

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CRIMINAL APPEAL NO. E060 OF 2023**  
**AS CONSOLIDATED WITH CRIMINAL APPEALS NO. E062 OF 2023,**  
**E001 OF 2024 AND E016 OF 2024**

**DAVID SIKUKU WASIKE.....1<sup>ST</sup>**

**APPELLANT**

**GEORGE NJUGUNA WAMBUI.....2<sup>ND</sup>**

**APPELLANT**

**SAMUEL MWANGI WAMBUI.....3<sup>RD</sup>**

**APPELLANT**

**MARY WANJIRU MBURU alias SHIRO.....4<sup>TH</sup>**

**APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**RESPONDENT**

**(Being appeals from the conviction and sentencing of Hon. Eunice Kelly (PM)  
in Naivasha CMC Criminal Case No. E28 of 2019)**

**JUDGMENT**

1. The four Appellants were arraigned before the Principal Magistrate's Court at Naivasha in Criminal Case No. E28 of 2019, charged with two counts of the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code.

2. The particulars of the offence in the first count were that on the night of 27<sup>th</sup> and 28<sup>th</sup> December 2018, at Ngomongo Estate in Gilgil Sub-County within Nakuru County, the Appellants, jointly with others not before the court, while armed with dangerous weapons namely a pistol, swords and rungun, robbed Martha Wambui Muhoho of cash Kshs. 13,600/-, one LG television set (49"), one 6kg gas cylinder, one Lenovo small laptop, one woofer, and two mobile phones make Neon Plus and X-Tigi, all valued at Kshs. 70,000/-, and that at the time of such robbery the Appellants used actual violence against the said Martha Wambui Muhoho.
3. In the alternative to the first count, the 1<sup>st</sup> Appellant was charged with the offence of handling stolen goods contrary to section 322(1)(2) of the Penal Code. The particulars of the offence were that on 26<sup>th</sup> March 2019, at Teachers B in Gilgil Township within Nakuru County, the 1<sup>st</sup> Appellant, otherwise than in the course of stealing, dishonestly retained one LG television set (49") serial number 505KCMR5A467, one Sony woofer, one padlock make Baugu, and one mobile phone make Neon serial number 351990100086864, knowing or having reason to believe them to be stolen goods.
4. The second count was also that of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The particulars of the offence were that on the night of 27<sup>th</sup> and 28<sup>th</sup> December 2018, at Ngomongo Estate in Gilgil Sub-County within Nakuru County, the Appellants, jointly with others not before the court, while armed with dangerous weapons namely a pistol, swords and rungun, robbed Ann Njeri Muhoho of cash Kshs. 800/-, two mobile phones make Samsung J1 and Tecno Y2, one pair of shoes, and one school bag, all valued at Kshs. 28,200/-, and that at the time of such robbery they used actual violence against the said Ann Njeri Muhoho.

5. The Appellants pleaded not guilty to the charges, and the matter proceeded to a full trial, during which the prosecution called eight (8) witnesses. Their evidence may be summarized as follows:
6. Ann Njeri Muhoho testified as PW1 and recounted that on 28<sup>th</sup> December 2018 at around midnight, she was asleep in a room separate from those used by her mother and other siblings when someone woke her up with flashlight directed at her face. She was threatened not to speak or do anything by three people who escorted her to her mother's bedroom. They ordered her to get into her mother's bed and cover herself, after which they went to another bedroom where her two sisters were sleeping.
7. The witness said that the intruders took their phones and ordered her and her two sisters to sleep on a mattress, giving them blankets to cover themselves. About two hours later, they asked each of them for their M-Pesa PINs, which they provided. She clarified that the phones taken from them were a Samsung J1, a Neon Kicker, and a Tecno Y2.
8. When they could no longer hear any movements, her mother switched on the lights and immediately switched them off. When they switched the lights on again about ten minutes later, they realized that the intruders had left. She noticed that several items were missing from the house, including an LG television set (49"), a woofer, speakers, a 6kg gas cylinder, and a Lenovo laptop.
9. She further stated that Kshs. 800/- was withdrawn from her bank account, Kshs. 500/- from her M-Pesa, and Kshs. 4,000/- was borrowed from M-Shwari. The intruders also withdrew Kshs. 10,500/- from her mother's phone and took Kshs. 3,600/- from her mother's wallet.
10. Thereafter, they went to a neighbor's house where she borrowed a phone and contacted her father and a friend, and also locked her phone. Later in the morning, they reported the incident at Gilgil Police

Station. She stated that she did not clearly see the faces of the attackers as she was shaken, and that one of them had a mask on.

11. On cross-examination by the 4<sup>th</sup> Appellant, she stated that she did not see any lady among the attackers.
12. PW2, Martha Wambui Muhoho, testified that on 27<sup>th</sup> December 2018 she was at home with her five children. At about 9:30 p.m., they had supper and thereafter she locked all the doors to her four-bedroom house before retiring to bed. At around midnight, she heard voices outside and became apprehensive that they were under attack. She opened the door and saw three men, one armed with a gun while the other two were holding machetes. They had torches which they flashed at her face. When she attempted to scream, they forced her to keep quiet.
13. They demanded money from her and she gave them Kshs. 3,600/- which she had in her handbag. They then asked for her phone which was charging. When she went to retrieve it for them, they proceeded to her daughter's bedroom, brought them to her bedroom and took their phones, after which they demanded their M-Pesa PINs.
14. After some time, when she could no longer hear any movement from the intruders, she switched on the lights but her daughters asked her to switch them off as the attackers might still be around. After a while she switched the lights on again and they went to the sitting room to check what was missing. She found that the following items were missing: an LG television set (49 inches), a woofer and speakers, a gas cylinder, and school bags. She stated that the intruders also took several mobile phones. She identified a Neon Plus mobile phone, a padlock, and photographs of a television set and woofer as items that had been taken from her house on the material night. She further testified that the intruders withdrew Kshs. 10,500/- from her M-Pesa account and borrowed Kshs. 5,500/- from her M-Shwari account.

15. She testified that she saw the faces of the attackers. She described the one armed with the gun as plump and brown in complexion and whom she identified on the dock as the 2<sup>nd</sup> Appellant. The second was slim, dark and tall, and she stated that he was wearing grey cap and navy-blue trousers and had a blanket around his neck. She further stated that the third attacker had worn a mask and that he was short and slim. She added that on one occasion while at Chawaka Supermarket, she saw the 2<sup>nd</sup> Appellant walk in, whereupon she froze in fear and left the premises.
16. On cross-examination by the 4<sup>th</sup> Appellant, she stated that the attacker who had worn grey cap and navy-blue trousers, and who was present in court, was the one who asked for their M-Pesa PINs after taking their phones.
17. On cross-examination by the 3<sup>rd</sup> Appellant, she stated that she described the features of her attackers to the police, that she did not attend any identification parade, and that she was never shown photographs of any suspects.
18. On cross-examination by the 2<sup>nd</sup> Appellant, she stated that he was the one armed with the gun and that he was the one who took money from her handbag. She further stated that he was the one who brought her children from their respective rooms. She added that she was able to see him with the aid of the torchlight and the light from the phone when he was keying in the M-Pesa PINs. She further testified that he was the same person she later saw at the supermarket a few days after the attack and that he had been wearing a navy-blue jumper, while during the attack he had worn a blue jacket.
19. On re-examination, she stated that she identified the suspects using their own torchlights and that when they were asking for the M-Pesa PINs they switched on the torchlights. She stated that they were close to her daughter and that she was able to see their faces. She added

that she did not cover herself with a blanket as instructed by the suspects adding that the 2<sup>nd</sup> Appellant had a gun and that the 3<sup>rd</sup> Appellant had worn the jacket, trousers and blanket that he had in court.

20. She further testified that she had been receiving threats warning her not to come to court in relation to the matter.

21. PW3 was Susan Nduta Nderitu who testified that she operated an M-Pesa agent shop known as Wadicom Ltd Marine Shop-Highway. She stated that on 28<sup>th</sup> December 2018, when she opened her shop at about 6:00 a.m., she noticed a withdrawal request of Kshs. 10,500/- by one Martha Wambui Muhoho from her M-Pesa handset. At around 7:30 a.m., the 4<sup>th</sup> Appellant, who was well known to her as a customer, came to claim the money. However, she declined the request and instructed her to bring the National Identity Card of Martha Wambui Muhoho or have her appear in person. The 4<sup>th</sup> Appellant claimed that Martha was her cousin. Despite the 4<sup>th</sup> Appellant insisting that she needed the money as she was travelling to Eldoret, PW3 maintained her position. The 4<sup>th</sup> Appellant further told her that she knew her agent number and that she had given it to the said cousin.

