the inventory. Suspect signed the inventory. There were food items, cooking oil, blue band, matchbox, baking flour, I kg of sugar and a 6kg cooking gas. He did not know how he was arrested.

29. On cross examination, he testified that he did not get any receipt. Only police officers were involved in the recovery. Items recovered were not normal household items. Some were available in some households. He did not state that items belonged to the complainant. Items in the inventory were not the items in the charge sheets. There was a thermos flask 3.2/3.0 litres and Sungold seed oil but there were no receipts received from complainant. There were no identifying marks. Inventory did not indicate time of recovery or person who prepared it.

30. On re-examination, he testified that he was present during recovery and the Appellant signed the inventory.

31. PW7, Safaricom data analyst, produced call data for 0722516777, going and incoming calls from 1.4.21 to 21.4.2021 as P exhibit 12 and a certificate in accordance with **section 106A, Evidence Act** as Pexhibit 13. Registered owner of 0722 516777 was Paul Tochuchu. On 13.4.21 at Nyeri Kingongo East at

21:26, there was an incoming SMS. All calls, Nyeri Kingongo captures incoming/outgoing calls.

32. On cross examination, he testified that they could tell incoming/outgoing calls location for 0722 516777. Registered name was Paul Tochuchu and not Gerald Mathu. He did not know about Gerald Mathu.

33. PW 8, CIP Francis Wambua testified that the incident occurred at 6.30 a.m and at around 8.00 a.m, PW1 was taken to hospital. After 10 days on 22nd /23rd April 2021, he was contacted by OIC Makau informing him that Appellant had been arrested. They proceeded to Nyeri police station and booked the Appellant and immediately prepared an inventory of search. Suspect signed affirming items recovered from his house at Majengo. He was provided with a copy and signed by witnesses. He produced the inventory as Pexhibit 10. Among items recovered was mobile phone Techno N85 golden in colour, Pexhibit 5. He opened the mobile and noted its IMEI No. 359395070191243. There were two Itel phones, Pexhibit 9A and B, a national ID no. 23898097 S/N 216943143-P Exhibit 14, cash Kshs. 135/=, stripped brown long sleeve shirt - Pexhibit 15, sale

agreement dated 22.4.21-Pexhibit 16, Rain coat (National AP) P exhibit 8, Green khaki bag - Pexhibit 17.

34. He revisited the Majengo house and made another inventory. They recovered sun gold seed oil 2 litres - P exhibit 18. PW1 identified sun gold oil which had been stolen from his house. The complainant produced a receipt of the mobile recovered with 0722 516777. He produced the inventory dated 23.4.21 as Pexhibit 19. PW1 was taken to police station to identify his property recovered from accused's house and he identified the mobile phone. He sent him to Safaricom for Mpesa statement and money had been withdrawn from his Mpesa in Mukurweini. He produced the Mpesa statement as Pexhibit 1.

35. He testified that he had an interest in a Zain No. 0737 320711 prior to the act. The number had been housed in the Itel phone. When he sent to Liaisons officer, it was indicated that on 12.4.21, the suspect was in Nyeri. Then proceeded to Kingongo. He then moved to Kiganjo (police college). On 13.4.21 suspect moved from Kiganjo (Kiganjo covers Baraka) moved to Kingongo, Ruringu, saba saba, Thika, Nairobi, Kenol, Kambiti back to Nyeri. As per data on 22.4.21, suspect was back to Kiganjo where he

was living on 22nd night using the zain house (sic) 0725 167777. That he created interest in the IMEI no for victim housed in suspects No. 0722 515777. Mobile phone for victim from 13.4.21 showed geographical position being Kiganjo police and it moved with IMEI No. of victim. On the material day 13.4.21 victim's mobile phone money withdrawn Mukurweini. Phone was replaced with suspect's mobile number. That is when the complainant's line went off and replaced by 0722 516777. Victim's mobile IMEI data was zero. The other line was recovered from suspect's line. He produced 0722 516777 as P exhibit 21 and investigation diary as Pexhibit 23

