

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. E038 OF 2024

**(CONSOLIDATED WITH HCRA NO. E039/2024 AND
E041/2024)**

ROBERT SERAPHINE OGALLE.....1ST
APPELLANT

MICHAEL ODONGO WESONGA.....2ND
APPELLANT

ALI JUMA ALIAS HENRY LAWI3RD
APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arises from the judgment of Hon. M. O. Wambani (CM) dated 24/7/2024 in Siaya Chief Magistrates Court Criminal Case N. 1194 of 2019)

JUDGMENT

1. The appeal arises from the judgment of Hon. M.O. Wambani (CM) in Siaya Chief Magistrates' Court Criminal Case No. 1194 of 2019 wherein she convicted and sentenced the Appellants to life imprisonment for the offence of robbery with violence contrary to section 296(2) of the Penal Code.
2. Being aggrieved by the said conviction and sentence, the Appellants filed their Petition of Appeal wherein they raised the following grounds of appeal.
 - i) That the Honourable trial court erred in law and facts by failing to observe that the identification of Appellants as attackers was not proved to the required threshold which is proof beyond any reasonable doubt.
 - ii) That the Honourable trial court erred in law and facts by ignoring to consider that their rights under Article 49 and 50(2) of the Constitution 2010 were grossly violated without due consideration that they play to be one of the constitutionally unlimited rights under Article 25 of the Constitution.
 - iii) That the Honourable trial magistrate erred in law and facts by failing to note that the Appellants herein

were not linked to any recovered exhibits in this particular case.

- iv) That the Honourable trial magistrate erred in law and facts by not considering that the investigations carried out in this particular case were shoddy, unprofessional and unworthy to link the Appellants herein to the scene.
- v) That the Honourable trial court erred in law and facts by not putting more weight on their induced alibi - defence which was the only available truth to be fully considered by the Honourable trial court.

The Appellants therefore prayed that the Honourable court issues orders quashing their conviction, setting aside the imposed life sentence, thus setting the Appellants at liberty, after re-evaluating the evidence on record.

3. This being a first appeal, this Court must reconsider and re-evaluate the evidence adduced before the trial Court so as to arrive at its independent findings and conclusion. (See **Okeno vs. Republic [1972] EA 32**). In doing so, this court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial court and, therefore, it ought to give due allowance in that respect as was held in **Ajode v. Republic [2004] KLR 81**.

4. **APC Olong'onyin Sirar Saitoti (PW1)** testified that he is a constable working in Siaya. That on 12/11/2019 at 8.00 AM,

he went to work at Equity Bank Siaya where he offers security services upto 5.00 pm. That he was with APC David Kiptoo at Equity Bank until 5.00 pm and that they went to renew firearms since they were to go and guard the County Commissioner's place within Siaya. That he instructed his colleague to report first ahead of him as he was preparing his food first, thereafter, he proceeded to the County Commissioner's office on foot which was a distance of about 3 kilometres from Siaya AP camp. That while near to the ACK Church, a motor cycle with three passengers on board arrived, one of them alighted and asked him to help them and that he advised them to seek help from police. That the man who had first alighted hit him from behind his head. That he struggled with him and that the man grabbed his gun which was an AK 47 Services No. 4849372 with 30 rounds of ammunition (6.62 millimetre special). That he fell down during the incident and that one of the assailants stepped on his back. That one of the assailants told the others to shoot him but one stated in Dholuo "*wedi kodi wathi*", in English "*leave him, lets go*". The assailants left him while unconscious. That when he recovered his consciousness, he found himself at Russia Hospital in Kisumu where he had been rushed by colleagues. That he saw Robert Seraphine (1st Appellant) during the incident. He further stated that he was able to see him by use of intensive security lights that were from the treasury building. That the 2nd and 3rd Appellants stood near the ACK church where there was no electricity. That he was not able to mark the faces of

the 2nd and 3rd Appellants. That the gun was recovered in Busia. That he identified the Daily Arms issue book which he signed in on 12/11/2019 for the issue of AK47 service gun number 4847372. That they robbed from him Kshs300/= together with a mobile phone make Viwa. That he identified his treatment notes and P3 form issued to him by the hospital.

On cross examination, he stated that he did not take note of the motor cycle registration number. That he was enabled by the intense electricity lights that shone from the treasury building to identify the 1st Appellant during the incident. That he saw three assailants but which he did not record in his statement. That he did not give a description of his attackers to the police. That Sergeant Jason Maelo issued him with the gun. That he did not describe the assailants to the police. That Sergeant Jason Maelo issued him with the gun and that he did not tell them that he was attacked with a man and a woman. That he did not know anyone with the name Pamela Wambi, since the assailants attacked him from behind. That he struggled with one of the assailants. That they took away the gun. That they left him unconscious.

On re-examination, he stated that there was intensive electricity lights from the treasury building that enabled him to identify the 1st Appellant.

