Ndeti & 3 others v Republic (Criminal Appeal 88 of 2020)
[2023] KECA 971 (KLR) (4 August 2023) (Judgment)

Neutral citation: [2023] KECA 971 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 88 OF 2020

MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA

AUGUST 4, 2023

BETWEEN

PATRICK NZIOKI NDETI ALIAS CAPTAIN ..... 1ST APPELLANT

PATRICK MWENDWA MUSILI ALIAS AVAI ..... 2ND APPELLANT

PETER KURIA NDEGWA ALIAS MATO ..... 3RD APPELLANT

JULIUS WAWERU MUCIRA ALIAS MANDEVU ..... 4TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court at Makueni (C. Kariuki, J.) delivered on 11th October, 2019 in HCCRA No. 72 of 2018)

JUDGMENT

1. The appellants, Patrick Nzioki Ndeti, Patrick Mwendwa Musili, Peter Kuria Ndegwa, Julius Waweru Mucira and another were charged with 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 April 9, 2018, the appellants with others not before the court while armed with dangerous weapons namely; a wheel spanner and police handcuffs robbed John Bosco Mutuku Kimuyu of Kshs 430,000 and during the time of such robbery threatened to shoot, and used actual violence to the complainant, John Bosco Mutuku Kimuyu, PW1.

2. The appellants pleaded not guilty to the charge and at the hearing, the prosecution called 8 witnesses. The trial Magistrate upon considering the evidence found them guilty, convicted them for the offence and sentenced them to each serve 30 years' imprisonment.

3. The appellants were dissatisfied by the decision and appealed to the High Court against the trial court's decision. Upon considering the appeal, the learned judge dismissed it and upheld both the conviction and the sentence.

4. The appellants were once again aggrieved by the decision of the High Court and appealed to this Court. In their separate memoranda of appeal, the appellants set out similar grounds which were, that the High Court was wrong in upholding the appellants' conviction and sentence when it failed to appreciate that; the evidence of identification was wanting since the identifying witnesses did not give any prior descriptions of the appellants to the police before the identification parade; in failing to appreciate that the appellants were subjected to a duplex charge; that the identification parade did not pass the test of Rudges' Rules; in disregarding the appellants' defence which was not rebutted by the prosecution; and finally, that the appellants' conviction and sentence did not comply with Article 50(1)(2)(h) of the *Constitution*.

5. The appellants filed joint written submissions, and when the appeal came up for hearing on a virtual platform, learned counsel for the appellants, Ms R Kiprono informed the Court that she would be relying on the written submissions in their entirety. In the submissions, the appellants faulted the concurrent findings by the two courts below and asserted that the two courts failed to find that the conviction against the appellants was unsafe for the reasons, that they were not properly identified and the reliance by the prosecution on the evidence of a single witness cast doubt as to their identification; that PW1 was the only witness to the commission of the offence, and though PW3, a boda boda rider testified that he ferried the appellants earlier on in the day, he was not at the scene of crime; that the courts below wrongly relied on his evidence to conclude that the appellants were properly identified.

6. Counsel further submitted that the positive identification of an accused is an essential element and that there required to be scrupulous compliance with the rules of conduct of identification parades. It was submitted that the evidence did not disclose that the guidelines pertaining to the identification parades were complied with because the Investigating Officer ignored the Police Force Standing Orders, and both the trial court and the High Court failed to appreciate that the identification parade was flawed.

7. Counsel further argued, that the appellants' alibi defences were not considered, yet their veracity were never challenged; that the defences displaced the prosecution's case, which rendered the conviction unsafe.

8. Learned counsel for the State, Mr O J Omondi submitted that the evidence presented by the prosecution sufficiently proved the offence of robbery with violence to the required standards; that the circumstances were adequate for proper and reliable identification of the appellants; that there was adequate interaction and conversation between the appellants and PW1 and that the hand writing expert report tendered in evidence was reliable and corroborative in all aspects to the evidence of identification as presented in the trial court.