36. On cross examination, he testified that they conducted an Identification parade but it was negative. The complainant did not identify the accused since he was nervous as he had been beaten. There was a receipt (P exhibit 2). It was a custom receipt and IMEI No ends with 243. Inventory of 13th was given by the complainant. Items recovered were only phone and cooking oil. Sun gold was recovered from accused's house and complainant listed stolen sun gold. There was no receipt and items in the list were household items. In inventory of 22.4.2, there were

witnesses listed. No name, no signature. They were all police officers. There was no neutral person. Call data for 0722 516777 was registered in another's names (Paul Thuku). It belonged to another but was with accused. IMEI ended with 243. Mpesa statement was made to establish that money was withdrawn at Mukurweini. It did not show it was withdrawn by Gerald. Suspect's phone was seen at Mukurweini. Phones were recovered from accused though not in accused's name. Accused phone was not registered in the name of accused. The receipt was not a purchase receipt. It indicated the owner. It was a computer generated receipt but was not accompanied by certificate. It could be manipulated. Many items stolen were not recovered from accused persons.

37. On re-examination, he testified that the complainant was anxious during identification parade. He was confused (traumatized). It was after 10 days after injury. That out of experience, when IMEI number is given, the data comes with a zero. It was a common last number. All the other digits are the same. Last digit changes to 0. Pexhibit16 was an agreement between Gerald and Oliver Wahome. It had Gerald's Number

0722516777. Same number in the call data. In Mpesa statement, withdrawal was done in Mukurweini and accused's phone was traced in Mukurweini on 13.4.21. Line found in house of accused and housed in accused's phone.

38. On further cross examination, he testified that PP1 had no signature of the accused and Oliver. There was no stamp on PP 1. PP 2 was signed by Gerald. No I.D/Telephone number.

39. On re-examination, he testified that the agreement had 2 pages. The agreement was recovered from accused's house.

40. PW 9, produced a P3 form, Pexhibit 22 filled by Dr. Beatrice Mugo who was away for further studies. He was familiar with her handwriting. Degree of injury was 'maim'. On cross examination, he testified that the doctor based her findings on treatment notes to fill P3 form. He did not have the treatment notes. Age of injuries was not known.

41. The appellant in his sworn testimony testified that he was an electrician. On 13.4.2021 at 6.30 a.m, he was at home in Blue valley Nyeri town. The techno N85 was his phone and he had a receipt IMEI 359395070191243. He purchased it for Kshs. 9,000/= in Nairobi from Digital world Communications on

5.4.2020. He did not steal it. Complainant had a receipt. He was not told about it and heard of the receipt in court. He was shown receipt produced in court and testified that it was a customer receipt which was computer generated. No certificate was produced to show how receipt was generated. He produced receipt for Techno N85 Kshs. 9,000/= as D exhibit 1. He also produced a receipt from maathai with cooking oil, sun gold oil Kshs.585/ as D exhibit 2. Complainant did not identify him. He was not at the scene of crime and he did not leave Nyeri town on that day. Call data IMEI last number was 240. He was shown IMEI No. last three digit 243. They did not tally. 0722 516777 was registered in the name of Paul Gacheche. The signature on the agreement was not his. There was no neutral person who witnessed him signing the inventory, only police. Stolen items were not recovered from his place.

42. On cross examination, he testified that he was at a house in Nyeri blue valley estate on 13.4.21 though he was not calling anyone to verify the same. He was arrested 19 days after robbery incident and signed the inventory. He was not threatened. He maintained that he bought techno phone from

Digital World Communication Nairobi Midlife shop building. Name on the receipt, Dexhibit1 was Peter Kungu. He was not Peter Kungu though it was his. The receipt from Mathaai supermarket, Dexhibit2 did not have his name. The date had faded and it was not legible. Wanjiru Mathu was his mother (deceased). He inherited the land Gikondi 3/4661. It was the same land being sold. His ID was 238981097 as in the inventory recovered from his house. Phone Number on agreement 0722 516777. Same number that was tracked. Line was in the phone. Number not removed from line. His No. 0720 495320. He saw the complainant in the station and court. He had a grudge with the informer.