5. **No.2003054896 ASP Roselyn Onyonyi (PW2)** testified that she was briefed by her predecessor Samuel Kariuki about the incident in that the complainant was on his way to the offices of the County Commissioner to perform guard duties when he was attacked on the way and robbed of his AK 47 rifle. That on 26/11/2019 they received a signal from Busia police station that the stolen rifle had been recovered. That she went there and confirmed the recovery and that the firearm tallied with the records at the armory and that she produced the entry which contained details of the arms movement where the complainant had signed for the said firearm.

On cross-examination, she stated inter alia; that she did not witness the arrest of the Appellants; that there is a criminal case No. 3371 of 2019 at Busia law courts; that she did not know the person who was found in possession of the stolen rifle; that she was not aware if the complainant had visited the police station prior to the identification parade; that it is only the 1st Appellant who agreed to participate in the identification parade; that she did not talk to PW1 prior to the parade; that there were nine parade members and that the 1st Appellant stood between member number two and three in the parade; that she did not allow PW1 to come to the parade before it started and that the Appellants did not inform her that the complainant had seen them earlier.

6. **Force No. 108232 Pc Willy Kiplagat (PW3)** testified that he is based at Bungoma DCI Sub County headquarters, Bungoma County and that he performs general investigative

duties. That in the year 2019, he was working at Busia DCI before being transferred. That he received a report on 25/11/2019 between 9.00 AM and 10.00 AM that members of public had called to inform that they had seen the suspects. That he was shown two men who were walking towards Busia town. That there was an officer at the Border Point, one Sergeant Kingara and others whom the witness requested to aid in arresting the suspects. That the two suspects arrived where the witness was and that they were stopped and who were informed that they were being suspected of having committed some crimes which had been reported to the police. That the witness was assisted by the officer at the Border Point to escort the suspect to Busia Police Station. That they interrogated the two suspects (1st and 2nd Appellants) and that they established that they were accomplices to Henry Lawi Alias Ali Alusa (3rd Appellant) who was in Busia. That the 1st Appellant led the officers up to where the 3rd Appellant was and where the gun, an AK 47 with serial number KEAP 4849372 had been hidden. That they established that the gun had been stolen from an Administration Police Officer (AP) from Siaya County who had been robbed and injured.

On cross examination by the 1st Appellant, he stated inter alia; that he recorded his statement on 30/11/2019 and that he had received information from members of public who are not witnesses to the case. That the Appellants were placed in custody after their arrest and that the firearm was recovered on the same day of arrest. That they were booked

in the OB after the firearm was recovered. That the Appellants are facing charges of robbery with violence where the State/Republic is the complainant. That it is the 1st Appellant who identified the 3rd Appellant

On cross examination by the 2nd Appellant, the witness stated that he received information from a member of public but that he did not record his statement; that the Appellant had another case at Busia Court and that nothing was recovered from him at the time of arrest. He further stated that the 1st Appellant is the one who implicated the 3rd Appellant and led the officers in arresting him within Busia town.

On cross-examination by the 3rd Appellant, he stated that nothing was recovered from him. That the 1st Appellant implicated him as he led the officers up to where he was within a certain estate in Busia.

- 7. Force No. 237371 Inspector Hillary Kibor (PW4)** testified that he is from Siaya Police station. That on 13/12/2019, he was requested by Inspector Kinuthia of DCI Siaya to assist him in conducting an identification parade in a robbery with violence case. That there was one witness who was to appear on that parade - APC Sirar Saitoti of CIPU Siaya Headquarters. That he informed both the parties to be involved of the exercise but it was only the 1st Appellant who agreed to participate. That he selected nine men with the same height and complexion and that the 1st Appellant chose to stand between position number two and three. That PW1

positively identified him by touching him. That he inquired from the 1st Appellant whether he was satisfied with the parade exercise and who replied that he wasn't satisfied as PW1 had seen him earlier.

On cross examination, he stated that he was not at the police cells prior to the police identification parade exercise. That he took all precautions three days prior to ensure that PW1 did not see the suspects prior to the exercise.

- 8. Force No. 220056, APC 19950550660 David Kiptoo (PW5)** stated that he is currently working in Kapsaret Sub County, Eldoret town, Uasin Gishu County. That he recalls on 12/11/2019 while with APC Sirah Saitoti as they were going to work at the County Commissioner's officer's residence, he went to armory at Siaya County Commissioner's office to take over guns and that he was ahead of Saitoti, and that Saitoti (complainant) failed to join him at work. That it took two hours before he called Sirah Saitoti who told the witness that he was on his way to work. That it was around 300 metres from the armory to Siaya County Commissioner's office. That after the communication, Sirah Saitoti's phone went off. That there was a member of public who saw Sirar being attacked. That colleagues called the witness and informed him that Sirar had been attacked. That he went to the scene and found that Sirar had been injured, bleeding from his head and was unconscious and that his phone had been snatched. That the witness called his bosses/in charges who came and took the complainant to hospital.