22. She testified that the 4<sup>th</sup> Appellant never returned to collect the money, although she continued to visit the shop and purchase other items as a customer. On 4<sup>th</sup> January 2019 at about 9:30 a.m., police officers from the DCI visited her shop with a statement seeking confirmation as to whether Kshs. 10,500/- had been withdrawn from her agent line on 28<sup>th</sup> December 2018, which she confirmed. She then informed them that the 4<sup>th</sup> Appellant had attempted to claim the money, although she had not given it to her.

23. On cross-examination by the 4<sup>th</sup> Appellant, she stated that she had known her for about one year as her customer but did not know her beyond that. She further stated that the withdrawal had been made at

around 2:00 a.m. She added that the withdrawal request remained on her phone for six days but she did not call customer care or contact Martha Wambui Muhoho. She also testified that although Safaricom supervisors visit M-Pesa outlets twice a month, she did not bring the issue to their attention.

24. On re-examination, she stated that she lived about 100 meters from the 4<sup>th</sup> Appellant's home and that this is how she came to know her name and the fact that she was her customer. She added that she had no reason to call Martha Muhoho because the 4<sup>th</sup> Appellant had informed her that she was her cousin.
25. PW4 testified that she was a Form Two student at Gilgil Day High School who was on the night of 27<sup>th</sup> and 28<sup>th</sup> December 2018, at home and had gone to bed at about 10:00 p.m. At around midnight, she saw two men passing along the corridor, as her bedroom door was open. She stated that the corridor lights were on and that she woke up and switched on the bedroom lights. The two men then went to her sister's bedroom and brought her sister to her room. One of the intruders flashed a torch at her and asked her to switch off the lights, which she did.
26. They then took them to their mother's bedroom, where they were ordered to lie down and were covered with blankets with one of the intruders remaining behind to guard them. The intruders demanded their phones, M-Pesa PINs, and money. Thereafter, the intruders left the house and the family went to their neighbor's house to seek assistance.
27. She stated that one of the attackers was brown in complexion and armed with a gun. Another had covered his mouth with a Maasai leso, while the third attacker had a mask on his face. She identified the 2<sup>nd</sup> Appellant as the brown, short, medium-sized attacker. She added that the one who had covered his mouth with a Maasai leso was tall, dark

and slim, although she was not certain whether he was among the accused persons. She stated that the Maasai lesa was green in colour and identified it as the one produced in court. She further testified that the attackers stole an LG television set (49 inches), four mobile phones, a laptop, and a 6kg gas cylinder.

28. On cross-examination by the 4<sup>th</sup> Appellant, she stated that she did not see any lady among the attackers.

29. On cross-examination by the 3<sup>rd</sup> Appellant, she stated that she was able to see the attackers with the aid of the torchlights and the light from the phones. She further stated that when she later went to the police station, she was shown photographs of suspects and that she positively identified one of them, while she was not certain about the other.

30. On cross-examination by the 2<sup>nd</sup> Appellant, she stated that she saw his face while in her mother's bedroom adding that it was the attacker who had covered his mouth with a Maasai lesa who asked for their M-Pesa PINs. She further stated that he was armed and that it was her mother who told her that the weapon he was carrying was a gun.

31. On re-examination, she stated that the 3<sup>rd</sup> Appellant was among the attackers and described him as dark, tall and slim.

32. PW5 testified that he was a boda boda operator, who was in the early January 2019, at about 6:00 p.m., approached by the 1<sup>st</sup> Appellant, whom he had known for about two months, approached him, while he was at the Posta stage to have some goods transported from site estate. The 1<sup>st</sup> appellant was in the company of another person who was slim, tall and dark. The two greeted him and walked away, but returned about thirty minutes later while eating roasted maize.

33. PW5 testified that he carried the friend to 1<sup>st</sup> accused on his motorcycle and they proceeded to a certain plot where they met another person who handed them a large television set wrapped in

cloth together with other items packed in a sack. They asked him to transport the items to Ebenezer, and he was paid Kshs. 100/- for the trip.

34. He further testified that later the 1<sup>st</sup> Appellant's brother, by the name of Moses, approached him and inquired whether he had transported some goods for the 1<sup>st</sup> Appellant, to which he responded in the affirmative. The brother warned him against saying so, stating that the 1<sup>st</sup> Appellant risked going to jail. When he later heard from a colleague that the police were looking for his motorcycle, he presented himself at the police station and narrated to them what had transpired.
35. On cross-examination by the 1<sup>st</sup> Appellant, he stated that the friend whom the 1<sup>st</sup> Appellant had asked him to carry directed him to stop at a certain house, after which the friend emerged carrying a large television set and other items in a sack. He added that he did not know that the goods had been stolen.
36. PW6 testified that because he owned a motorcycle, he was in December 2018, contacted by the 1<sup>st</sup> Appellant with information that he was travelling upcountry and had a friend who had some goods he was to transport to Nairobi, but that his vehicle had broken down in Gilgil. The 1<sup>st</sup> appellant requested PW6 to pick the goods from Framjo-Gilgil Highway and keep them at his house until he could collect them later.
37. The 1<sup>st</sup> Appellant insisted that he should go immediately, but PW6 maintained that he would be available only after 5:00 p.m. later that day at around 6:00 p.m., he received a call from a person who stated that he had obtained PW6's number from the 1<sup>st</sup> Appellant. PW6 then proceeded to the Gilgil Highway, where he met the 1<sup>st</sup> Appellant's friend, who had with him a large television set wrapped in cloth and a 90 kg bag. PW6 transported the items to his own house at Site Estate

and was paid Kshs. 50/-. He added that a day later, the person who had given him the goods returned to collect them.

38. PW7 testified that he was one of the investigating officers. He recalled that on 28<sup>th</sup> December 2018 at 9:00 a.m., it was reported that a robbery had occurred on the night of 27<sup>th</sup> and 28<sup>th</sup> December 2018 at the house of PW2 in Ngomongo Estate, Gilgil, near NYS. PW2 reported that she and her children had gone to bed at 9:30 p.m. and were awakened in the middle of the night by voices. She screamed but was told to keep quiet. She saw two persons in the bedroom, but could hear movements in the table room. Her three children were then brought to her bedroom and they were asked to give money. She disclosed that she had Kshs. 3,600/- in her purse. A mattress was brought, and her daughters were asked to sleep on it, covered with a blanket. The intruders also demanded their phones and later their M-Pesa PINs. She stated that the robbers pressed the touchscreens, allowing her to see them inputting numbers. Later, it was discovered that the phones had been used to take loans from M-Shwari and to withdraw money.
39. After the robbers left, PW2 contacted her husband, who was in Bungoma, and informed Safaricom through their customer care line. She then obtained her M-Pesa statements and discovered that a loan of Kshs. 4,500/- had been taken using one of the lines and that Kshs. 10,500/- had been withdrawn from Wadicom Ltd Marine Shop, Gilgil Highway.
40. The witness added that they went to the shop and met the owner, who confirmed the withdrawal and informed them that Mary Wanjiru Mburu, the 4<sup>th</sup> Appellant, had come to claim the money but insisted that she must appear with the National Identity Card of PW2. The attendant texted Mary to go to the shop, at which point she was arrested. The 4<sup>th</sup> Appellant informed them that Njuguna had instructed her to collect the money.