9. The evidence that was before the trial court on the commission of the offence was that, on April 9, 2018, after PW 1, had withdrawn Kshs 430,000 from a bank for his Mpesa business, he proceeded to Kathonzweni and alighted from the vehicle. As he was waiting for another vehicle, a white Toyota Fielder stopped in front of him, and the occupants introduced themselves as police officers. They had a walkie talkie and handcuffs. They told him that he was under arrest, and when he protested, he was forcefully bundled into the vehicle, handcuffed and beaten up. The vehicle was then driven off in the direction of Wote town. He screamed for help, and a CID vehicle together with motor cyclists gave chase, whereupon, his captors pushed him out of the vehicle near river Kaiti where he was rescued still in handcuffs. He said the assailants stole his money.

10. He testified that whilst in the vehicle, he saw that the 1st and 2nd appellants who had sat in the back seat and the 4th appellant was the driver. The 2nd appellant hit him with a wheel spanner which the 3rd appellant handed to him. The 2nd appellant also ransacked his pockets, while the 1st appellant showed him his photo on his phone. He stated that he identified the appellants at the police identification parades.

11. On the same day, Peter Mutinda Nyaa, PW 3, a boda boda rider had stopped his motor-cycle at a watering point when two men, the 1st and 3rd appellants approached and requested him to take them to Itangine. He rode with them to Ocal Petrol Station and ordered fuel of Kshs 100. One man told him to fuel with Kshs 200 for which the man paid. They told him a vehicle awaited them at Itangine, but when they did not find it there, the two men told him to keep riding. At some point, he declined to ride any further, and they paid him Kshs.200. He said one of the appellants was a Kamba and the other a Kikuyu and that they had talked a lot. The 3rd appellant who had brown teeth spoke on his phone in Kikuyu. He left the two at Munyu area, and on his way back, he met with fellow boda boda operators who told him he had carried some criminals who robbed someone at Kathonzweni. He later identified them at the police identification parade.

12. Inspector Wesley Langat, PW 5, conducted the identification parades, for which he stated that he followed the laid down procedures. Samwel Kamau Mungai, PW 4, was the owner of vehicle No xxxx, a Toyota fielder white in colour which he had leased out to the 4th appellant. He identified the vehicle in court, but it bore a different registration number of xxxx.

13. Dr Emmanuel Loiposha, PW 2, identified and produced PW1's P3 form, that indicated that he had bruises on both hands and head, blunt injury on the back and injury on the right eye which he said could lead to blindness hence classified the degree of injury as 'harm'.

14. Sergeant Patrick Bwire, PW 6, received a report about a hijacking incident on April 9, 2018. They gave chase and recovered motor vehicle No xxxx, a Toyota fielder white in colour abandoned along Makueni Kakiwa dry weather road. The hijacked victim had been abandoned earlier. He recovered a bag with some clothes, a novel, 'Doing his time' with the name Patrick D Ndeti written inside, vehicle plate numbers xxxx, xxxx and a wheel spanner from the vehicle. He also recovered handcuffs from the hijacked victim.

15. Upon conducting a search of the vehicle, he found it was registered in the name of PW 4 who told him he had leased it to the 5th accused; that she did not have records to show to whom she had subsequently leased out the vehicle. Using a phone number given to him by the 5th accused, he tracked down the 1st and 3rd appellants who were arrested at Embu. The others were arrested in Nairobi. She also gave him the number xxxx registered in the names of Patrick Ndeti. Sergeant Bwire further obtained a sample of the 1st appellant's handwriting which the Government document examiner analysed, and compared with the handwriting found in the novel, and which concluded that the handwritings matched. He produced the document examiner's report.

16. In his sworn defence, the 1st appellant, Patrick Nzioki testified that on April 9, 2018, he was at his shamba with Jackson Ngila, DW 5, working up to about 1.00 pm. He later went to Kyaani market and returned home at night. On April 22, 2018, police officers alleged that he had stocked his bar with contraband liquor. He was taken to Itambo Police Post in Embu and locked up and later taken to Makueni Police Station in the company of 3rd appellant. He said the book (novel) recovered from the vehicle used in the alleged offence was not his. DW 5 stated that he knew the 1st appellant and gave similar evidence to that of the 1st appellant regarding events of April 9, 2018; that he was in the company of the 1st appellant on that day.