On cross examination, he stated that he reported to armory at 6.00 pm and that he took about 30 minutes while the complainant spent there about 2 hours. That it was a walking distance of 300 - 400 metres from the armory to Siaya County Commissioner's residence. It was not regular for officers to depart for work place at different times. That the complainant was armed with AK 47 rifle. That a civilian saw the officer being attacked and who upon reported the matter to the police. That he had been beaten, unable to talk and he had to be operated. That the attackers had trailed the complainant and that they were on a motor cycle, they hit him and rode away. That he could not recount what had happened and that his gun had been snatched.

9. **Brian Chengek Chemeng (PW6)** of Practice ID No. 2265 and a holder of Diploma in Clinical Medicine and Surgery testified that he is a clinical officer working at Siaya County Referral Hospital for the past eight years. That he has a P3 form for Sirar Saitoti aged thirty (30) years old which was filled by his colleague Kennedy Opiyo and whom they have worked with for 6 ½ years and that he is conversant with his handwriting and signature. He stated that the first treatment was on 12/11/2019 and then the complainant was transferred to Jaramogi Oginga Odinga Hospital on 12/11/2019. That he was in jungle green uniform blood stained which were dry. That it was alleged that he had been assaulted on 12/11/2019 at 2000 hours by unknown

people within Siaya Township and was left unconscious. That the patient was in pain but was stable. That there were healing extensive cut wounds with multiple bruises on the left side of the head and face. That there were also multiple bruises on the back and stiffness. That on the upper limb, there was a deep cut wound, the right hand had a cut wound which was deep and the right-hand tentacles were ruptured. That the lower limbs were normal and that the injuries were four (4) weeks. That the probable weapon used to cause the injuries was a sharp object. The wounds were stitched and he was given medication as per the P3 form which was signed and stamped by the hospital's stamp on 16/12/2019 and that X-ray was done. That the degree of injury was assessed to be grievous harm.

On cross-examination, he stated inter alia; that he had his appointment letters; that he has not availed the employment letter in court; that the patient was injured on 12/11/2019 and that he was attended to in hospital for injuries sustained from unknown people.

10. **No. 237289 Chief Inspector Joseph Kinuthia (PW7)** testified that this case was reported on 12/11/2019 that Sirar Saitoti had been robbed of his official gun at the time he was going to work. That he was injured during the robbery. That they took the complainant for treatment and commenced investigations. That they called for the complainant's work roster and gun register for the date of the incident and recorded witness statements. Further, he stated that on

26/11/2019 they received information that some people had been found with a gun and that they went to Busia. That they found out that the gun serial No. 4849372 had been discovered at Busia and which had been robbed from the complainant herein. That he went to Busia Court and requested that the accused be brought to Siaya for the police identification parade which was to be done by IP Kibor. That the 1st Appellant accepted to attend the said parade whereas the other Appellants declined. That the complainant one Sirar Saitoti (PW1) positively identified the 1st Appellant in that police parade. That Saitoti (PW1) positively identified the gun as the one he had been issued with and that the gun was taken to the ballistic analyst and a report thereto is in the police file. That he recorded the witness statement together with his investigations and made out his directions that the accused persons attacked the complainant, injured him and snatched his official gun and escaped to Busia. That he handed his file to DPP for further directions and that the gun is before court. That PW1 had been given the gun for his official work and that it belonged to the Government of Kenya vide the duty roster and the firearm register which were produced as exhibits. That he also produced the ballistic report, the gun namely AK 47 serial No. 4849372 as well as police parade identification form.

On cross-examination, he stated inter alia; that Pamela Wambia arrived at the scene of crime and that PW1 informed her that he had been attacked by three people;

that the complainant identified the attackers with the help of security lights from a nearby building; that the complainant remained behind as his colleague proceeded to the work place and that he was to join him later; that the gun was found in the 1st Appellant's brother's home; that finger print dusting on the gun was not done.

11. The trial court later established that a prima facie case had been established against the Appellants herein who were thus placed on their defence.
12. **Robert Seraphine Ogallo (DW1)** testified that he is a residence of Mundika Shopping Centre in Busia town and that he has been working with Military Unit before his arrest. That he has worked with Kenya Defence Forces within the rank of Lieutenant or a section Commander in the 19th Amant Battalion of Kenya Rifles since 1998 at the age of 26. That he worked until 2014 when he resigned from the KDF and that he applied to go outside the country. That he went to Ruanda as a Drilling Instructor after being cleared by Interpol, that he was taken to train the British Royal Army about quarter buttons and logistics in 2016 and that he was working in the Special Unit. That in 2017 he was deployed to DRC in Kisangani as a regiment commander at the rank of Colonel. That he took leave on 19th November 2019 which was to expire on 15th January 2020. That on 26/11/2019 he travelled to Kenya from DRC through Ruanda then Uganda into Kenya. That while at home he was alerted by his brother's worker that several strangers had turned up and