41. PW7 further stated that PW2 described two of the attackers to them, one as brown, heavy-set, and medium height, and the other as wearing a grey cap with black writing, dark bluish trousers, and a red line on the tracksuit. He testified that there had been a spate of robberies in Gilgil and Naivasha, and the 3<sup>rd</sup> Appellant had been mentioned in an incident in Engineer. The 4<sup>th</sup> Appellant also stated that Njuguna was with her when the money was sent.
42. He further stated that at the time of the 3<sup>rd</sup> Appellant's arrest, he was wearing clothes described by PW2; a green cap with green writing, and he carried a paper bag containing a dark blue tracksuit with white and red stripes and a Maasai shuka. He identified the cap, tracksuit, and shuka as those produced in court, clarifying that the 3<sup>rd</sup> Appellant had not worn them at the time of his arrest but that they had been in a recovered carrier bag.
43. He stated that they did not conduct an identification parade for the 3<sup>rd</sup> Appellant because PW2 feared for her life and had moved to her husband's home in Bungoma.
44. Regarding the 2<sup>nd</sup> Appellant, he stated that he had been arrested by DCI Naivasha in connection with other crimes based on the fact that he matched the description given of him; brown, slightly heavier, and of medium height. Although there had been planned an identification parade for him, he declined, stating he had already been photographed. PW7 added that during interrogation, the 4<sup>th</sup> Appellant disclosed that she had been instructed by the 2<sup>nd</sup> Appellant to withdraw the money.
45. The witness further testified that, through Safaricom data, they discovered that one of the stolen phones, Neon, serial number 351990100086864, had been traced to Samson Wasike Wanjala, who stated that he had bought the phone from his uncle, the 1<sup>st</sup> Appellant. Samson took them to the 1<sup>st</sup> Appellant's home at Teacher's Estate, War

Cemetery, where they found a TV among other items in a single room. An inventory was taken, and the 1<sup>st</sup> Appellant signed it.

46. The police team returned the following day and recovered many unused electronics and padlocks in a sack, and the 1<sup>st</sup> Appellant again signed an inventory. PW7 stated that when the TV was stolen from PW2's home, the intruders had not taken the TV box. When the box was brought to the station, its serial number matched that of the TV (505KCMR5A467). He stated that a woofer was also recovered and has since been returned to PW2 due to its delicate nature. The items were inscribed with the name "Muhoho," PW2's husband. PW2 identified one of the padlocks recovered as hers, although the key she produced did not fit the padlock because it had been tampered with.
47. On cross-examination by the 4<sup>th</sup> Appellant, he stated that she was identified to them by PW3. He further stated that there was no data connection between the 4<sup>th</sup> Appellant and the other Appellants.
48. On cross-examination by the 3<sup>rd</sup> Appellant, he stated that the clothes and trousers were in a paper bag, but the 3<sup>rd</sup> Appellant had worn the cap and shuka. He denied that he had prepared the inventory and hoodwinked the 4<sup>th</sup> Appellant into signing it on the promise that he would keep the items safe. He further stated that they could not dust the area for fingerprints because when PW2 raised the alarm, neighbors came and interfered with the scene.
49. On cross-examination by the 2<sup>nd</sup> Appellant, he stated that although the charge indicated that the attackers stole Kshs. 13,600/-, the aggregate amount stolen was Kshs. 14,100/-. He further stated that although PW2 had said a bright torch was directed at her face, reasonably speaking, she would see the light and not necessarily the person. He stated that PW3 gave the transaction code MLSOSVAR3Q for the transaction that occurred at 2:51 a.m. on the material night, while the statement obtained from Safaricom captured the reference number as

MLSISUZIXT, and that only a Safaricom official could explain the discrepancy. He added that he did not take any photographs of the 2<sup>nd</sup> Appellant on the day of his arrest.

50. On cross-examination by counsel for the 1<sup>st</sup> Appellant, he stated that although no padlock had been named in Count 1 and Count 2, the padlock discovered with the 1<sup>st</sup> Appellant had been used to secure the complainant's gate. He further stated that he was not aware that the 1<sup>st</sup> Appellant a repairer of padlocks. He admitted that the LG TV and the Neon phone were captured in the alternative count and not in the main count.

51. PW8, Samson Wekesa, testified that sometime in February 2019, he was at his uncle's shop with a friend by the name of Brian. While at the shop, the 1<sup>st</sup> Appellant came to buy airtime. As he was serving him, he mentioned to his friend Brian that he was looking for an affordable smartphone. He stated that it appeared the 1<sup>st</sup> Appellant overheard their conversation because later that same day he returned with two smartphones.

52. PW8 testified that he liked the Neon phone, which the 1<sup>st</sup> Appellant offered to sell to him for Kshs. 2,200/-. He paid a deposit of Kshs. 2,000/-, and the balance of Kshs. 200/- a week later. He further stated that he was later arrested by the police in March 2019 in connection with the phone, and he informed the police that the phone had been sold to him by the 1<sup>st</sup> Appellant, whom he knew as a regular customer at the shop and who worked at Gilgil War Cemetery. He stated that he had known the 1<sup>st</sup> Appellant for about eight months. He further testified that it was his brother, Dan, who led the police to the home of the 1<sup>st</sup> Appellant. He added that he had no grudge against the 1<sup>st</sup> Appellant.

53. On cross-examination, he stated that he had gone to Gilgil on 20<sup>th</sup> January 2021, and clarified that he had purchased the phone in February 2019.

54. The testimony of PW8 marked the close of the prosecution's case. The trial court found that a prima facie case had been established and placed the accused persons on their defence.
55. The 1<sup>st</sup> Appellant gave sworn evidence and testified that he worked as an Assistant Station Master at the Commonwealth War Graves Commission. He stated that he had taken his annual leave on 27<sup>th</sup> December 2019 and travelled to Kakamega using Blue Line matatus, returning to Gilgil in mid-January of the following year. He clarified that he had since misplaced the ticket for the return journey to Gilgil but produced a receipt for the journey to Kakamega as D EXH 1.
56. He further testified that upon his return, a family member of John Ngaruiya, a neighbor at his workplace, by the name of Joseph Kamau, informed him that he had a school fees problem and required a loan of Kshs. 30,000/-. He asked him to provide security, whereupon Joseph offered an LG TV (49 inches) worth Kshs. 35,000/-, and he advanced him a loan of Kshs. 25,000/-. Since Joseph needed more money, he introduced him to PW8, who gave him Kshs. 2,000/-, and Joseph offered a Neon phone as security for the loan. He stated that although a loan agreement had been executed in that regard, he did not have it in court. He further clarified that the police took thirty padlocks from him and that he was forced to sign an inventory of the items found in his house. He added that while on the way to the police station he tried to tell the police that he could show them where he had obtained the padlocks, but the police declined.
57. On cross-examination, he confirmed that his counsel had not raised the defence of alibi and that he did not show the police receipts for the purchase of the padlocks. He further stated that his uniform had been stolen by one Stephen, whom he later spotted wearing it.
58. The 2<sup>nd</sup> Appellant also gave sworn evidence. He testified that in January 2018, he was with his friend Joe Kariuki, whose cousin, Joseph

Mburu, had been involved in a road traffic accident. When Joseph was discharged from hospital, he accompanied Joe to visit him at home, where they found him with his wife. His wife stepped out to get some soup but returned with DCI officers, who implicated Joseph in a carjacking incident and proceeded to arrest all three of them.

59. He stated that the police demanded Kshs. 100,000/- from him, but he and Joe managed to raise only Kshs. 5,000/- each, after which they were released and asked to send the balance later, which they did not do. He further testified that Joseph Mburu was later killed by the police and that he advised the family to report the matter to IPOA.

60. He added that later, while working with a colleague driver transporting stones, he noticed that the driver was communicating with DCI officers, who eventually intercepted them and questioned the driver. He stated that the police had a photograph of him in which he was wearing a blue jacket. He further testified that an identification parade was conducted but contended that although the investigating officer stated in court that he had conducted a parade, the parade form did not indicate the members or witnesses, and only his name appeared on the form.

61. On cross-examination, he stated that there were nine people in the identification parade.

62. The 3<sup>rd</sup> Appellant also gave sworn evidence stating that he was at his house on the night of 27<sup>th</sup> December 2018. He recalled that on 6<sup>th</sup> January 2019, he left his house at about 4:00 p.m. and upon reaching the Nyahururu-Naivasha junction, a Subaru vehicle approached and stopped. The occupants identified themselves as DCI officers. They asked for his name and informed him that he had been adversely mentioned in connection with an offence. He was then arrested and taken to Kikopey Police Post. On the 9<sup>th</sup> January 2019, the investigating officer called him from the police cells and took the two phones,

trousers, and cap he had for safekeeping at the police station, after which he was returned to the cells. He stated that he was not arrested with a Maasai lesa.

63. He added that he had been arrested for theft of a motor vehicle and carjacking, as reflected in the Occurrence Book (OB) report, which he produced as DXH 2. He added that he remained in the police cells for seven days, during which time no one identified him in relation to any offence.

64. On cross-examination, he stated that he signed the inventory indicating that a cap, a Maasai lesa, and trousers had been taken from him, and clarified that he was not forced to sign the inventory.