17. In his sworn defence, the 2nd appellant, stated that on April 9, 2018, he was in Hola area having left Nairobi on April 7, 2018 to deliver some goods. He returned to Nairobi on April 12, 2018 when police officers approached him and told him that he had transported contraband goods. He was taken to Makueni Police Station. He did not have the particulars of his business.

18. In his defence, the 3rd appellant, Peter Kuria Ndegwa stated that on April 9, 2018, he was at his electronics and gas shop in Ruiru with his employee, Lilian Wamaitha, DW 6, when he was arrested on April 22, 2018 and ordered to produce one John Kimanthi whom he had loaned some money. DW 6 gave similar evidence to that of the 3rd appellant. She further stated that the 3rd appellant was her employer and that he paid her Kshs 10,000 per month, for which she did not have any proof.

19. In his sworn defence, the 4th appellant, Julius Waweru Mucira asserted that on April 9, 2018, he was attending to his deceased wife who was admitted in hospital. He did not have any proof of his wife's admission. He was arrested on May 12, 2018 when he met PW 6 in the company of another police officer whom he had sold some land but who was demanding a replacement.

20. This is a second appeal. The mandate of this Court is specified under section 361(1 of the *Criminal Procedure Code* to the effect that in second appeals, this Court's jurisdiction is limited to matters of law only. The Court ought not to interfere with factual matters save for instances where the findings made are not supported by the evidence on record. See *Adan Muraguri Mungara v Republic [2010] eKLR* and *David Njoroge Macharia v Republic [2011] eKLR*.

21. We have considered the appeal and the parties' submissions, and bearing in mind the foregoing, we consider that the issues that fall for determination are;

    i. Whether the appellants' faced duplex charges which rendered the charge sheet defective.

    ii. Whether the appellants' rights under Article 50 (2) (h) of the *Constitution* were violated;

    iii. Whether the ingredients of the offence of robbery with violence were established, and whether the High Court properly evaluated the evidence of identification;

    iv. Whether the High Court failed to take into account the appellants' alibi defence; and

    iv) Whether the High Court properly re-evaluated the evidence, and if so, whether it was sufficient to sustain a conviction;

22. We begin with the appellants' contention that they were convicted on a duplex charge which was fatal. A duplex charge is one which specifies more than one offence in the same count. In this case, the appellants were charged with 'Robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code.

23. Section 295 of the Penal Code stipulates;

    ' Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery'.

24. The provision is with reference to the definition of a robbery as a felony, while section 296 on the other hand pertains to the offence of aggravated robbery and provides a stiffer penalty of a capital punishment. It states:

    (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other 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".

25. Hence, section 296 (2) relates to aggravated robbery and sets out circumstances that would render the commission of the offence an aggravated robbery, while section 295 relates to a lesser charge of robbery. Clearly therefore, the charge sheet incorporated two offences and was therefore duplex. As to whether this rendered the charge sheet fatally defective, in the case of *Isoe v Republic [2023] KECA 27 (KLR)* this Court observed that;

> ' It then follows that in assessing whether a charge is fatally defective on account of duplicity, the court must address its mind to two issues, namely, whether the charge as framed enabled the accused person to know the case against him and which he needed to defend; and also whether the charge as framed occasioned a mix up or uncertainty on what defence an accused ought to mount against the charge.'

26. As already stated above, the charge against the appellants were for, 'Robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code', and the particulars of the charge were that;

> ' On April 9, 2018 the Appellants while armed with dangerous weapons namely a wheel spanner and police handcuffs robbed John Bosco Mutuku Kimuyu Kshs 430,000/= and during the time of such robbery threatened to shoot, and used actual violence to the said John Bosco Mutuku Kimuyu.'

27. Although the statement of the charge as framed made reference to two different offences and could be considered bad for duplicity, it was clear that the charge read together with the particulars, was in respect of the aggravated or the more serious offence of robbery with violence under section 296(2) of the //**Penal Code, as the particulars pointed to actual violence meted out on PW1 by the appellants, rather than for mere stealing as set out under section 295.