picked up his brother one Patrick Lumumba. That he called people from neighbourhood to join him at the police station to find out. That at the police station he met the same police officers whom he had earlier in the year 2011 lodged a complaint against them for assaulting him. That the said officers turned against him and placed him in custody. That he lost six thousand dollars, Ugandan currency 120,000 as well as Kshs200,000/= plus some Ruandan currency. That he lost his Kenyan ID, Ruandan ID, military ID, International Passport, Interpol work permit, East African Temporary Passport, KCB Mastercard, Equity Bank Master Card, Commercial Bank of Africa Visa Card, Academic Certificates and mobile phones. That he produced a P3 form as his Defence Exhibit 1, receipt DEXH 2, Court Order from Busia CM's Court DEXH 3, OB report and Number (Exhibit DEXH 4 and 5). That he was in police custody for 13 days after being moved from one police station to another. That his arrest was in connection with PW1's gun which was recovered from his brother's house and whose body was recovered from River Yala in December 2012 in a sack. That his brother Lumumba died as well as his two neighbours as their bodies were also found in the same River Yala. That he has never known why he was arrested. That he is aware that the police took away his brother's life. That he was not present when the gun was recovered. That his late brother was a police officer. That he has been fixed in this case. That before the gun was reported as stolen in Siaya, it had been used in some robberies in Busia and Siaya. That the robbery cases

regarding the use of the alleged stolen gun were already ongoing in Busia, for instance, vide Criminal Case 3371/2019. That he did not commit the offence. That he has never met the 2nd or 3rd Appellants. That he had been a law-abiding citizen and never committed criminal offence. That this is the 6th year that he is behind bars since he was denied bond. That he has been implicated in this case because he was pursuing the death of his brother who was killed by police. That he was implicated because of the differences he had with the Busia Police Officers.

On being cross examined by Mr. Mwangi, he stated inter alia; that the stolen firearm was recovered from his brother's house; that his brother was a police officer; that he has not exited from the military; that he has experience on the use of firearms; that Saitoti (PW1) did not know the people who robbed him since he did not positively identify him in the police ID parade; that he has a receipt to prove that he travelled from Ruanda to Busia; that he was arrested on 26/11/2019; that the police fabricated this offence against him because he had complained against them at Busia Police Station and also he was to follow up over the death of his brother.

The 2nd and 3rd Appellants did not have any question for him.

13. **Michael Odongo Wesonga (DW2)** testified that he was arrested on Tuesday 26/11/2019 at 12.00 noon. That he was at his work place where he works as a hawker who sells flasks, bedsheets and blankets. That a customer came to

Busia District Hospital where he was doing his business. That he then sold to him a flask and the customer went away. That after an hour, the same customer came back alleging that he had been given fake money. That the customer came with police officers from Busia police station and they arrested him and took him up to Busia police station where he was detained in the police cells upto 9th December 2019. On 19/12/2019, he was taken to Siaya Law Courts for plea. He was jointly charged with people he does not know. That he does not know the charges in this case and that he has been in custody for long yet he is sick. That the investigation officer did not find from his chief whether he has ever committed any criminal offences.

On cross examination, he stated that he was surprised that he was charged with this case. That he is a hawker at Busia. That one customer alleged that he had given him fake money. He further stated that he had never seen the 1st accused and had only seen him in court and that he had never seen the 3rd accused prior to this case and that they have never transacted any business with the 3rd accused.

14. **Ali Juma Alias Henry Lawi (DW3)** testified that on 26/11/2019 he woke up as usual and that he travelled to Busia. That upon arrival at Busia, he crossed the border to Uganda and took beer as usual. That he used the shortcut route and reached at the roadblock at Busia. The vehicle he had hit another vehicle from behind at 9.00 am and that he took the beer upto Kakamega and that when he came back

for the second time, Esther from Dudi in Siaya County called him and requested him to supply beer and that he informed her that he did not have money and so she sent him Kshs17,000/= shillings which he used to buy beer and took to her. That when he reached Dudi in Siaya, he was called by his boss who is the owner of the vehicle inquiring about the vehicle. That his boss who is the owner of the vehicle he was driving requested him to send the number of the person whose vehicle he had hit from behind and who requested him to go to Busia police station. That upon arrival, he was detained because, apparently, the owner of the vehicle he had hit turned out to be the DCIO. That he was detained upto 9th December 2019 and that he was taken to Busia Court. That he denied the charges and was later taken to Siaya where he was charged with robbery with violence alongside other people whom he did not know and of the charge he was not aware of as well.

On cross examination by the prosecutor Mr. Mwangi, he stated inter alia; that his boss died in February 2021 and who could have been his witness; that he does not know the 1st accused herein; that he was arrested because of trading in beer.

On cross examination by the 1st and 2nd Appellants, he stated that he did not know if he did not know them and that he had never carried out business with them.