65. On his part, the 4<sup>th</sup> Appellant also gave sworn evidence to the effect that she worked as a waitress at a club in Chule, Gilgil. She recalled that on 28<sup>th</sup> December 2018, as she was heading home from work, she was stopped by occupants of a small car who introduced themselves as police officers. She was escorted to Gilgil Police Station and informed that she had been arrested because some suspects had stolen a motor vehicle.

66. She stated that she worked with PW3 at the club and denied that PW3 worked at an M-Pesa shop. She added that PW3 was also her neighbor and that they had worked at the club for about three months prior to her arrest.

67. On cross-examination, she stated that she was at home on the night of 27<sup>th</sup> December 2018 when the incident occurred. She testified that she would report to the bar where she worked as a waitress at 5:00 p.m. and leave at about 11:00 p.m. She added that PW3 had been dismissed from work and that they had differences, which resulted in a strained relationship between them.

68. None of the Appellants called independent witnesses. Judgment was subsequently delivered on 26<sup>th</sup> October 2023, convicting all the

Appellants on the first and second counts. For both counts, the Appellants were sentenced to fifty (50) years' imprisonment terms. The court directed that the sentences would run concurrently. In respect of the 3<sup>rd</sup> Appellant, the sentences were held in abeyance as he was already serving a prison term of ninety (90) years for other similar offences.

69. The decision aggrieved the Appellants lodged their respective separate petitions of appeal, setting out their respective grounds of appeal.

70. In his undated Petition of Appeal filed in court on 30<sup>th</sup> November 2023, the 1<sup>st</sup> Appellant seeks orders that the appeal be allowed, the conviction quashed, the sentence set aside, and that he be set at liberty. The appeal is premised on the grounds that the ingredients of the offence were not conclusively proved, that the evidence before the court only pointed to the offence of handling stolen goods, that he was not positively identified by the prosecution witnesses, that the exhibits produced by the prosecution were not proved to be connected to him, and that his sworn testimony was sufficient to displace the prosecution's case.

71. The 2<sup>nd</sup> Appellant also filed an undated amended grounds of appeal filed in court on 26<sup>th</sup> November 2024, seeking orders that his conviction be quashed, the sentence set aside, and that he be set at liberty unless otherwise lawfully held. His grounds of appeal are that the sentence meted out to him was harsh, that he was convicted without proper identification, given that the attack occurred at night, and that there was no clear evidence as to the intensity of the light used. He further contends that the key witness did not give distinct identifying features to the police.

72. The 3<sup>rd</sup> Appellant, vide an undated Petition of Appeal filed in court on 15<sup>th</sup> January 2024, seeks orders that his conviction be quashed, his

sentence set aside, and that he be set at liberty. His appeal is based on the grounds that the prosecution failed to prove the offence of robbery with violence against him beyond reasonable doubt, that he was not positively identified, and that the trial court failed to consider his defence as cogent and credible.

73. Even though both the physical file, Naivasha HCCRA No. E016 of 2024 and the Judiciary Case Tracking System do not contain the 4<sup>th</sup> Appellant's Petition of Appeal, she attended court and filed submissions insisting that she did file a petition of appeal seeking orders to have her conviction quashed and sentence set aside. The submissions capture the grounds relied upon by the 4<sup>th</sup> Appellant as being that the prosecution failed to prove its case beyond reasonable doubt, that the prosecution failed to call crucial witnesses, that her defence was not considered, and that the prosecution's case contained contradictory evidence.

#### **Response to the Appeals**

74. This file, and two others, I have handled disclose a procedure that I find to be unique to Naivasha registry alone. The respondent has responded and resisted the appeal by way of Grounds of Opposition and Replying Affidavit. I find that approach unique and strange because the law does not envisage that an appeal be responded to in the manner the respondent has done. In fact, the law anticipates that the appeal be heard and determined on the basis of only the material presented at trial and no more. Additional fact like what the respondent has put in the Replying Affidavit can only be introduced by an express leave and order of the court pursuant to an application argued in the presence or by consent of both.

75. On the other hand, Grounds of opposition ought to be limited to legal positions, and not facts, as applied to the record at trial. Because there is no basis to file the two documents, the court considers same an

attempt at sneaking additional material in an appeal unprocedurally and contrary to the law. The two documents are struck out and expunged from the court record and shall not form part of the court's consideration in this judgement.

76. In the court's view, the issues raised in the Grounds of opposition should otherwise have been filed by way of a cross appeal so that the appellants exercise their right to fair hearing in defending such cross appeal.

77. In striking out the two documents, the court foresees no prejudice to be occasioned to the respondent with a clear appreciation of the duty of a first appellate court.

### **1<sup>st</sup> Appellant's Application**

78. Further to his Petition of Appeal, the 1<sup>st</sup> Appellant, vide a Notice of Motion dated 15<sup>th</sup> January 2025, moved this court seeking leave to adduce additional evidence which had allegedly become available from Mr. Joseph Kamau alias Bengan Mekimei, John Ngera, and Shadrack Ekipara. The application was brought pursuant to the provisions of sections 358 and 150 of the Criminal Procedure Code and Articles 25, 50, 159(2), and 165 of the Constitution. The application is premised on the grounds set out on its face and the supporting affidavit of David Sikuku Wasike sworn on 15<sup>th</sup> January 2025. The grounds advanced are that the State had conceded, through its submissions and grounds of opposition, that the 1<sup>st</sup> Appellant was erroneously convicted on the charge of robbery with violence. He further stated that he sought to avail new and compelling evidence in respect of the charge of handling stolen goods contrary to section 322(1) and (2) of the Penal Code. He deponed that the said evidence had become available through Mr. Joseph Kamau alias Bengan Mekimei, who had allegedly borrowed a soft loan of Kshs. 25,000/- from him and left behind as collateral an LG Television Set (49 inches), Serial Number 505KCMR467. He further

averred that a loan agreement had been executed between him and the said Joseph Kamau alias Bengan Mekimei, and that Joseph's signature was witnessed by Mr. John Ngera, while his own signature was witnessed by Mr. Shadrack Ekipara Okimaru.

79. He further averred that since the State had conceded to the charge of robbery with violence, it would be in the interest of justice and good practice for the court to allow the new and compelling evidence to be considered during the hearing of the appeal, pursuant to sections 358 and 150 of the Criminal Procedure Code, so as to accord him a fair hearing, which cannot be limited in view of Article 25(c) of the Constitution.

80. The appeal has been canvassed by way of written submissions filed by the respective parties, which may be summarized as follows:

#### **1<sup>st</sup> Appellant's Submissions**

81. In his submissions, the 1<sup>st</sup> Appellant appears to introduce additional grounds of appeal, namely that the doctrine of recent possession in respect of the alleged stolen Neon phone did not apply to him; that the evidence of PW8 amounted to accomplice evidence and was therefore inadmissible; that crucial witnesses were not availed by the prosecution; that the prosecution failed to prove legal ownership of the alleged stolen goods by the complainant; that the trial court denied him the opportunity to rely on his alibi defence; that he was not accorded a fair hearing; and that the credibility of the prosecution witnesses was doubtful.

82. On his application for the admission of additional evidence, the 1<sup>st</sup> Appellant refers the court to the decision in **Elgood v Regina [1968] EA 274**, where the court set out the principles governing the admission of new evidence. The court held that such evidence should satisfy the following conditions: that the evidence was not available at the time of trial; that the evidence is relevant to the issues before the

court; that the evidence is credible in the sense that it is capable of belief; and that the court must consider whether, if the evidence had been adduced at the trial together with the other evidence, it might have created a reasonable doubt in the mind of the court as to the guilt of the appellant.

83. The 1<sup>st</sup> Appellant submits that the new evidence he seeks to adduce was not available at the time of trial, as the relevant documents had been misplaced between the time when his house was raided by the police and the time when he was arrested and held in custody before being released on bond. He further submits that upon being released on bond, he found that his house had been broken into, and that some of his property, including the documents he now seeks to produce as additional evidence, had been stolen. He states that he reported the matter vide OB No. 11/10/07/2019 at Gilgil Police Station (Exhibit L9). He further submits that upon conducting his own inquiries, he later traced some of the missing items to a book sale and used books store in Nakuru, where he allegedly retrieved the loan agreement.
84. He contends that if the court allows him to adduce the additional evidence, it will demonstrate that at the time of the alleged robbery he was at his rural home in Kakamega. He further asserts that a lady by the name of Caroline Nangila Okwomi, a staff member at Blue Line Travelers, can confirm this position. He also submits that he will demonstrate that the LG television set came into his possession as security for a soft loan, and that with regard to the Neon phone, he merely acted as a link between PW8 and one Joseph Kamau alias Bengan Mekimei, who allegedly sold the phone to PW8.
85. In his submissions on the appeal itself, the 1<sup>st</sup> Appellant argues that in convicting him of the offence of handling stolen goods, the trial court relied on the doctrine of recent possession, based on the evidence of PW8, whose testimony he contends was contradictory. He further

argues that section 165(c) of the Evidence Act requires the court to test the credibility of a witness, including examining whether the evidence of such a witness is consistent.