See also *Justine Masolo Nyakundi v Republic [2019] eKLR.*

28. So that, much as the charge sheet incorporated two different offences, a consideration of charge and the particulars thereof in totality discloses that the appellants were able to discern that they faced a charge for robbery with violence under section 296 (2), and not the lesser charge of robbery under section 295. We say so because, the way in which they participated in the trial and cross-examined the witnesses in respect of the charge for aggravated robbery disclosed that they were not prejudiced in any way. As such, the defect was not fatal and was capable of being cured under section 382 of the Criminal Procedure Code. This ground lacks merit.

29. Next was the issue of whether the appellants' rights under Article 50(2)(h) were violated because they were not assigned any legal representation during the trial. The provision specifies that an accused person has the right 'to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.'

30. This Court had occasion to examine similar arguments in the case of *William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng v Republic [2022] KECA 23 (KLR)* where it was held that;

> ' The operative circumstance that triggers the necessity of legal representation in criminal proceedings arising from the examination of the cited articles and decisions, is where

substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person, or and the incapacity and inability of the accused person to participate in the trial.'

31. Similar sentiments were expressed by this Court in *Sutse v Republic [2022] KECA 678 (KLR*

32. In the present appeal, the record is clear that the appellants were not represented by legal counsel during the trial. However, the proceedings do not disclose that the issue was raised either in the trial court or in their appeal before the High Court. Needless to say, the proceedings do not also disclose that there was injustice occasioned to the appellants on account of this failure. Nothing in the proceedings showed that they were challenged by the complexity or seriousness of the charges they faced, or that they suffered some incapacity or ability to fully participate in the trial. Instead, the record shows that after they indicated they were ready to proceed with the trial, they participated fully, demonstrated by the manner in which they ably and extensively cross examined all the prosecution witnesses. They had a clear comprehension of the charge they faced and the evidence adduced against them. We find that there is no merit in the appellants' complaint that their rights to a fair trial under Article 50(2)(h) of the *Constitution* were violated by reason of the failure of an advocate being assigned to them. This ground also fails.

33. We now turn to address the issue of whether the ingredients of the offence of robbery with violence were established. Section 296(2) of the Penal Code provides that:

34. If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company of 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.'

35. In the case of *Johana Ndungu v Republic [1996] eKLR*, this Court had this to say about the elements of the offence of robbery with violence;

36. 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 before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub - section:

    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.

37. And as held in the case of *Oluoch v Republic [1985] KLR 549*, proof of any one of the above stated ingredients is sufficient to sustain a conviction.

38. In the instant case, PW1 testified that he was violently robbed of money that he had just withdrawn from the bank, together with other items, and severely injured by the appellants who beat him up, hit him with a wheel spanner with which they were armed, and handcuffed him. Indeed, PW4, the doctor confirmed that PW1 suffered injuries which he assessed as 'harm'.

39. Both the trial court and the High Court found, and it cannot be controverted that PW1 was violently robbed, and sustained serious injuries after the appellants attacked him.

40. As to whether the appellants were properly identified, it was their contention that they were not because, the police identification parade carried out by PW5 was not properly conducted.

41. In their judgments, both the trial magistrate and the High Court considered the manner in which the police identification parade was conducted, and came to the conclusion that the parades carried out by PW5 were shoddy and did not comply with the Police Force Standing Orders. On this basis, both courts disregarded the outcome of the identification parades, and instead based the identification of the appellants on the evidence of PW1 and PW3.

42. At this juncture, the question that begs an answer is whether the nullification of the police identification parades by the courts below rendered any other identification of the appellants by the prosecution witnesses worthless and inadmissible.

43. In addressing this issue, this Court in the case of *Njihia v R [1986] KLR 422* emphasized the importance of a properly conducted identification parade and expressed itself thus;

> ' It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an 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 if 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.'