43. On re-examination, he testified that D exhibit 1 (Techno receipt) was in the name of Peter Kungu. He bought the phone with him. His name was written. The phone was his. That someone could buy a phone from another. Complainant did not complain of a stolen Itel phone. D exhibit II (Maathai) receipts from supermarket did not show name of purchaser, save for person who served him. It had cooking oil (sungold oil). Purchaser's name was not indicated. They do not ask who customer is. The phone number in Pexhibit 16 (sale agreement)

was registered in the name of Paul Gichuki - Tel 0720 495320 (his) Number in agreement was not his. He did not know where it came from. Land registered in the name of Wanjiru Mathu (deceased). Seller was Gerald Mathu Wanjiru. One cannot sell land of another. He could not sell that land. Purchaser was not called as a witness.

44. That was the totality of the evidence before the trial court. As obligated of this court, I have considered the evidence at trial. In so doing, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard of the submissions made and case law cited. I have taken into account the applicable law. The broad issue for determination is whether the prosecution proved its case to the required degree. To answer this question, the court will have to scrutinize the evidence to find whether each ingredient of the offence was proved.

45. The Appellant was charged with the offence of robbery with violence. ***Section 296(2)*** *of the* ***Penal Code***.

46. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of ***OLUOCH –VS – REPUBLIC [1985] KLR*** where it was held:

> ***"Robbery with violence is committed in any of the following circumstances:***
>
> *a.* ***The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> *b.* ***The offender is in company with one or more person or persons; or***
>
> *c.* ***At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ……"***

47. The use of the word **or** in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under ***section 296(2)*** of the ***Penal Code***. The prosecution duty was therefore to establish any of the above ingredients and to show the court that the Appellant robbed the complainant.

48. It is in evidence that the attackers were several. PW1 testified that two men accosted him and he could hear other two in the main house while being held in hostage. They were also armed with a 'chuma' which they used to hit him on the head. The evidence on record is that he was even admitted in hospital

for several days. It therefore follows that the element of wounding the complainant was established and the million dollar question then remains who was involved in the wounding and taking away of the complainant's property.

49. On identification, the evidence on record shows that the Appellant was not identified on identification parade. PW1 testified that he saw the Appellant among the people on the parade but he was afraid and so he did not identify him. This was also amplified by PW9, the investigating officer who testified that PW1 was anxious and afraid so he did not identify the Appellant. PW1 however testified that he saw the Appellant on the material day as he was the one who demanded for his pin, he stood guard over him, took his car keys and covered his face with clothes. It was in the morning at around 7:00am so he was able to see. He did not know him but he was sure the Appellant was there.

50. In ***R vs Turnbull [1976] 3 ALL ER 549***, it was stated by the Lord Chief Justice of England and Wales as follows:

> ***"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification 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 on 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 sure reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which 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 (sic) between the 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 his actual appearance"(emphasis added).

51. Applying the above tests in our instant case, the circumstances surrounding identification were that the incident took place at around 6:00 a.m in the morning and the complainant testified that the assailants stayed for about an hour. He testified that when he opened the door, he met two men who hit him with a 'chuma on the head, sat on him and dragged him into the house. He did not state whether at that moment of seeing

and being hit, whether he was able to identify them. Further, he did not state whether at that time there was darkness or not. While in the house, he testified that the Appellant covered him with a blanket. He also stated that the Appellant was the one who demanded for pin and car keys. He however did not testify whether when the Appellant was demanding for the Pin and car keys, he was covered or not. The complainant was wounded and according to the evidence, he was severally wounded and he was bleeding which in my view would have impended him from identifying the assailants. Furthermore, the attack was sudden as explained by the complainant which might have also impended him from identifying the assailants.