15. The appeal was canvassed by way of written submissions. It is only the Appellants who complied.

16. The 1st Appellants submissions are dated 20/11/2025 and those of the 2nd Appellant are dated 15.1.2025 while those of the 3rd Appellant are dated 14th January 2025. They raise almost similar issues.
17. The gist of the Appellants' submission revolve around the issue of improper identification exercise conducted by the police, inconsistencies in the testimonies of witnesses, absence of proper identification of the Appellants by the witnesses and imposition of excessive sentences by the trial court. The Appellants therefore have urged this court to quash the conviction and set aside the sentences imposed.
18. I have considered the record of appeal and the submissions filed. I find the issue for determination is whether the charge of robbery with violence contrary to Section 296 (2) of the Penal Code was proved by the Respondent against the Appellants herein beyond any reasonable doubt.
19. It is trite law that the burden of proof in criminal cases is always upon the prosecution to discharge and that the standard is one of beyond reasonable doubt. See **Woolmington Vs DPP [1935] AC 462.**
20. The offence of robbery with violence under Section 296 provides that 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. The Court of Appeal in the Case of **John Kariuki Gikonyo Vs Republic [2019] eKLR** the Court held that the ingredients of the offence of robbery with violence are inter alia; offender is armed with any dangerous or offensive weapon or instrument; if he is in the company with one or more other person or persons, if at or immediately after the time of robbery who wounds, beats, strikes or uses any other violence to any person. The court went further to hold that proof of any one of the ingredients of robbery with violence is enough to sustain a conviction. Again, in the case of **Johana Ndungu Vs Republic [1996] eKLR** the ingredients of the offence of robbery with violence were stated to be as follows:

“In order to appreciate as to what acts constitute an offence under section 296 (2) of the Penal Code, one must consider the subsection in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is use or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in section 296(2) which we give below and any of which if proved will constitute the offence under the subsection:

1. **If the offender is armed with any dangerous or offensive weapon or instrument;**
2. **If he is in company with one or more other person or persons, or;**
3. **If at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.”**

21. All the Appellants have contended that the identification process was flawed and therefore the eventual conviction based on such a process was unsafe and should be quashed. The Appellants further contended that the ingredients of the offence were not proved beyond reasonable doubt and finally that the sentences imposed are manifestly excessive in the circumstances.

22. It is noted that the complainant (PW1) herein was the one who was attacked while on his way to the office of the County Commissioner of Siaya having left his colleague to proceed earlier and therefore he was then walking alone while armed with an AK 47 rifle. His evidence was as follows.

APC Olong’onyin Sirar Saitoti (PW1) testified that he is a constable working in Siaya. That on 12/11/2019 at 8.00 am he went to work at Equity Bank Siaya where he offers security services upto 5.00 pm. That he was with APC David Kiptoo at Equity Bank until 5.00 pm and that they went to

renew firearms since they were to go and guard a County Commissioner's place within Siaya. That he told APC David Kiptoo to report first ahead of him as he was preparing his food first, thereafter, he proceeded to County Commissioner's office on foot which was a distance of about 3 kilometres from Siaya AP camp. That while near to the ACK Church a motor cycle with three passengers on board arrived, one of them alighted and asked him to help them and that he advised them to seek help from police. That that man who had first alighted hit him from behind his head. That he struggled with him. that he grabbed his gun which was AK 47 Services NO. 4849372 with 30 rounds of ammunition f 6.62 million special. That he fell down during the incident and that one of the assailants stepped on his back. That one of the assailants told the others to shoot him but one said in dholuo "*wedi kodi wathi*", in English *leave him, lets go*. The assailants left him while unconscious. That when he recovered his conscience, he was at Russia Hospital in Kisumu where he was taken by colleagues. That he saw Robert Seraphine during the incident. He further stated that he was able to see the 1st accused by use of intensive security lights that were from the treasury building. That accused 2 and 3 stood near the ACK church where there was no electricity. That he was not able to mark the face of Accused 2 and 3. That the gun was recovered at Busia. That he produced his Daily Arms issue book which he signed in on 12/11/2019 for AK 47 service 4847372 gun. That they robbed from him Kshs300/= together with a mobile phone

make Viwa. That he produced his treatment notes and P3 form as exhibits.

On cross examination, he stated that he did not take note of the motor cycle registration number. That he was enabled by the intense electricity lights that shone from the nearby treasury building to identify the accused during the incident. That he saw three assailants but which he did not record in statement. That he did not give a description of his attackers to the police. That Mr. Sergeant Jason Maelo issued to him with the gun. That he did not describe the assailants to the police. That Mr. Sergeant Jason Maelo issued him with the gun and that he did not tell them that he had been attacked by a man and a woman. That he did not know anyone with the name Pamela Wambia, since the assailants attacked from behind. Further, he stated that he struggled with one of the assailants. That they took away the gun. That they left him unconscious.

On re-examination, he stated that there was intensive electricity lights from the nearby treasury building that enabled him to identify the accused who was in the dock.

23. The evidence of PW1 was backed by that of his colleague **No. 220056, APC 19950550660 David Kiptoo (PW4)** who had left him behind and went ahead to the office and that on being alerted by a member of public who had

witnessed the incident, he rushed to the scene and found that Sirar had been injured, bleeding from his head and was unconscious and that his phone together with the rifle had been snatched. That he alerted his superiors who came and took him to hospital. That it was a walking distance of 300 – 400 metres from the armory to Siaya County Commissioner’s residence. It was not regular for officers to depart for work place at different times. That the complainant was armed with AK 47 rifle. That a civilian saw the officer being attacked and who upon reported the matter to the police. That the complainant had been assaulted, unable to talk and that he had to be operated on. That the attackers had trailed the complainant and that they were on a motor cycle, then hit him and rode away. That he could not recount what had happened and that he had been robbed of a gun.

24. **Brian Chengek Chemeng (PW5)** of Practice ID No. 2265 and a holder of Diploma in Clinical Medicine and Surgery testified that he is a clinical officer working at Siaya County Referral Hospital for the past eight years. That he has a P3 form for Sirar Saitoti aged thirty (30) years old which was filled by his colleague Kennedy Opiyo and whom they have worked with for 6 ½ years and that he was conversant with his handwriting and signature. He stated that the first treatment was on 12/11/2019 and then the complainant was transferred to Jaramogi Oginga Odinga Hospital on 12/11/2019. That he was in jungle green uniform which was

blood stained. That it was alleged that he had been assaulted on 12/11/2019 at 2000 hours by unknown people within Siaya Township and was left unconscious. That the patient was in pain but was stable. That there were healing extensive cut wounds with multiple bruises on the left side of the head and face. That there were also multiple bruises on the back and stiffness. That on the upper limb, there was a deep cut wound, the right hand had a cut wound which was deep and the right-hand tentacles were ruptured. That the lower limbs were normal and that the injuries were four (4) weeks. That the probable weapon used to cause the injuries was a sharp object. The wounds were stitched and he was given medication as per the P3 form which was signed and stamped by the hospital's stamp on 16/12/2019 and that X-ray was done. That the degree of injury was assessed to be grievous harm.

25. **Force No. 237289 Joseph Kinuthia (Chief Inspector)** (**PW6**) testified that this case was reported on 12/11/2019 that Sirar Saitoti had been robbed of his official gun at the time he was going to work. That he was injured during the robbery. That they took the complainant for treatment and commenced investigations. That they called for the complainant's work roster and gun register for the date of the incident and recorded witness statements. Further, he stated that on 26/11/2019 they received information that some people had been found with a gun and that they went to Busia. That they found out the gun serial No. 4849372

had been found at Busia and which had been robbed from the complainant herein. That he went to Busia Court and requested that the accused be brought to Siaya for the police identification parade which was to be carried out by IP Kibor. That the 1st Appellant accepted to attend the said parade whereas accused 2 and 3 Appellants objected. That the complainant one Sirar Saitoti PW1 positively identified the 1st Appellant on that police parade. That Saitoti (PW1) positively identified the gun as the one he had been given to go work with and that the gun was taken for ballistic analysis and a report thereto was in the police file. That he recorded the witness statement together with his investigations and made out his directions that the Appellants had attacked the complainant, injured him and snatched his official gun and escaped to Busia. That he handed his file to the DPP for further directions and that the gun was before court. That PW1 had been given the gun for his official work and that it belonged to the Government of Kenya vide the duty roster and that he produced the firearms register as exhibits 1 and 2.

26. Force No. 237371 Inspector Hillary Kibor (PW2)

testified that he is from Siaya Police station. That on 13/12/2019, he was requested by Inspector Kinuthia of DCI Siaya to assist him in conducting an IP parade in a robbery with violence case. That there was one witness who was to appear on that parade - APC Sirar Saitoti of CIPU Siaya Headquarters. That he informed both the parties to be

involved of the exercise but it was only 1st Appellant who agreed to participate. That PW1 positively identified him by touching him. That he inquired from the 1st Appellant whether he was satisfied with parade exercise who replied that he wasn't satisfied as PW1 had seen him earlier.

On cross examination, he stated that the complainant was not at the police cells or the place where police identification parade was carried out prior to the exercise. That he took all precautions three days prior to ensure that PW1 did not see the suspects prior to the exercise.

27. The Appellants have contended that they were not properly identified and that the witnesses who allegedly identified them at the parade did not give their description to the police when they first reported. The court is now called upon to analyse the evidence so as to confirm whether the identification conducted was proper and safe to be relied upon so as to ensure that there was no possibility of a miscarriage of justice. The Court of Appeal in **Wamunga Vs Republic [1989] KLR 426** held that it is trite law that where the only evidence against a Defendant is evidence of identification or recognition, the trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction. Again, in **Nzaro Vs Republic [1991] KAR 212** as well as **Kiarie Vs. Republic [1984] KLR 739** the Court of Appeal held that evidence of

identification recognition at night must be absolutely watertight to justify a conviction. In **Republic Vs Turnbull & Others [1973] 3 ALL ER 509** the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness as follows:

“ ...the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way...? If only occasionally had he any special reason for remembering the accused? How long elapsed 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? ... recognition may not be reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