86. He further argues that the evidence of PW8 was inconsistent in several respects. In particular, he points out that PW8 initially testified that he bought the Neon phone from the 1<sup>st</sup> Appellant and used it until his brother Dan informed him that the phone had been reported stolen. He further states that PW8 indicated that his brother Dan was arrested while he himself retained the phone, but later contradicted himself by stating that the phone was taken by a lady from his brother at the police station. He further contends that PW8 later stated that his brother led the police to the person who had sold him the phone, even though he had earlier claimed that his brother did not know the person. He further contends that the witness again contradicted himself when he stated that his brother knew the person who sold the phone to him since he was a customer at the shop.

87. On the effect of these contradictions, he refers the court to the decision in **PNW v Republic [2017] eKLR**, where the court held as follows:

**“Where witnesses contradict each other, it is not for the trial court to speculate which of them is telling the truth. Apart from the question of credibility of the witness, the only other conclusion the trial court can come to, at the very least, is that the contradictions are a manifestation of doubt, the benefit of which is always given to the accused person.”**

88. As regards the woofer, the 1<sup>st</sup> Appellant contends that it was incumbent upon the police to explain how the same came into their possession. He argues that PW7, during cross-examination, testified that what was found in the 1<sup>st</sup> Appellant’s house was a Sony speaker

and not a woofer. He therefore argues that according to the inventory marked as P EXH 11, the items listed as woofer and sub-woofer were not found in his possession.

89. On his conviction for the offence of handling stolen goods, he argues that the law provides for a sentence not exceeding fourteen years, yet the trial court imposed a sentence exceeding the statutory limit.

90. With regard to his conviction for the offence of robbery with violence, the 1<sup>st</sup> Appellant argues that in convicting him, the trial court bundled him together with the other accused persons in the wording of the judgment. He cites the decision of the Court of Appeal in **Munyole v R [1985] KLR 662** for the proposition that in a joint trial involving more than one accused person, the evidence against each accused person must be considered separately and must prove the guilt of that particular accused beyond reasonable doubt. He contends that the trial magistrate failed to demonstrate the level of culpability of each accused person, which prejudiced him.

91. He further contends that none of the descriptions given by PW2 placed him at the scene of the crime.

92. He concludes by citing the decision of the Court of Appeal in **Chhabildas D. Sumaiya v R [1953] 20 EA CA 144 at 145** for the proposition that if each piece of evidence, taken separately, is capable of an innocent explanation, even though their cumulative effect may appear to suggest guilt, a conviction cannot properly be founded upon such evidence.

### **2<sup>nd</sup> Appellant's Submissions**

93. The 2<sup>nd</sup> Appellant's first ground of submission is that the visual identification was not free from the possibility of error, particularly because the alleged perpetrator was a stranger to the witnesses. He refers to the testimony of PW1, who stated that she did not clearly see the faces of the three attackers, as she was shaken during the incident

and that one of the attackers had worn a mask. He contends that such disguises significantly reduce the accuracy of identification.

94. He further contends that the prosecution witnesses did not provide any description of the attackers in the initial report to the police. In this regard, he refers the court to the decision in **Moses Munyua Mucheru v R**, for the proposition that in matters of identification, the first report made to the police ought to be produced in evidence in order to ascertain whether the witness indicated that they could identify the suspect and by what means. He further argues that an identification parade conducted after the accused persons have already been arrested and are in police custody is of limited evidential value, as witnesses may assume that the police have already apprehended the correct suspect. In support of this position, he relies on the decision in **Lemamba v Republic**.
95. He adds that none of the witnesses were able to identify the attackers due to the intensity of the torchlight used at the scene. He argues that evidence of visual identification should always be approached with great care and caution, as held by the Court of Appeal in **Joseph Muchangi Nyaga & another v Republic [2013] eKLR**. He further contends that it was not sufficient for a witness to merely state that the attacker was brown, short, and fat without further corroboration.
96. The second issue identified by the 2<sup>nd</sup> Appellant is whether the sentence imposed was harsh in the circumstances. On this issue, he submits that he was 32 years old at the time of his arrest, and that with the life expectancy for males in Kenya being about 64 years, a sentence of 50 years' imprisonment effectively means that he will spend the rest of his life in prison.
97. To emphasize the alleged harshness of the sentence, he refers the court to the decision in **Ali Abdalla Mwanza v Republic [2018] KECA 287 (KLR)**, where the court stated:

**“In considering whether the sentence of 40 years was manifestly excessive, we have taken note of the latest health profile for Kenya compiled by the World Health Organization (WHO) data for 2018, on life expectancy which is indicated as 64.4 for male and 68.9 for the females and total life expectancy average as 66.7. Of course, if one went to the specifics of the causes of death in Kenya, a fair percentage would be due to murders and other homicides but that is perhaps not for us to determine in this appeal although it has a bearing in considering sentencing as a deterrent. It is also trite that every case of sentencing should strictly be considered on its own circumstances as no one individual should be sent to prison purely to send a message to other would-be offenders.**

**In this case it is obvious to us if the appellant were to serve the entire 40 years sentence with the above life expectancy of about 67 years, the sentence would go beyond the life expectancy and in that case, it would appear manifestly excessive. We say so because the Judge did not impose a death sentence or even a life sentence. When the Judge imposed a term sentence, to us it would appear, it was meant to be lower than life sentence. It is for the aforesaid reasons that we are of the view that if the trial Judge had taken the above matters into consideration, perhaps she would have considered a lesser term than 40 years. In the circumstances we partially allow the appeal and substitute the sentence of 40 years with a term of 20 years from the date of conviction.”**

98. He further contends that in imposing the sentence, the trial court failed to take into account the period he had spent in custody since the date of his arrest, as required under section 333(2) of the Criminal Procedure Code.

### **3<sup>rd</sup> Appellant's Submissions**

99. The 3<sup>rd</sup> Appellant contends that he was neither identified by PW1 nor PW2. He submits that PW1 testified that she was not able to see the faces of the attackers, while PW2 told the court that she did not see his face. He argues that the circumstances under which PW1 and PW2 allegedly identified him were not conducive to a positive identification. In support of this submission, he refers the court to the decisions in **Joseph Ngumbao Nzalo v R [1991] 2 KAR 212** and **Wamungu v Republic Criminal Appeal No. 20 of 1989 [1989] 1 KLR**, for the proposition that a court ought to carefully examine the prevailing conditions at the time of identification in order to exclude the possibility of error.

100. The 3<sup>rd</sup> Appellant further contends that no exhibit was recovered from him, nor was any circumstantial evidence tendered to link him to the incident. He submits that according to the testimony of PW7, he was arrested wearing a cap, trousers, and a track suit, but he argues that the first report recorded in OB No. 24/27-28/12/2018 did not contain any reference to this crucial evidence.

101. On the issue of sentence, the 3<sup>rd</sup> Appellant contends that the 50-year term of imprisonment imposed upon him violated his rights under Articles 29(d) and (f) and 50(2)(p) of the Constitution. He further submits that the trial court failed to consider his mitigation, which he argues amounted to a violation of his rights under Articles 25(a), 25(c), and 27 of the Constitution.

102. The 3<sup>rd</sup> Appellant also argues that his rights under Article 50(2)(k) of the Constitution were infringed. He submits that he had requested

the recall of PW1, PW2, and PW4 under section 200 of the Criminal Procedure Code, but although the court allowed the application, the said witnesses were never availed for further cross-examination.

103. He further faults the trial court's finding that his defence, that he was at home on the night of 27<sup>th</sup> December 2018, was unbelievable, arguing that it was the duty of the prosecution to prove his guilt beyond reasonable doubt, and not his obligation to prove his innocence.

#### **4<sup>th</sup> Appellant's Submissions**

104. The 4<sup>th</sup> Appellant contends that there was no evidence adduced to prove that she was at the scene of the crime nor at the alleged Mpesa shop. She further submits that she was not found in possession of any items related to the offence at the time of her arrest.

105. She argues that there was no nexus between her and the other appellants, and that there was no communication between her and the other appellants, noting that no Safaricom call data was adduced to show any link.

106. She submits that crucial witnesses, such as a Safaricom expert, were not called to confirm that PW3 was indeed an Mpesa agent, and to clarify the agent number which formed the center of contradiction between PW3 and PW7.

107. She adds that the contradiction in the Mpesa transaction reference numbers, PW3's (MLSOSVAR3Q) versus PW7's (MLSISUZIXT), creates doubt as to whether PW3 was truly an Mpesa agent. She argues that the failure by the prosecution to call such crucial witnesses is fatal, citing **Bukenya & another v Uganda (1972) EA 549** in support of this proposition.

108. She further contends that the trial court relied on an alleged confession by the appellants, which was neither tested for admissibility nor verified as true, and did not comply with the provisions of section 25 of the Evidence Act.

109. She submits that she gave sworn evidence that was truthful, cogent, and reliable, and that her evidence was consistent with the facts and other evidence before the court.

### **Respondent's Submissions**

110. The Respondent reiterates the testimonies of the prosecution witnesses, submitting that PW2 saw the attackers, describing that one was armed with a gun, plum and brown in color, and the other was slim, dark, tall, wearing grey cap and navy-blue track trousers, which were adduced in court as exhibits. The Respondent further submits that a few days after the attack, PW2 spotted the 2<sup>nd</sup> Appellant at a supermarket and identified him, informing the police. Additionally, PW2 identified the 2<sup>nd</sup> Appellant as the attacker who had covered himself with a lesa.

111. Regarding the 4<sup>th</sup> Appellant, the Respondent contends that she was well known to PW3, the Mpesa agent, as a customer, and that she visited the shop on 28<sup>th</sup> December 2018 with the intention of withdrawing money.

112. Concerning the 1<sup>st</sup> Appellant, the Respondent submits that he was found in possession of exhibits that had been stolen on the night of 27<sup>th</sup> December 2018, and he could not explain how he came into possession of the stolen goods.

113. The Respondent prays that the court uphold the conviction and sentence of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Appellants, but set aside the conviction against the 1<sup>st</sup> Appellant and instead convict and sentence him on the alternative charge of handling stolen goods contrary to section 322(1) and (2) of the Penal Code.

**Is the 1<sup>st</sup> Appellant entitled to an order for receipt of additional evidence?**

114. At the outset, and before delving into the substantive issues raised in the appeal, it is necessary for this Court to determine the 1<sup>st</sup> Appellant's application seeking leave to adduce additional evidence at the appellate stage.

115. The application is brought, inter alia, pursuant to Section 358 of the Criminal Procedure Code which provides as follows:

**“358. Power to take further evidence**

- 1. In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.**
- 2. When the additional evidence is taken by a subordinate court, that court shall certify the evidence to the High Court, which shall thereupon proceed to dispose of the appeal.**
- 3. Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.**
- 4. Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court.”**

116. It is clear from the stipulation of the statute that reception of additional evidence must be *viva voce* and taken preliminarily before the appeal is argued and that the court other than being moved may direct same *suo sponte*.

117. In this matter, the application came after the appeal had been admitted and directions given on its disposal. That appears disruptive of the progression of the appeal but, if the court discerns that the additional evidence is crucial for the ends of justice to be met, nothing stops the court from receiving such additional evidence.

118. The principles governing the admission of additional evidence on appeal were authoritatively set out in **Ladd v Marshall [1954] 1**

**WLR 1489**, where the English Court of Appeal established a three-part test based on the elements of non-availability, relevance and credibility. In that case, Denning LJ stated as follows:

**“In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”**

119. Here home and very recently, the Supreme Court in **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others (2018) eKLR** expanded upon the principles in **Ladd v Marshall (supra)** and set out the circumstances under which additional evidence may be admitted on appeal. The Court stated:

**“...We therefore lay down the governing principles on allowing additional evidence in appellate Courts in Kenya as follows:**

- (a) The additional evidence must be directly relevant to the matter before the Court and be in the interest of justice;**
- (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;**
- (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at**

- the time of the suit or petition by the party seeking to adduce the additional evidence;
- (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;**
  - (e) the evidence must be credible in the sense that it is capable of belief;**
  - (f) The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;**
  - (g) Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;**
  - (h) Where the additional evidence discloses a strong prima facie case of willful deception of the Court;**
  - (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.**
  - (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.**
  - (k) The Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence**

**on the other. We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.”**

120. The 1<sup>st</sup> Appellant seeks to introduce a loan agreement allegedly entered into between himself and one Joseph Kamau alias Bengam Mekimei. According to the 1<sup>st</sup> Appellant, the document has only recently become available through the said Joseph Kamau.
121. The application is dated 15<sup>th</sup> January 2025, yet the judgment of the trial court was delivered on 26<sup>th</sup> October 2023. Notably, the 1<sup>st</sup> Appellant has not explained why the purported evidence could not, with reasonable diligence, have been obtained and produced during the trial. Equally unexplained is the delay of over one year after conviction before the alleged evidence surfaced.
122. One of the grounds advanced in support of the application is that, since the State has conceded the charge of robbery with violence, it would be good practice for this Court to admit the new and compelling evidence. However, it would appear that it was only after the Respondent filed its grounds of opposition that the 1<sup>st</sup> Appellant was prompted to lodge the present application.
123. The loan agreement which the 1<sup>st</sup> Appellant seeks to rely upon indicates that one Mr. Shadrack Ekipara Okimaru witnessed its execution. The record further shows that the 1<sup>st</sup> Appellant was represented by an advocate during the trial proceedings, yet no indication was given to the trial court that he intended to call any witness in support of such a defence.
124. Indeed, during the trial the 1<sup>st</sup> Appellant testified that he had received the television set as security for a loan. However, when afforded the opportunity to cross-examine PW2, who was the owner of the television set alleged to have been given as security, the 1<sup>st</sup>

Appellant expressly indicated that he had no questions for the witness.

125. In the circumstances, the Court finds that the defence relating to the alleged loan agreement lacks credibility and appears to be an afterthought introduced in an attempt to fill evidentiary gaps in the defence case.

126. Guided by the principles set out in **Ladd v Marshall (*supra*)** and **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others (*supra*)**, the Court is not persuaded that the requirements for the admission of additional evidence have been satisfied.

127. Accordingly, the 1<sup>st</sup> Appellant's application to adduce additional evidence at this stage of the proceedings is hereby dismissed.

#### **Merits of the Appeal and mandate of the Court**

128. Being a first appeal, the Court is under a legal duty to re-evaluate, re-analyze and reconsider the entire evidence on record and to draw its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify and must therefore give due allowance for that fact. See **Okeno v Republic [1972] EA 32**.

#### **Issues, Analysis and Determination**

129. From the grounds of appeal and the submissions of the parties, the following issues arise for determination:

- a) Whether the offence of robbery with violence, in both counts, was proved beyond reasonable doubt?**
- b) Whether the appellants were properly identified as the perpetrators?**
- c) Whether failure to call certain witnesses was fatal to the prosecution case?**
- d) Whether the prosecution evidence was marred by material contradictions and inconsistencies? and**

**e) Whether the sentence meted was harsh and excessive in the circumstance?**

**Whether the offence of robbery with violence was proved beyond reasonable doubt**

130. The ingredients of the offence of robbery with violence were set out by the Court of Appeal in **Johana Ndungu v Republic [1996] eKLR** as follows:

**“In order to appreciate properly as to what acts constitute an offence under section 296(2), one must consider the subsection in conjunction with section 295 of the PC. The essential ingredient of robbery under section 295 is use of 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 one 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; or**
- 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 the robbery, he wounds, beats, strikes or uses any other violence to any person.”**

131. The Court of Appeal further clarified in **Dima Denge Dima & Others v Republic, Criminal Appeal No. 300 of 2007** that the elements

of the offence under Section 296(2) are to be read disjunctively, and proof of any one of them is sufficient to establish the offence.

132. Similarly, in **Oluoch v Republic [1985] KLR 549**, the Court observed that proof of any one of the ingredients set out under Section 296(2) of the Penal Code is sufficient to sustain a conviction for robbery with violence.

133. In the present case, PW1, PW2 and PW4 were present in the house on the material night when the attack occurred. It was their consistent testimony that the intruders were more than one and armed with a gun and machetes. The Court is therefore satisfied that the ingredient that the offender be in the company of at least another and or armed with a dangerous or offensive weapon was established. The proof was beyond reasonable doubt because that evidence was never shaken by cross-examination or controverted by contrary evidence.

134. PW1, PW2 and PW4 further testified that the attackers were three in number. Although proof of only one of the ingredients under Section 296(2) of the Penal Code is sufficient to sustain a conviction, the evidence also established the second ingredient, namely that the offenders were in the company of more than one person.

135. Having established that the offence of robbery with violence was committed in the home of PW2 on the material night, the Court now turns to interrogate whether the appellants were the persons who committed the offence. Were they positively identified beyond reasonable doubt?

#### **Identification of the 1<sup>st</sup> Appellant**

136. PW1, PW2 and PW4 were unable to state whether the 1<sup>st</sup> Appellant was among the attackers. The evidence linking the 1<sup>st</sup> Appellant to the offence arose from the recovery of stolen items from his house. According to the testimony of PW7, and as confirmed in the inventory

signed by the 1<sup>st</sup> Appellant, whose signature he admitted he appended voluntarily and without coercion, the items recovered included, among others, an LG television set (49 inches) belonging to PW2, a Sony woofer which PW2 identified as hers, and a padlock also identified by PW2 as her property.

137. In respect of the 1<sup>st</sup> Appellant, therefore, the identification evidence was fortified by the doctrine of recent possession. Under the law, the doctrine of recent possession is a principle of circumstantial evidence which provides that where a person is found in possession of recently stolen property and fails to offer a reasonable explanation as to how he came by it, a rebuttable presumption arises that the person either stole the property or received it knowing it to be stolen.

138. The Court of Appeal restated the doctrine and the elements that must be established before it can be applied in **Erick Otieno Arum v Republic Criminal Appeal No. 85 of 2005 [2006] eKLR**, where it held:

**“In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”**

139. On the first limb, the 1<sup>st</sup> Appellant appended his signature to the inventory dated 26<sup>th</sup> March 2019 confirming that an LG television set

bearing serial number 306SYEVDY700 and a Sony speaker system bearing serial number 4065143 were recovered from him, among other items. The serial numbers of the recovered items matched those of the items stolen from PW2's house, and there was no dispute as to their ownership. In fact, the items were inscribed with the name Muhoho agreed to be the name of the husband to PW2.

140. The 1<sup>st</sup> Appellant attempted to raise a contradiction by contending that PW2 referred to a Sony speaker while the inventory referred to a woofer, arguing that the two were different items. However, the similarity in the serial numbers dispels the contention that the items were different. The items were stolen from PW2's house on the night of 27<sup>th</sup> and 28<sup>th</sup> December 2018 and were recovered from the 1<sup>st</sup> Appellant's house on 26<sup>th</sup> March 2019, thereby satisfying the requirement that the items were recently stolen.

141. The 1<sup>st</sup> Appellant failed to offer any plausible explanation as to how the LG television set came into his possession. Similarly, no reasonable explanation was provided regarding the woofer. With regard to the Neon phone stolen from PW2's house and later recovered from PW8, PW8 testified that he had purchased the phone from the 1<sup>st</sup> Appellant. The 1<sup>st</sup> Appellant contended on appeal that the phone had been given as security for a loan of Kshs. 2,000/- taken by one Joseph Kamau from PW8, and that he merely acted as an intermediary between PW8 and the said Joseph Kamau. This explanation appears to be an afterthought, as the 1<sup>st</sup> Appellant did not put these allegations to PW8 during cross-examination. Moreover, he had the opportunity to call the said Joseph Kamau but chose not to.

142. PW6 testified that the 1<sup>st</sup> Appellant had requested him to collect some goods from the highway, including a television set that had been covered, and to keep them at his house pending collection. PW5

also testified that in early January 2019 the 1<sup>st</sup> Appellant had requested him to transport certain goods for his friend, which included a television set. This evidence creates a nexus between the 1<sup>st</sup> Appellant and the stolen television even prior to the agreement he purported to introduce, which is said to have been executed on 17<sup>th</sup> January 2019.

143. The 1<sup>st</sup> Appellant further alleged that PW8 had travelled to Gilgil in the year 2021. However, PW8 testified that he purchased the Neon phone from the 1<sup>st</sup> Appellant in February 2019. A perusal of the proceedings confirms that PW8 was referring to travelling to Gilgil in 2021 for purposes of attending court in relation to this case.

144. Notably, thirty-four assorted padlocks were also discovered in the house of the 1<sup>st</sup> Appellant. During cross-examination of PW7, the 1<sup>st</sup> Appellant appeared to suggest that he was in the business of repairing padlocks. However, he did not mention this in his sworn testimony and later abandoned that line of defence in his subsequent submissions.

145. The doctrine of recent possession entitles a court to draw an inference of guilt where an accused person is found in possession of recently stolen property in unexplained circumstances. In the present case, the court finds that the evidence irresistibly points to the guilt of the 1<sup>st</sup> Appellant and that his explanation on how he came into possession was disjointed and not credible.

#### **Identification of the 2<sup>nd</sup> Appellant**

146. The 2<sup>nd</sup> Appellant contends that he was not properly identified owing to the circumstances under which the attack occurred, namely at night. He further argues that no evidence was tendered to demonstrate the description of the assailants contained in the initial report made to the police.

147. The importance of proper and reliable identification of an accused person cannot be overstated, as it forms the basis upon which a court may safely found a conviction.

148. In **Peter Mwangi Mungai v Republic [2002] eKLR**, the Court of Appeal stated:

**“In Owen Kimotho Kiarie v. R. Criminal Appeal No.93 of 1983, (unreported) this Court held that dock identification of a suspect is worthless unless it is preceded by a properly conducted identification parade. The principle was re-echoed in the case of Charles O. Maitanyi v. Republic [1985] 2 KAR 75. In that case it was also held that even where the dock identification is preceded by a properly conducted identification parade the evidence of a single identifying witness must be tested with the greatest care before a conviction is entered. The court there said:**

**That cannot be done unless the identifying witness had made a report as to whether he could identify the accused and given a description. His ability to identify the accused is then to be tested on an identification parade ... If one is to test the evidence with the greatest care this was the way that Court of Appeal in England in R.v. Turnbull [1976]3 ALL ER 549 saw the examination. The Judge ... examines closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, e.g. by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason**

**for remembering the accused? How long elapsed between 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 him and the accused's actual appearance...”**

149. The persons present in the house on the night of the incident were PW1, PW2 and PW4. They testified that the attackers had torches and that they interacted with the complainants' smartphones while demanding the PIN numbers. PW1 stated that she was extremely shaken during the incident and did not clearly see the faces of the attackers, one of whom had a mask.
150. PW2 testified that she saw the faces of the attackers and described the one with the gun as plump and brown in complexion, whom she identified as the 2<sup>nd</sup> Appellant. PW7 testified that in the report made by PW2 she described one of the attackers as brown, of medium height and slightly heavy. PW4 also identified the 2<sup>nd</sup> Appellant as the attacker who was brown, short and medium sized.
151. PW2 and PW4 further stated that although the incident occurred at night, the attackers had torches which enabled them to see them. PW2 testified that it was the 2<sup>nd</sup> Appellant who demanded their phones and PIN numbers and that she was able to see his face as he operated the smartphones. She further stated that a few days after the incident she saw the 2<sup>nd</sup> Appellant at Chakawaka Supermarket, whereupon she immediately left and later informed the police. The 2<sup>nd</sup> Appellant was subsequently arrested on 4<sup>th</sup> January 2019, about one week after the incident.
152. In the premises, the identification evidence, in the unique circumstances of this case, was free from error, sufficiently

corroborated, and unequivocally placed the 2<sup>nd</sup> Appellant at the scene of the robbery.

153. The Court therefore affirms the finding of the trial court that the 2<sup>nd</sup> Appellant was positively and reliably identified as one of the perpetrators of the robbery. His conviction was thus safely founded or cogent evidence of identification.

#### **Identification of the 3<sup>rd</sup> Appellant**

154. The identification of the 3<sup>rd</sup> Appellant was based on the testimonies of PW2 and PW4. PW2 testified that one of the attackers was a tall, slim, dark-skinned man who wore grey cap and navy-blue trousers, and carried a lesa. PW7 further testified that, at the time of the 3<sup>rd</sup> Appellant's arrest, he was found with the grey cap described by PW2 and PW4, and that the lesa and trousers were recovered in a carrier bag. According to the charge sheet, the 3<sup>rd</sup> Appellant was arrested on 4<sup>th</sup> January 2019, about a week after the incident, and by way of an inventory signed on 6<sup>th</sup> January 2019, he confirmed that the items had been recovered from him.

155. Given that a week had lapsed between the incident and the arrest of the 3<sup>rd</sup> Appellant, the court is of the view that identification based solely on the clothing worn was not reliable.

156. Accordingly, the court finds that the 3<sup>rd</sup> Appellant was not properly identified.

#### **Identification of the 4<sup>th</sup> appellant**

157. PW1, PW2, and PW4 were categorical in their testimonies that none of the persons who carried out the robbery was a woman. Their evidence was consistent and unshaken on cross-examination. Consequently, there was no direct evidence placing the 4<sup>th</sup> Appellant at the scene of the robbery or identifying her as one of the perpetrators who attacked the complainants.

158. The only evidence linking the 4<sup>th</sup> Appellant to the events of the material night was the testimony of PW3, an M-Pesa agent. PW3 testified that after PW2's M-Pesa funds amounting to Kshs. 10,500/- had been withdrawn during the robbery, the 4<sup>th</sup> Appellant went to her shop to collect the said amount, claiming that she had been sent by PW2 and describing herself as PW2's cousin. This evidence was not materially shaken during cross-examination.
159. In her defence, the 4<sup>th</sup> Appellant alleged that she had prior differences with PW3, whom she described as a fellow waitress at a bar, and asserted that PW3 falsely implicated her after allegedly losing her employment. However, the record shows that when the 4<sup>th</sup> Appellant cross-examined PW3, she did not put these allegations to the witness. It is a well-established principle of evidence that a party intending to impeach the credibility of a witness must confront the witness with the alleged facts during cross-examination so as to give the witness an opportunity to respond. The failure by the 4<sup>th</sup> Appellant to do so renders the allegation of a grudge an afterthought and diminishes the probative value of her defence.
160. The 4<sup>th</sup> Appellant also sought to challenge PW3's credibility by pointing out alleged discrepancies between the reference numbers produced by PW3 and those obtained from Safaricom, arguing that this demonstrated that PW3 was not a genuine M-Pesa agent and did not operate a Safaricom shop. While the court has considered this argument, the discrepancy in reference numbers, standing alone, does not sufficiently dislodge PW3's core testimony that the 4<sup>th</sup> Appellant appeared at her shop to collect the funds withdrawn from PW2's account shortly after the robbery. She however passes well as an accessory after the fact or just a conduit/front to shield the real perpetrators from contact with PW3. She was however not charged with any offence as an accessory after the fact

161. Nevertheless, the evidence on record does not demonstrate that the 4<sup>th</sup> Appellant participated in the planning or execution of the robbery, nor does it place her at the scene where the offence of robbery with violence was committed. The consistent testimony of PW1, PW2, and PW4 that none of the attackers was a woman creates a clear evidentiary gap that cannot be bridged by inference alone. In criminal proceedings, such doubt must be resolved in favour of the accused.
162. What the evidence does establish, however, is that the 4<sup>th</sup> Appellant presented herself to collect money that had been fraudulently withdrawn from PW2's M-Pesa account immediately after the robbery, falsely representing herself as PW2's cousin. Her conduct demonstrates knowledge of the unlawful transaction and facilitation of the robbers' access to the stolen funds.
163. In the circumstances, while the prosecution evidence falls short of proving beyond reasonable doubt that the 4<sup>th</sup> Appellant was one of the persons who committed the offence of robbery with violence, it does establish that she knowingly assisted the perpetrators in the realization of the proceeds of the crime. Her actions therefore amount to aiding and abetting the commission of the offence within the meaning of Section 20 of the Penal Code.
164. The sentence provided for the offence of aiding or abetting under Section 20(3) of the Penal Code states that any person who procures another to do, or omit to do, any act which, if done or omitted by the person themselves, would constitute an offence, is guilty of an offence of the same kind and is liable to the same punishment as if they had personally committed the act or omission. Such a person may also be charged with doing the act or making the omission. Accordingly, the charge and conviction of the 4<sup>th</sup> Appellant is affirmed.

**Whether the sentence meted was harsh and excessive in the  
circumstance**

165. Turning to the question of whether the sentence imposed in the circumstances of this case was harsh or excessive, the principles governing appellate interference with a sentence were articulated in **Bernard Kimani Gacheru v Republic [2002] eKLR**, wherein it was held:

**“It is now settled law, following several authorities of this Court and the High Court, that sentencing is a matter resting within the discretion of the trial court and must be determined by the facts of each case. On appeal, the appellate court will not lightly interfere with a sentence unless it is manifestly excessive in the circumstances of the case, or the trial court overlooked a material factor, took into account irrelevant material, or acted upon a wrong principle. Even if the appellate court considers the sentence heavy and might have imposed a different sentence, these alone do not suffice to interfere with the trial court’s discretion unless one of the foregoing grounds is established.”**

166. An appellate court is not at liberty to lightly interfere with sentencing simply because it would have imposed a different sentence. Interference is justified only where there is a material misdirection in law or fact.

167. In **Shadrack Kipkoech Kogo v Republic Criminal Appeal No. 253 of 2003 (Eldoret)**, this Court of Appeal observed:

**“Sentence is essentially an exercise of discretion by the trial court. For an appellate court to intervene, it must be shown that the trial court considered an irrelevant factor, applied a wrong principle, or that, absent these, the**

**sentence itself is so excessive as to constitute an error of principle.”**

168. This Court has perused the proceedings of the trial court. The mitigating factors advanced by the appellants, save for the 1<sup>st</sup> Appellant, were limited to the period they had spent in custody. The 1<sup>st</sup> Appellant additionally submitted that he was an elderly man with grandchildren. The trial court, in imposing sentence, stated that it had considered the presentence reports.

169. The sentence prescribed for the offence of robbery with violence under the Penal Code is the death penalty. The trial court had the discretion to impose up to the maximum sentence, being death penalty, but opted against both death and life imprisonment. The court reads the intention of the trial court to have been a sentence other than a life incarceration and capable of being fitted into the life expectancy of the convicts.

170. While taking notice of the ages of the three whose convictions have been upheld and the known life expectancy in Kenya, and being guided by the Court of Appeal decision in **Ali Abdalla Mwanza v Republic [2018] KECA 287 (KLR)**, the court considers the sentence to be excessive and too harsh. I consider it harsh on the 1<sup>st</sup> accused because he is acknowledged as an old man who by basic logic is not expected to leave another 50 years in custody.

171. In **Ali Abdalla Mwanza’s** case (supra) the Court of Appeal held : -

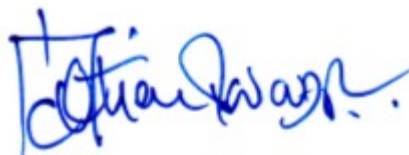
**“In this case it is obvious to us if the appellant were to serve the entire 40 years sentence with the above life expectancy of about 67 years, the sentence would go beyond the life expectancy and in that case, it would appear manifestly excessive. We say so because the Judge did not impose a death sentence or even a life sentence. When the Judge imposed a term sentence, to us it would appear, it was meant to be lower than life sentence”** (emphasis added)

172. For the 1<sup>st</sup> appellant the sentence is reduced to 20 years to be computed from the date the sentence by the trial court was imposed. That becomes the effective date because he was on bond pending trial.

173. Even for the 2<sup>nd</sup> and 4<sup>th</sup> appellants, the sentence is too long, to be reasonably fitted into their life expectancy, and thus harsh and excessive. Their term is equally reduced to 30 years to be computed from the date of their arrests and arraignment in court, being the 04.01.2019, because they remained in custody pending trial. The last two years of the term for the two shall be served on probation under the Supervision of the County director of probation, Nakuru County, or under any other officer designated by him.

174. Accordingly, while the convictions of the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> Appellants are hereby affirmed but sentences reduced as said hereinabove, the appeal of the 3<sup>rd</sup> Appellant succeeds in entirety. His conviction is quashed, and the sentence set aside. The 3<sup>rd</sup> Appellant shall be released forthwith, unless otherwise lawfully detained.

Dated, signed and delivered at Lodwar this 13<sup>th</sup> day of March 2026



Patrick J O Otieno

Judge