52. It is a fact that an identification parade was conducted in which PW1 did not identify the Appellant as one of his attackers. An identification parade by its very nature and setting is an ideal opportunity for a victim of a crime in circumstances where the suspect was not known to them and where they had an opportunity to see the physique and features of such a suspect to point out the suspect confirming that, yes, he saw him at the time

of the crime and indeed pick him out by touching for certainty. The exercise has no timelines and is not hurried.

53. In my view, where a witness is unable to pick out a suspect in an identification parade, dock identification is useless and cannot suffice. The identification in this case thus falls far short of the legal threshold required.

54. The court of Appeal expressed itself on the matter in **Gabriel Kamau Njoroge v Republic**, **[1987] eKLR** where the court stated:

> ***"Dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade."***

55. That said, even where the evidence of identification is found inadequate, the case can still succeed based on other evidence and more specifically under the doctrine of recent possession and circumstantial evidence.

56. The trial court while convicting the Appellant held as follows;

> *"In his testimony, PW1 testified he saw the accused on 13/4/2021. He is the one who asked for his PIN. He stood guard over him. He took his car keys. He covered his face with clothes. It was in the morning. It was about 7:00am. They stayed till passed 7:00am. They stayed for over 1 hour. The accused was in*

his house. He did identify before court. This evidence was corroborated by PW4 who arrested the accused from his house and recovered items which included Techno phone with IMEI No.359395070191243 which was identified PW1 as his. PW7 also adduced call logs which show that PW1's phone number 0722516777 was located at place where the accused was arrested. The same phone number was recovered from the accused. It is based on this evidence that the prosecution relied on to prove that the accused was amongst the robbers who attacked the complainant on the material day."

57. The trial court erred in that, phone number 0722516777 was not the complainant's number. Pexhibit12 showed that the said number was registered in the name of Paul Tochukwu. This was confirmed by PW7, Safaricom data analyst. The complainant's number according to the Mpesa statement, Pexhibit1 was 0722481629. It therefore follows that the trial court erred convicting the Appellant based on the fact that the complainant's phone line was with the Appellant at the time of the arrest.

58. As regards the recoveries allegedly made from the Appellant, the prosecution evidence was that the phone, Tecno N8S Imea 359395070191240/243, belonged to the complainant and complainant produced a customer receipt as Pexhibit2. The said

receipt was not a purchase receipt but it showed that the complainant had taken the phone for repair.

59. Even assuming that the receipt was a purchase receipt, the Appellant raised a point of law to wit, that the receipt produced by the complainant was a computer generated receipt which was not accompanied by a certificate of electronic evidence pursuant to **Section 106B** of the **Evidence Act.** This was confirmed by PW8, the investigating officer.

60. Section **65 (8)** of the **Evidence Act** provides;

> ***"In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—***
> ***(a) identifying a document containing a print-out or statement and describing the manner in which it was produced;***
> ***(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;***
> ***(c) dealing with any of the matters to which conditions mentioned in the subsection (6) relate,***
> ***which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the***

document relates in the ordinary course of business shall be admissible in evidence."

61. These provisions are further reinforced under **section 106B** of the same Act which provides for the admissibility of the electronic records. For a computer output to be admissible, it must certify the following conditions as set out under section **106B (2);**

"a. The output must have been produced during regular use;
b. It must be of a type expected in ordinary use;
c. The computer generating the output must be operating properly or it must be shown that the accuracy of the computer is not otherwise affected; and
d. Where multiple computers are involved, those operating in succession and considered as one."

62. For authentication of computer print-outs, section **106B (4)** provide for a straightforward way of automatically authenticating them if certain conditions are met by producing a certificate of authenticity. That certificate must satisfy three conditions (paraphrased):

"***a. It must identify the electronic records and production process;***

b. It must show the particulars of the producing device; and

c. It must be signed by the responsible person."