28. The conduct of identification parades was considered by the Court of Appeal at Nyeri in **John Mwangi Kamau vs. Republic (2014) eKLR** where Visram, Koome and Odek JJA expressed themselves as hereunder:-

“15. Identification parades are meant to test the correctness of a witness’s identification of a suspect. See this Court’s decision in John Kamau Wamatu -vs- Republic - Criminal Appeal No. 68 & 69 of 2008. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but not that DW1, CPL John Makumi (Cpl John), in producing the Occurrence Book testified that the incident was recorded as OB. No 45 of 24/6/2003; the assailants’ were never described in the said report. We also not that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. in Gabriel Kamau Njoroge vs. Republic (1982- 1988) 1 KAR 1134, this Court observed: -

“A dock identification is generally worthless and the court should not place much reliance on it unless this has been proceeded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.

16. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the Appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequences of the said failure? In Nathan Kamau Mugwe -vs- Republic Criminal Appeal No. 63 of 2008 this Court faced with a similar situation expressed itself as follows: -

“As to the complaint in ground six that the witnesses had not given to the police the description of the Appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL’s case supra the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness should be ASKED. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence. Yet if he (witness) saw that person again, he would be able to

identify him. it would be wrong to deprive such a witness of an opportunity of properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again, it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the Appellant, his evidence with regard to the identification parade ought to have been rejected.

- 17. Based on the foregoing, we are of the considered view that the failure to given the description did not invalidate the identification parade. We find the issue that falls for our consideration is the weight to be attached to the*

said identification evidence. On the issue of whether the identification parade was properly conducted we can do no better than to reproduce this Court's observations in David Mwita Wanja & 2 Others Vs. Republic Criminal Appeal No. 117 of 2005:-

"The purpose for and the manner in which, identification parade ought to be conducted have been subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get right. As long ago as 1936, the predecessor of this court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R V Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspect of identification parade since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424.

" It is not difficult to arrange well conducted parades. The orders are clear.

It properly conducted, especially with the independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court.

Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course a suspect is only identified at an improperly conducted parade. It will be concluded by the witness that the man in the dock is the person accused of the crime; and it will be difficult if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”

Indeed, Police Form 156 which is designed pursuant to Force Standard Orders issued by the Commissioner of Police under Section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant

to this case, Standing Order 6(iv) (d) and (n) state as follows:

“6 (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail:-

We concur with the two lower courts that the identification parade was properly conducted. We also note that each witness identified the Appellant as the assailant who was armed with the pistol. Therefore, there was corroboration of the identification evidence. We are of the considered view that the identification evidence was positive and free from error.”

57. The Court of Appeal again and more recently further expressed itself on this aspect in **Douglas Kinyua Njeru vs. Republic (2015) eKLR** as under:-

“20. Identification parades are meant to test the correctness of a witness’s identification of a suspect. See this court’s decision in *John Kamau Wamatu -vs- Republic - Criminal Appeal No. 68 & 69 of 2008*. In *Mwangi Mahita -vs. Republic (1976- 80) 1 KLR 153* this Court held:

“Whether or not a parade is so irregular as to necessitate being disregarded, is in our view a question of degree which has to be decided in light of the circumstances of this case.”

Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. The Appellants herein contents that the failure to do so rendered the identification parade worthless. As to the consequences of such a failure it was held in the case of **Nathan Kamau Mugwe vs. Republic Criminal Appeal No. 63 of 2008** the Court held that it would be wrong to deny the police an opportunity to put such a suspect on a parade to see if the witnesses can identify him and hence the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration could be the weight to put on the evidence regarding the identification parade and therefore the failure to give the description does not invalidate the parade.

PW4 gave evidence of how the identification was conducted. He testified that the 1st Appellant was placed among a group of nine parade members who comprised of persons of similar height and complexion. The 1st Appellant did not object to the manner in which the parade was conducted save only that he gave his final remark

that he was not satisfied because the witness had seen him earlier but did not elaborate further on that. As the 1st Appellant is the one who made the allegation, it behooved upon him to present evidence in that regard. He did not do so and hence I find that the parade was properly conducted as regards the 1st Appellant and therefore his identification was safe and free from error.

29. The evidence of PW1 is that he was able to identify the 1st Appellant as among the three persons who ambushed him from behind and assaulted him and later snatched his rifle. He stated that there was enough security lighting at the scene which was near the treasury building and that he clearly saw the 1st Appellant. Indeed, PW1 did not identify the 2nd and 3rd Appellants who were later tracked and traced in Busia County where they led police officers in the recovery of the stolen AK 47 rifle. The complainant stated that the 1st Appellant's accomplices stood nearby in a dark corner. It was the evidence of Pc Willy Kiplagat (PW4) that the 2nd and 3rd Appellants led the police officers in the recovery of the stolen firearm and that they were arrested and placed in custody and afterwards the 1st Appellant was also arrested. Even though the 2nd and 3rd Appellants were not identified at the scene, the doctrine of recent possession must come into play. They are the ones who led the police to where the stolen gun was recovered. The Courts have time and again held that before it relies on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be