44. This Court in the case of *Andrea Nahashon Mwarisha v Republic [2018] eKLR*provided further guidance thus;

> ' Identification parades are necessary though not absolutely where the witness purports to identify a suspect did in extremely difficult conditions, say, where the offence is committed at night and when visibility may have been a challenge having regard to the availability or lack of light and when the circumstances under which the offence is committed are harrowing to the witness thereby impairing his ability to positively perceive and with certainty identify the culprit or where the incident lasts for a short time. The purpose of identification parade as explained in Kinyanjui & Others v Republic, [1989] KLR 60: 'is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify and for a proper record to be made of that event to remove possible later confusion.' Further identification parades are meant to gauge and test the correctness of a witness's identification of a suspect given the circumstances under which he claims to have identified the suspect. See John Mwangi Kamau v Republic [2014] eKLR.'
>
> In this case, the offence was not committed in difficult circumstances at all. It was during the day and visibility was not poor. The complainant too spent some time with the appellant at the scene of crime In those circumstances, of what evidential value would have been the identification parade? We cannot think of any. To our mind, it would have been superfluous. The identification parade would even have been hampered by want of earlier description by the complainant of any attributes of the appellant. Even if the complaint by the appellant was valid, we are still of the view that given the circumstances under which the

identification was made, there was no room for mistaken identity. The complainant had all the opportunity to properly and positively identify the appellant as one of the robbers.'

45. Therefore, even though the evidence of police identification parade was disregarded, it did not negate the fact that with or without the police identification parade, there was other prosecution witness evidence on identification that could still be relied upon to reach a conviction.

46. So, were the appellants properly identified by the prosecution witnesses? As stated earlier, both the courts below relied on the evidence of PW1 and PW3 on identification of the appellants. In this regard the trial court stated;

> ' Though the two witnesses did not know the accused's (sic) before the incident, they said the incident was in broad daylight. They did spend ample time with the accused persons and engage (sic) in conversations with them. They did describe what each of the accused persons did. It is the findings of the court that the conditions conducive for a proper identification did subsist, and that the witnesses made an unimpeded observation of the accused persons'.

47. On its part the High Court observed;

> ' The evidence shows that before being bundled into the motor vehicle, the complainant spent about two minutes with the assailants and later on while giving evidence in Court, he described what each of them did and did not mix up the roles even on cross-examination. He even described their seating positions in the motor vehicle and it is not in dispute that the attack happened in broad daylight. In my view, despite the frightening situation, which he later found himself in, there was an initial interaction with the assailants where the complainant was able to observe the attackers.'

48. In addressing the manner and form of identification in the case of *Roria v R [1967] EA 583*, the court cautioned of the dangers of convicting on the evidence of a single identifying witness and stated that;

> ' A conviction resting entirely on identity invariably causes a degree of uneasiness. That danger is of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this Court to satisfy itself that in all circumstances it is safer to act on such identification.'

49. Again, in the case of *Abdallah Bin Wendo & Another v R 20 EACA 168*, the Court expressed the need to warn itself of the dangers of acting on the evidence of a single identifying witness and the need for great circumspection when dealing with cases based wholly on such identification evidence and emphasised the need in particular to seek other corroborative evidence as;

> ' Subject to certain well-known exemptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is the evidence, whether it was circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from error.'

50. Similarly, in the case of *R vs Turnbull (1976) 3 ALL ER 549* and *Wamunga vs Republic, [1989] KLR 424*, the threshold requirements for satisfactory identification were set out thus; The length of time the witness had the accused under observation and in what distance and light, whether the observation by the witness was impeded in any way, whether the witness had ever seen the accused before, and if so, how often, the length of time that elapsed between the original observation and the subsequent identification to the police, whether there is any material discrepancy between the description given by the witness and the actual appearance of the accused.

51. PW1's evidence was that he was robbed by the appellants. The incident took place in broad day light, and he could see the robbers after they hijacked and drove off with him. He described where each appellant sat in the motor vehicle as they talked to him. In addition, given the distance they travelled,they would have spent a significant amount of time together. He was not even masked. Clearly, the conditions for identification were conducive and did not impede his ability to identify each one of them. As set out above, both the trial and High Courts concurrently found that the identification of the appellants was without error, and similarly, we are also satisfied that the appellants were properly identified. More so, in view of the concurrent findings on identification, we have no basis on which to differ with the courts below.