63. Were these conditions met in the present case? The document in dispute is Pexhibit 2, a computer print-out. However, the receipt was not authenticated as per the provision of **section 65(8)** and **section 106(B)** of the **Evidence Act.** None of the conditions set there under were complied with. In that respect, Pexhibit 2 was inadmissible.

64. The Appellant on the other hand claimed that the phone was his and he produced a receipt which was in the name of another person, Peter Kungu. He claimed that they had bought the phone together but Peter's name was written on the receipt. This receipt of course did not prove that the Appellant owned the phone.

65. While am quick to note that the receipt produced by the Appellant does not aid his cause at all as the same shows the phone as belonging to someone else, it is to be remembered that the Appellant bore no duty to prove his innocence. It was for the prosecution to prove beyond doubt that the phone in question belonged to the complainant.

66. On the whole the prosecution fell short of proving the ownership of the subject phone by the complainant.

67. With regard to sun gold cooking oil which the complainant claimed belonged to him, no receipt was produced to prove that he had bought the cooking oil. Further, there were no identifying marks which could have shown that it belonged to him. It is also noteworthy that cooking oil is a common commodity and expected to be found in any household. I need say no more on this item. Prove of its ownership is not achieved.

68. The prosecution tendered evidence of recovery of a land sale agreement between the Appellant and one Oliver Wahome. It had the Appellant's Number 0722516777 the same number as in the data provided. In Mpesa statement, withdrawal was done in Mukurweini and accused's phone was traced in Mukurweini on 13.4.21 and the line was found in the house of accused and housed in accused's phone.

69. Even though the line with 0722516777 was traced in Mukureweni, PW7 said the said line was registered in the name of Paul Tochukwu. Who was Paul Tochukwu? There appears to have been no investigations at all to establish who Paul Tochukwu was and the connection to the Appellant and to this case. I find this to be a fatal omission that raises

credible doubts as to the identity of the owner of the line in question and the mere fact that it was written in an agreement bearing the Appellant's name does not with any degree of certainty link him to the offence herein.

70. In criminal proceedings, the burden lies squarely upon the prosecution to establish the guilt of an accused person beyond reasonable doubt, and that burden never shifts. This principle has long been settled.

71. In **Bhutt v Republic [1957] EA 332** the Court underscored that the duty of proving the charge rests throughout upon the prosecution. Equally, the Court of Appeal in **Sawe v Republic [2003] KLR 364** cautioned that suspicion, however strong, cannot form the basis of a conviction and that the prosecution must exclude any reasonable hypothesis consistent with innocence. The standard of proof was further explained in **Miller v Minister of Pensions [1947] 2 All ER 372** where Lord Denning observed that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt, but it must be such as leaves the

court with no reasonable uncertainty regarding the guilt of the accused. Where such doubt persists, the accused is entitled to the benefit of that doubt, a position reiterated by the Court of Appeal in **Mary Wanjiku Gichira v Republic [1998] eKLR.**

72. In the present appeal, the evidence on record leaves material gaps and unresolved issues of identification of the Appellant as well as clear and firm evidence to support the doctrine of recent possession.

73. On the whole, and upon re-evaluation of the evidence on record, and guided by the settled principle that it is far better that a guilty person be set at liberty than that an innocent person be wrongly convicted, this Court finds that the conviction cannot be allowed to stand and must be disturbed. The benefit of doubt arising therein must, as a matter of law, be resolved in favour of the appellant.

74. With the result that I find merit in the appeal and the same is allowed. I quash the conviction and set aside the sentence imposed and substitute thereof an order acquitting the

Appellant who is set at liberty forthwith unless otherwise lawfully held under another warrant.

Dated signed and delivered virtually this 12th day of March 2026.

A.K. NDUNG'U

JUDGE