positively proved and that certain ingredients must be established namely: that the property was found with the suspect; that the property is positively identified as a property of the complainant; that the property was stolen from the complainant and that the property was recently stolen from the complainant. Indeed, the stolen gun was recovered soon after the incident of robbery (after one week). It was the evidence of PW3 that acting on a tip off, they arrested the 2nd and 3rd Appellants at the at the Busia-Uganda border and escorted them to Busia police station. That it was the 1st Appellant who led them to the 3rd Appellant and this was following a robbery incident that had taken place at Roots Hotel where one Evan Voya was killed and that it was the 1st Appellant who led them to Manko estate where the said Appellant worked as a caretaker and who led them to the recovery of the stolen gun that had been robbed from the complainant herein. This together with the evidence of the complainant then leaves no doubt that all the three Appellants were placed at the scene of crime and that their defence did not cast doubt upon the evidence of the Respondent which was quite overwhelming against them.

30. The Appellants have tendered defence of alibi and maintained that they were not at the scene of crime on the alleged date. The 1st Appellant maintained that he was then away in DRC and later travelled through Ruanda to Kenya on 26/11/2019 only to be arrested in Busia when he went to the police to follow up on a case of his brother who had been

killed by police in the years 2011. He produced the bus fare receipt issued by Rolex Express as an exhibit. I find that even though there was a bus fare receipt, the same is put into doubt when the same 1st Appellant is the one who led the police to the recovery of the stolen gun from the complainant on 12/11/2019 in Siaya. It is clear that the 1st Appellant was already in Kenya by that time and that if he dashed off to Ruanda after the incident and then came back on 26/11/2019 he was still placed at the scene because the date crucial for the purposes of the case was 12/11/2019. Again, it is not that difficult for one to acquire such a document. I am therefore not satisfied by the 1st Appellant's alibi defence. As regards the 2nd Appellant, his case is that he was a hawker selling household goods and was arrested on allegation that he had given a customer fake money while the 3rd Appellant claimed that he had been involved in a traffic offence whereby his vehicle hit another vehicle belonging to the Busia DCIO only to be charged alongside the other Appellants. In the case of Patrick Muriuki Kinyua & Another Vs Republic [2015] KECA 1000 (KLR) it was held that an alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged. Again, in the case of **R Vs Sukha Singh s/o Wazir Singh & Others [1939] 6 EACA 145** the court held as follows:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as

soon as he can because, firstly, if he does not bring it forward there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”

Looking at the Appellants alibi as juxtaposed with the evidence tendered by the Respondent, it is clear that the said alibi defences did not dislodge or cast doubt upon the evidence of the prosecution which was quite overwhelming against the Appellants who were squarely placed at the scene of crime. The 1st Appellant’s alibi defence that he had been framed because of pursuing the case of his brother who was killed by police in 2011 is preposterous in that he was the one who later led police to the discovery of the stolen gun and implicated the 3rd Appellant. The 2nd Appellant’s claim that he was an innocent hawker who was alleged to have given a customer fake money was also not convincing in that the alleged customer did not feature at all in the proceedings or via an OB. Further, the 3rd Appellant’s claim that he was charged because he had hit a vehicle belonging to the DCIO was also not believable since he was implicated in the crime over possession of the stolen gun and thus placed at the scene of crime. Consequently, the finding by the trial court on conviction was quite sound and must be upheld.

31. As regards sentence, it is noted that the trial court ordered each of the Appellant to serve a sentence of life imprisonment. Indeed, the sentence imposed by Section 296(2) of the Penal Code is a sentence of death. However, following the decision of the Supreme Court in **Francis Karioko Muruatetu & Another Vs. Republic[2017] eKLR** the mandatory nature of death sentence was declared unconstitutional and that the Courts have been permitted to exercise discretion after receiving mitigating circumstances from offenders and thereafter impose the appropriate sentence. However, the Court could as well impose a sentence of death if circumstances warrant it. It is noted that the circumstances of the offence were quite serious as the complainant almost lost his life following the robbery incident. He survived death by the teeth of his skin. The offence was serious and aggravated which called for a deterrent sentence. I find that the sentence imposed was not excessive in the circumstances. It is noted that learned counsel for the Respondent has filed a notice of enhancement of sentence from life imprisonment to death sentence. However, the same was not served upon the Appellants to react thereto either orally in court or through their submissions. Indeed, none of the parties herein submitted on that issue and hence, iam inclined not to interfere with the sentence imposed by the trial court as the same is neither excessive nor harsh. The same must be sustained.

32. In the result, it is my finding that the Appellants' appeal lacks merit. The same is dismissed.

Dated and delivered at Siaya this 13th day of March 2026.

D. KEMEI

JUDGE

In the presence of:

Robert Seraphine Ogalle.....1st Appellant.

Michael Odongo Wesonga.....2nd Appellant.

Ali Juma alias Henry Lawi.....3rd Appellant.

Soita.....for Respondent.

Maureen.....Court Assistant.