52. But that is not all. The 1st appellant was also linked to the crime by a novel found in the motor vehicle, with his name in it. As observed by the High Court, the forensic document examiner's report indicated that the handwriting in the novel and 1st appellant's specimen handwriting that were analysed were made by the same author, the 1st appellant. The report was produced by PW6 without any objection from the 1st appellant. The presence of the novel with his name was further proof that he was one of the robbers that hijacked PW1 on the material day.

53. Based on the above, like the courts below, we too are satisfied that all the ingredients for the offence of robbery with violence were established, and, hence, the appellants' conviction was safe.

54. That said, the appellants also complained that both the trial and High Courts did not properly evaluate the evidence, and further disregarded their defences.

55. Our consideration of the record reveals that though the two courts below evaluated the prosecution evidence and came to the conclusion that the appellants violently robbed PW1, it is also apparent that they did not evaluate the appellants' defences. This notwithstanding, a consideration of the defences show that they did not displace the prosecution's case.

56. In his sworn defence, the 1st appellant stated that on April 9, 2018, he was working in his farm up to about 1.00 pm with DW 5. He later went to Kyaani market and returned home at night. On April 22, 2018, he was arrested. DW 5 confirmed that he was with the 1st appellant that day.

57. DW 2 stated that he was in Hola having left Nairobi on April 7, 2018 to deliver some goods. He returned to Nairobi on April 12, 2018 when police officers told him that he was transporting contraband goods. He was taken to Makueni Police Station.

58. The 3rd appellant claimed to have been at his electronic and gas shop in Ruiru on the day in question, with his employee Lilian Wamaitha, DW 6, who added that the 3rd appellant was her employer paying her Kshs 10,000 per month, but she did not provide any proof of that relationship.

59. The 4th appellant's defence was that on April 9, 2018, he was attending to his deceased wife who was admitted in hospital. He was arrested on May 12, 2018.

60. This Court in the case of *Kiarie v Republic [1984] KLR* stated;

> ' An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.'

61. And in the case of *Erick Otieno Meda v Republic [2019] eKLR* this Court outlined guidelines for evaluating the alibi defence against the prosecution's case thus;

a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.

b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See Mhlungu v S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014).

62. Furthermore, this Court in the case of *Athuman Salim Athuman v Republic [2016] eKLR* explained the necessity of ascertaining the veracity of the alibi defence thus;

63. Although the appellant in this case put forth his alibi defence rather late in the trial, we cannot agree with counsel for the prosecution that the alibi defence must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed, in *Ganzi & 2 Others V Republic[2005]1KLR 52*, this Court stated that where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence.'

64. In proffering their defences, it is apparent that the appellants were seeking to establish alibis on which to rely on in order to displace the prosecution's case against them. The alibi defences were proffered for the first time during the defence hearing when the opportunity for the prosecution to test them at the investigation stage had long since passed.

65. From the evidence, the 2nd and 4th appellants' alibi defence was uncorroborated, vague and of no assistance. While the defences of the 1st and 3rd appellants were that they were with DW5 and DW6 respectively on the material day. Nevertheless, PW1, identified all the appellants who abducted him, and by so doing placed them at the scene of the offence. For his part, PW 3 identified the 1st and 3rd appellants as the passengers he carried and dropped them at Munyu that morning. So that, much as the 1st and 3rd appellants proffered corroborative alibi evidence, both having been placed at the scene of the offence by both PW1 and PW 3 meant that the alibi defence was implausible, and unbelievable.

66. In addition, the 1st appellant's book with his handwriting that was found in the get away vehicle also reinforced the prosecution's evidence that he was at the scene on the day in question.

67. There is no question that the evidence of PW1 and PW3 placed the appellants at the scene of the crime, and we are satisfied that both courts below came to the right conclusion that the appellants committed the offence, which rendered the conviction safe. This ground is without merit.

68. In sum, we dismiss the appeal and uphold the conviction and sentence.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST,, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

G.W. NGENYE- MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR