IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MARAGA & OUKO, JJ.A)

CRIMINAL APPEAL NO. 282 of 2012

BETWEEN

MARTIN ODUOR LANGO ……………………..……..………1st APPELLANT

TONNY WANDERA JUMA…………………………..……...2ND APPELLANT

HARRISON KARIUKI MWANGI………………..…..………3RD APPELLANT

AND

REPUBLIC …………………………………………………..RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi (Ochieng & Achode, JJ.) dated 9th July, 2013

in

H.C.CR.A. NO. 677 OF 2012)

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JUDGMENT OF THE COURT

1. The three appellants, ***Martin Oduor Lango*** (Oduor); ***Tonny Wandera Juma*** (Wandera) and ***Harrison Kariuki Mwangi*** (Kariuki) were among five accused persons before Kibera Chief Magistrate’s Court where they faced one main charge of robbery with violence and other alternative counts of handling stolen property and being in possession of a firearm without a firearm certificate. Two of the co-accused were acquitted after the trial while the three appellants were convicted for the offence of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code and were sentenced to death. They appealed against their conviction to the High Court sitting in Nairobi, (Ochieng and Achode, JJ.), but their appeals were dismissed, hence this second and probably final appeal.

2. Oduor and Wandera were represented before us by learned counsel Mrs. Betty Rashid. They had drawn and filed “Grounds of appeal” on their own before Mrs. Rashid was appointed by the court to represent them, and she filed a supplementary memorandum of appeal consolidating the grounds of appeal for both of them. Twenty grounds are raised in the three documents but Mrs. Rashid argued them as six grounds, which may be summarised as follows:-

- *The appellants were subjected to unfair trial contrary to **Article 50 of the Constitution**.*
- *The identification process was incurably flawed and unconstitutional;*
- *The purported identification parades were contrary to the Force Standing Orders in* **Chapter 46**, *Laws of Kenya;*
- *The doctrine of recent possession was wrongly applied;*
- *The appellants were denied facilities for preparing and meeting their defences;*
- *The defences of the appellants were not considered contrary to **Section 169(1)** of the **Criminal Procedure Code**.*

3. Kariuki was represented before us by learned counsel Mr. Elvis Obok, instructed by M/S Kounah & Company Advocates who abandoned the original memorandum of appeal filed by Kariuki and substituted it with a supplementary memorandum containing 11 grounds of appeal. Mr. Obok however, essentially argued two grounds which may be summarized, thus:

- *There was no proper evaluation of evidence relating to Kariuki;*
- *There was no identification parade conducted in respect Kariuki and the purported identification parade was contrary to the Force standing orders.*

4. The state was represented before us by learned Senior Assistant DPP, Mrs. G.W. Murungi. We shall revert to those grounds of appeal and the submissions made thereon, presently. First, a recap of the concurrent findings of facts made by the two courts below.

5. On the evening of Friday, 20th January, 2006, ***R R S*** (PW6) (R) was with his family at his hotel business in Karen. Among the family members was his wife***,*** ***A S*** (PW1) (A); daughter ***R S*** (PW2) (R); son ***A S*** (PW7) (A); nephew, ***A L K*** (PW8) (A); and another daughter, ***S***. At about 9.00 p.m. the family left [PARTICULARS WITHHELD] to go home at Kitengela leaving R behind as he was opening a new disco at the hotel that night. They left in two cars following each other; one carrying A and her son A; the other occupied by A, R and S.

6. Unknown to them, a gang of 7 men armed with a pistol and other crude weapons had struck at their Kitengela home at about 6.30 p.m. There, the gang found the watchman ***M L*** (PW4) (M). As M entered the generator engine room to check the machine, he was confronted by the seven men one of whom pointed a pistol at him. They grabbed him, tied him up, and dumped him in the room adjacent to the generator room. The assailants went out and shortly brought his wife, the shamba boy, ***D I N*** (PW9) (D); and house girl, ***H A*** (PW5) (H), who were all beaten, tied up and dumped in the same place. The assailants took the keys to the main house from the house girl. They also removed the watchman's uniform worn by M and it was worn by the person he identified as Kariuki. Then they lay in wait.

7. At about 9.10 p.m., the family arrived home. The gate was opened by the person they all thought was M and they parked their vehicles. As A and the others disembarked from their cars, she heard some groans from the generator room and was about to enquire from the watchman what was happening, when six men emerged, one pointing a gun at them. They were ordered to lie down at the pain of being shot dead. The assailants cut the kids' school bag straps, tied them up and forced them into the main house as they ordered M to start the generator which lighted the house and compound. The workers were also transferred into the main house.

8. For the next seven hours or so before the robbers left at about 4.00 a.m. the following morning, they took turns to demand keys to the safes to take money, R's gun and other valuables. They gathered household and personal effects like television, DVD player, sewing machine, laptops, cameras, mobile phones, watches, bracelets, clothes , cash, as well as one of the family cars, all valued at Ksh.7 million. They stole them. At one point, some of them took R to the kitchen where she was raped by a member of the gang who was not before court.

9. Within that space of time, the workers and family members say they identified Oduor, Wandera and Kariuki. M, the watchman, recalled that it was Kariuki who donned his uniform at about 6.30 p.m. and was later busy in the house ferrying household goods in the lit house. Kariuki was not disguised in any

other way and M was able to pick him out of an identification parade later. He also recalled that he had seen Odour who used to work at [PARTICULARS WITHHELD] and occasionally visited the home.

10. ***H***, the maid, was confronted at 6.40 p.m. by a short brown man who asked her whether she had seen people like him before and he brandished a pistol which he used to hit her as the robbers took the house keys. She recalled that two of those people had worked with her before since their voices were familiar despite their covered faces and goggles. That was Oduor and Wandera. She also noted the peculiar walking style of Wandera and confirmed it was him. She also identified Kariuki, whom she had never seen before but said he talked to her for a considerable period warning her of death if no money was handed over, and was dark with a big upper lip and a broken tooth. Later she also picked him out of an identification parade.

11. D, the shamba boy, did not have much time to see the person who confronted him at 6.30 p.m. as he rested on a sofa set outside his house. He was held by the face, dropped down, briefly struggled with the lone assailant before he was hit with a metal bar and fainted. Before he fainted, D had seen and recognized Wandera who had worked there with him before as a casual labourer.

12. A had spent some considerable time with two of the robbers who had covered their faces, as they moved from room to room looking for money and guns. At some point when the safe was opened, and some guns were visible inside, one of the robbers said they were toy guns, which was true. They were toy guns for paint ball games. They left the toy guns and took R's two rifles and a target gun from the safe. They returned to the sitting room where everybody was held, sat and continued to talk, listen to music and eat. In the process, A noticed the peculiar bouncing walk of one of the hooded robbers and remembered seeing him working at the hotel and the home. It was Wandera. At some point also, the second hooded man uncovered himself in one of the bedrooms and A saw his face and recognized him as one of the workers at the hotel. It was Oduor. She also had a conversation with Kariuki who was holding a knife threatening her son and she pleaded with him not to kill him. She picked him out at the identification parade as the person who was dark with big lips.

13. The other witness who testified on identity was ***R***. She was a student in [PARTICULARS WITHHELD] and recalled the first thing Kariuki did when the family arrived was to command her to remove her bracelet and put it on him. After she was raped in the kitchen by one of the robbers, it was again Kariuki who asked her how it felt like. His face was not disguised and so she saw it for about 1 hour. At the identification parade she talked about a scar on Kariuki's face and big lips. She identified Oduor and Wandera as people who worked at her father's hotel, and remembered Oduor as the first person to confront her as she disembarked from the car and recognized his eyes. In the house where they were held, Oduor sat facing her. Only part of his face was visible but R did not show him that she had recognized him. Wandera's face was also covered, but he removed the mask as they were leaving the house carrying suit cases and R saw him well for about ½ hour.

14. A was also an eye witness to identification. He was an A-level student at [PARTICULARS WITHHELD]. He was the one who was dragged along to different rooms with the mother as the robbers looked for the safe. He is the one who opened the safe to reveal some guns but one of the robbers said they were for kids' games. For quite some time one of the masked men talked to A asking him when his father would be arriving and that is when he recognized Oduor's voice. He had worked at their home before and Adam had played football and paint ball games with him. He also recognized Wandera when he and Oduor were counting jewelry in his presence. Wandera had been to the house before working on the paint balls. He also saw the faces of the two men as they removed their masks while leaving the house. He stared at them for about one minute but did not talk to them and they did not look at him. Later he picked them out of an identification parade. He also picked out Kariuki since he had seen him at the scene when he held a knife to A's neck and had big lips and a scar on the face.

15. Finally, ***A*** managed to identify Oduor from his voice since he knew him as a worker at [PARTICULARS WITHHELD] and had even played football with him for a year. As the robbers started leaving, they could not start the car and drained the battery whereupon they took A to go out and change the car battery which he did before starting the car for them. He was accompanied by Kariuki and a short

stout guy at the time. As they left, Odour and Wandera removed their masks and A was able to see their faces. He recognized Wandera as another casual worker at [PARTICULARS WITHHELD]. He was able to pick all three from identification parades arranged for that purpose.

16. The robbery was reported to Ongata Rongai Police station and to R immediately the victims were able to free themselves. R rushed to the police station and received a report from there. As he was at one time a Police reserve officer, he requested the DCIO and the OCPD to allow him to liaise with the Investigating officer and assist him. Permission was granted. After listening to the account of events from his family, he formed the view that the two robbers had covered their faces because his family knew them. He recalled that Oduor and Wandera were his casual workers at [PARTICULARS WITHHELD] and they had worked at his home. They had also worked with him as he practiced his shooting skills at the hotel since he was a sharp shooter who represented Kenya at the All Africa games. Wandera had in fact at one time stolen one of the paint ball pistols from the house and it was later recovered from him.

17. In conjunction with the police, informers were planted in several places in Nairobi where Oduor and Wandera frequented and this bore fruit. Four days later on 25th January, 2006, Wandera was arrested from one of the night clubs in Nairobi. The investigating officer, ***Corporal Richard Kimeu*** (PW16) (Cpl. Kimeu) who was leading other police officers approached Wandera who disclosed his name. He was wearing a golden necklace and a bracelet. R, who was present, identified the two items as the property of his wife. The police asked Wandera for his residential house and he volunteered to take them there. It was in Riruta Satellite. On arrival he said he had no key to the house and the police woke up the owner of the plot who confirmed that she had rented out the house to Wandera together with another boy called Martin Oduor one week earlier. The owner was ***Agnes Wanjiku*** (PW14)(Agnes) and she produced a copy of the receipt she issued to Oduor on payment of Ksh.2000/= rent. She did not know them before. At the request of the police she allowed them to break the padlock to the house and gain access.

18. Inside the house, the police recovered a large number of items stolen from R's house which items he identified, and which are listed in the charge sheet. An inventory of the items was made and was signed by Wandera, Agnes and the police officers. Asked where Oduor was, Wandera said he had travelled to Kisumu. The police went to Kisumu, accompanied by Antony, and arrested Oduor. During cross-examination, Cpl. Kimeu disclosed that one of their informers was one ***Joseph Kibe*** who had stayed in the police station for 17 days assisting the police and was not charged with any offence. Kibe was not a witness in the case but the officer had established that the things found in the house were not Kibe's. The investigating officer was not clear about the arrest of Kariuki, only saying he was arrested in Kiserian. R, however, testified that he was instrumental in making the arrest. He had seen the photograph of Kariuki, whom he referred to as "Karish" together with another suspect who was never arrested and he organized for and made his arrest from a bus heading to Kibera.

19. Before they were taken to court, the three appellants were subjected to identification parades. However, the only evidence on record on identification parades relates to Kariuki alone. ***Acting Inspector Nelson Yegon*** (PW11) (Ag IP Yegon) organized that parade for a suspect known as **"John Kariuki Mwangi"** on 27th May 2007. That would be about 16 months after the event. He produced as Exhibit 23 the forms he used to carry out that parade but they relate to and are signed by one John Kariuki. In the charge sheet and throughout the trial and appeal, the appellant has been referred to as **"Harrison Kariuki Mwangi"**.

20. In his defence which was given under oath, Oduor admitted that he resided at Riruta Satellite and that he worked as a casual worker at [PARTICULARS WITHHELD] and used to go to R's home whenever there was a party. He stated, however, that he was away from Nairobi from 18th January 2006 when he went to Kisumu to visit his sick auntie. He stayed there until 27th January 2006 when the police arrested him and brought him to Nairobi, and later charged him with robbery. He could not therefore have taken part in the robbery allegedly committed on 20th January 2006. He knew the complainants well but they lied about seeing him at the scene of the robbery because they never told the police in the first report that he was involved. He was not identified in any parade since none was held for him.

21. Wandera also gave his defence under oath. He admitted that he resided at Riruta Satellite with Oduor and had worked at [PARTICULARS WITHHELD] for three years. He was familiar with the home and the children there knew him well. On 25th January 2006, his friend, Joseph Kibe gave him some items to store for him in his house. Kibe also gave him a necklace chain which he wore that evening as he went partying in town. Later in the night, Kibe came to the night club and told him the things he left with him were needed. They went outside the club only to find the police who asked him where he got the necklace he was wearing from and he said he was given by Kibe. They asked for his house and he offered to take them there but on arrival he could not get his key because it had fallen in the car. The landlady was asked for and gave permission to break the door open and the police found and collected the items therein. He, the police and the landlady signed the inventory. He was then taken away and later charged with the offence of robbery. He denied that he was at the scene of the robbery on 20th January 2006, contending that the witnesses who knew him could have given his name to the police in their first report but did not. He was not identified in any parade since none was held for him.

22. Kariuki gave an unsworn statement narrating how he was arrested on 15th May, 2006 from a bus as he went home after work. He was taken to Ongata Rongai Police Station where several of the witnesses who testified in court came and he was asked to open his mouth. He was taken to an identification parade and later charged with the offence he knew nothing about.

23. We may now revert to the grounds of appeal raised by Oduor and Wandera through Mrs. Rashid. In doing so, we must recall that this is a second appeal and it must therefore lie on issues of law only- see ***Section 361***, **Criminal Procedure Code**. The concurrent findings of fact made by the two courts below shall be respected by this Court and shall not be disturbed unless they were not based on any evidence at all or were based on a perversion of the evidence on record or unless it can be shown demonstrably that there was an error in principle in making such findings. See **THIONGO V. REPUBLIC (2004) 1 EA 333.**

24. The first ground of appeal is based on the provisions of ***Article 50*** of the **Constitution, 2010** which guarantees the right to a **fair hearing**. The complaint, as we understand it, was not about any procedural impropriety in the trial itself after the appellants were arraigned in court up to their conviction and sentence. Put another way, it is not trial-related. The complaint was rather that there was a fundamental breach of the law during investigations when the police allowed R (PW6) to get involved in the investigation of the crime and to make arrests of the suspects. This was pre-trial. In Mrs. Rashid's view, R was in effect the complainant as well as the investigator in the case and, therefore, the whole trial that followed was vitiated.

25. Mrs. Rashid pointed out that R was in a position of authority and influence over his wife (PW1), son (PW7), daughter (PW2) and brother- in- law, (PW8) who were the key witnesses in the case. She submitted that R, who said he was once a "Police Reserve Officer" took over investigations from the lawful authority in charge of criminal investigations, the regular police, but bungled it. To illustrate this, Mrs. Rashid made several references to the evidence of R where he said he had planted informers in night clubs and gave them mobile phones; accompanied the police at the arrest of Wandera and during recovery of the stolen goods; arranged for his driver to accompany the police for the arrest of Oduor in Kisumu; and his own statements that he was *"investigating the crime*" and that he was *"masterminding the operation from the background"*. Along the way, she submitted, R doubled up as a complainant, identifying stolen items and the people who allegedly stole them. In sum therefore, she concluded, a process where the complainant was also the investigator cannot be constitutional and the product of such investigations was also unconstitutional.

26. In response, Mrs. Murungi submitted that there was no procedural impropriety, let alone a constitutional breach, committed by R. In her view, R was not the investigator in the case and was only assisting the police in that task. He did not collect any evidence, did not record any statements from witnesses and did not make final arrests of suspects. Furthermore, she submitted, there was nothing in law to stop a complainant from following up his case with the police since he had an interest in it. All the witnesses also testified independently and R did not influence them, as alleged. In this case, she concluded, there was an investigating officer, PW16, who testified on what he did and what information

he received from informers.

27. We have anxiously considered this ground of appeal but in the end we have come to the conclusion that it has no merits. The issue was raised for the first time in this second appeal and therefore we do not have the benefit of any decision thereon by the High Court. We also think it is a matter which ought to have been raised at the earliest opportunity as it relates to violation of Constitutional rights, but was not. Nevertheless, it is a legal issue and we shall treat it as germane for discussion.

28. Article 50 was not in existence when the trial was held and concluded in October 2007. Nor was **Article 49** which was not raised by Mrs. Rashid but which covers the ***"Rights of arrested persons"***. Both Articles, however, fall under **CHAPTER FOUR** of the **Constitution 2010** on the **"BILL OF RIGHTS**" and **Part 2** thereof covering **"Rights and fundamental freedoms**". The old Constitution had similar, but less elaborate, provisions on **"Fundamental rights and Freedoms of the Individual**". Such rights do not cease to be protectable or enforceable when there is a regime change or, as happened in this country, transformation to a new constitutional and governance order. The Bill of Rights transcends such developments as the rights are indelibly etched in every person's DNA. As regards the right to a fair hearing which is relevant in this matter, it is one of universal application and has always been safeguarded under the law. Under the old Constitution, the relevant provisions were **Sections 72** (right to personal liberty) and **77** (protection of the law). This Court considered some aspects of "fair trial" under those Sections and analyzed a wide range of international laws and instruments in **JULIUS KAMAU MBUGUA v. REPUBLIC, Cr. Appeal No. 50 of 2008.** It came to the conclusion that a distinction was necessary between trial-related breaches and pre-trial breaches as they merit different considerations and attract different remedies. The court in that case stated in part as follows:-

1. **"…………..**

2. **The general approach to the determination whether, the right has been violated is not by a mathematical or administrative formula but rather by judicial determination whereby the court is obliged to consider all the relevant factors within the context of the whole proceedings.**

3. **There is no international norm of "reasonableness". The concept of reasonableness is a value judgment to be considered in particular circumstances of each case and in the context of domestic legal system and the economic, social and cultural conditions prevailing.**

4. **Although an applicant has the ultimate legal burden throughout to prove a violation, the evidentiary burden may shift depending on the circumstances of the case. However, the court may make a determination on the basis of the facts emerging from the evidence before it without undue emphasis on whom the burden of proof lies.**

5. **The standard of proof of an unconstitutional delay is a high one and a relatively high threshold has to be crossed before the delay can be categorized as unreasonable.**

6. **Although the procedure for raising a violation of the right varies from one jurisdiction to the other, the violation of the right should be raised at the earliest possible stage in the proceedings to enable the court to give an effective remedy otherwise the right may be defeated by the doctrine of waiver where applicable.**

7. **The purpose of the right is to expedite trial and is designed principally to ensure that a person charged should not remain too long in a state of uncertainty about his fate.**

8. **The right is to trial without undue delay. It is not a right not to be tried after undue delay except in Scotland and it is not designed to avoid trials on the merits.**

9. **…………………**

In our view, the right of a suspect to personal liberty before he is taken to court under Section 72 (3) (b) are clearly distinct from the rights of an accused person awaiting trial under Section 77 (1).”

29. We have examined the complaint laid before us and we are satisfied that it is not trial-related. Put differently, the appellants do not complain about breaches of the constitution from the time the plea was taken up to their conviction and sentence. As stated above, it is the process of investigation which is alleged to have been improper. We have carefully re-examined the role played by R (PW6) in the investigation process and it is our view that it was not outside the law. It is the civic duty of every citizen to assist law enforcement agencies in the detection and punishment of crime. Indeed the **Criminal Procedure Code** in ***Section 34*** provides for instances where a private person may arrest a person who has “*committed a cognizable offence*” or is “*suspected of having committed a felony*” or persons *“found committing an offence involving injury to property”*. Persons arrested in such manner shall be taken to the nearest police station to be re-arrested and dealt with in accordance with the law.

30. In this case, there was a police investigating officer, Cpl. Kimeu (PW16), who testified as such and who was involved in the arrangements to hunt down and arrest the perpetrators of the crime and recover the stolen property. He recorded statements from the victims; he received reports from informers and followed them up; he was present at the arrest of Wandera and during recovery of the stolen items; he travelled to Kisumu for the arrest of Oduor; and he kept and produced in evidence the exhibits recovered during investigations. The assistance actively given by R to the police in their investigations did not amount to taking over the investigations and in any event it was duly authorized. We therefore reject the submission made in that regard. As to whether R unduly interfered or influenced the victims who were related to him, we find no basis for such allegation. The victims gave their own statements to the police, testified on oath in court and were cross examined by the appellants, but no allegation was put to them about being influenced by R. The submission is based on mere suspicion and we reject it too.

31. The second ground of appeal was on re-evaluation of evidence on identification, which according to Mrs. Rashid, was deeply flawed and unconstitutional. That is because the victims - A, R, A, A, M, H and D - who purportedly visually identified and recognized the two appellants at the scene, never mentioned their names to the police in their first report. Furthermore, she submitted, an order made by the trial court on production of the Occurrence Book (OB) to prove that there was no mention of the appellants in the first report was not complied with as the OB was never produced, which was prejudicial to the appellants’ defence. The evidence on identification must, therefore, either have been suggested to the witnesses by R or was mere dock identification which is worthless.

32. In response thereto, Mrs. Murungi submitted that the evidence on identification was beyond reproach. That is because the robbery took more than eight hours and the witnesses were present with the robbers throughout; there was electricity lighting throughout; the two appellants were workers in the home and were familiar to the witnesses; and at some point the two removed the masks they wore and were seen by the witnesses.

33. In evaluating the evidence relating to identification, the High Court appreciated, as was stated in the case of **REPUBLIC VS. TURNBULL & OTHERS (1976) 3 All ER 549** that mistakes can be made even in cases of recognition, and that an honest witness may nonetheless be mistaken. The court therefore proceeded to analyze the evidence on identification with caution, and in the end stated as follows:-

> **“On the grounds of identification and recognition of the appellants therefore, the evidence of the five eye witnesses corroborated each other on different material aspects of the evidence. They were in agreement that there was electric light powered by a generator, throughout the period of the robbery. We also find from the evidence on record that the observation of the three appellants by PW1, PW2, PW5 and PW7 who were at the scene of the robbery was drawn out, rather than momentary. It lasted from approximately 9 p.m. to 4 a.m.**
>
> **The evidence on record was that in those seven hours during which the robbery**

lasted, the 1st appellant grew weary of his mask and removed it, exposing his face for what PW2 estimated to be a half hour, before the intruders departed. The 2nd appellant was identified by his eyes, voice and gait, by the eye witnesses, but was also observed by PW7 without his mask in the final moments of the robbery.

The 1st and 2nd appellants were known to the witnesses before the incident in question as they worked in the family hotel and also did odd jobs in the home…….. We therefore find that the conditions under which the appellants were observed were favourable for positive identification. Even though none of the witnesses gave the names of the assailants in the 1st report to the police, PW16, Cpl. Kimeu testified that they all said that they could identify their assailants if they saw them again. PW16 was one of the investigating officers who arrived at the scene of the robbery at 5 a.m., an hour after the robbers departed."

34. We have carefully considered the findings of fact made by the two courts below in support of identification of Wandera and Oduor, and we do not find any error in principle in the manner the High Court analyzed and applied the evidence in reaching the conclusion it did. There was sufficient time for the witnesses to observe, hear and register in their minds the features each testified to have done during the robbery. It is true, as it was freely admitted by the witnesses, that they did not disclose the names to the police in their first report. That was the same result the appellants wanted to achieve by asking for the Occurrence Book to show that they were not mentioned. The submission made on their behalf that the non-production of the OB caused any prejudice thus becomes invalid. The appellants were under no duty to prove anything. As stated by the High Court, the witnesses did inform the police when they recorded their statements that they could identify their attackers. As the witnesses indicated that they had recognized the two appellants as people they had known, it was pointless to hold an identification parade and the record does not disclose one was held for those appellants. The ground of appeal on identification therefore fails.

At all events, the evidence on identification did not stand alone as there was further evidence of recovery of the stolen items, which, if properly evaluated, would strongly support the evidence on identification. We now turn to the third ground of appeal for that evaluation.

35. The submission by Mrs. Rashid was that the doctrine of recent possession was improperly evaluated because Wandera had no physical possession or control of the recovered goods as they were found in a locked house which the police had to break into; that the said goods were kept there by one Kibe who was known to the police and was released after falsely implicating the appellants; that nothing was recovered from Oduor and he had no physical possession of the recovered items; and that Oduor had raised an *alibi*, which was not disproved, that he was nowhere near the scene of crime on 20th January, 2006.

36. In response to those submissions, Mrs. Murungi submitted that Wandera, at the time of his arrest, physically wore the bracelet stolen from A; that he freely led the police to his residence; that the landlady testified that the house was rented out to Wandera and Oduor a few days before the robbery; that the definition of **"possession**" under ***Section 4*** of the Penal Code includes constructive possession, with knowledge or consent; and that Oduor may have been in Kisumu during recovery of the stolen items but had knowledge that the goods were in his house.

37. The High Court, after reviewing the evidence on recovery of the stolen goods concluded as follows:-

"**In the case of Arum v Rep. [2006] 1 KLR pg. 233, the Court of Appeal sets out conditions that must exist before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case. These include proof:**

a. **That the property was found with the suspect;**
b. **That the property was positively the property of the complainant;**
c. **That the property was stolen from the complainant;**

d. **That the property was recently stolen from the complainant.**

2. The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

3. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and any discredited evidence on the same cannot be suffice, no matter from how many witnesses.

This being a criminal trial there was no burden on any of the appellants to explain their innocence. The burden of proof in a criminal trial rests unshiftingly upon the prosecution.There is overwhelming evidence on record however, that the 2nd appellant led the police to the recovery of the stolen items in his own house. He raised the issue of an accomplice whose whereabouts he did not supply, but whom he stated to be the source of the recovered goods. We however find that his defence flies in the face of the rest of the evidence of identification and recognition that was already on record. The evidence of recent possession was not the sole evidence forming the basis for conviction, but augmented the rest of the evidence on record. In our opinion considering all the evidence on record, the accomplice was a figment of the 2nd appellant's imagination."

38. Again, we think the High Court made no error in principle in the manner it laid out the law and applied it to the evidence on record. The totality of the evidence, including any statements made by the appellants, must be considered in determining whether the case has been proved beyond reasonable doubt. It was proved by the prosecution and admitted by the appellants in sworn testimony, that they had rented the house in which the stolen goods were recovered; that they had no claim to the ownership of the goods which had been kept there one week earlier; that Wandera freely led the police to his own house where the recovery of the stolen items was made; and that the goods were proved to belong to the complainants. The only claim put forward by Wandera was that the stolen items were brought to the house and the stolen bracelet given to him by one Kibe. We agree with the High Court that the said claim was put forward as a smokescreen and was rightly rejected. The *alibi* claim put forward by Oduor, which he had no duty to prove, is yet another smoke screen as it flies in the face of overwhelming evidence of his presence at the scene of the crime, and we reject it. The further contention that he was not in physical possession of the stolen items does not avail him. As correctly submitted by Mrs. Murungi, the definition of "possesion" in the Penal Code is wide enough to encompass constructive possession. It states as follows:-

"(a) "be in possession of' or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) if there are two more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;"

39. The two other grounds raised and argued by Mrs. Rashid may be consolidated and disposed of together. She argued that the purported identification parades for the two appellants served no purpose since some of the witnesses had seen the appellants before such parades. We have already stated above that there is no evidence on record to show that there was an identification parade organized for Wandera and Oduor. If there was one, as stated by some of the witnesses, it would have been worthless since this was a case of recognition. That view was readily conceded by Mrs. Murungi. The final submission was that the defences of the two appellants were not considered, but this only needs to be stated to be dismissed. The High Court in re-evaluating the evidence considered the defences of the appellants on each of the crucial issues of identification and recovery of the stolen goods and rejected such defences.

The trial court, which had the advantage of seeing and hearing the witnesses and was able to assess their credibility, believed the prosecution witnesses, as did the High Court, and we have no reason to differ.

40. The upshot is that there is no merit in the grounds put forward by Wandera and Oduor and we accordingly dismiss their appeals.

41. Turning to the appeal filed by Kariuki, we stated earlier that it was reduced to two grounds. The strongest argument put forward by Mr. Obok was that the identification parade purportedly organized for the appellant was a nullity and of no probative value. That is because in the oral evidence of the parade officer, ***Ag. IP Yegon*** (PW11), and the exhibits produced by him, the parade was in respect of another person - one **"John Kariuki Mwangi"-** who was not before the court. Furthermore, he submitted, the parade should have been arranged in strict compliance with the **Force Standing Orders** under ***Chapter 46***, Laws of Kenya, particularly, **6(iv)(d)** which requires that:

> **"the accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;"**

The person who allegedly committed the offence was said to have had special physical features but no parade was arranged in accordance with the law to pick him out and therefore, Mr. Obok submitted, the identification made in court was no more than dock identification. In his view, the only reason why the appellant was arrested by R was because his image was in a photograph obtained by R as he unsuccessfully pursued another suspect. It was mistaken identity.

42. We have considered these submissions and we think there is considerable merit in them. The appellant in this case was a stranger to the witnesses who testified on identification. It was necessary, therefore, to connect him with the person seen by the witnesses at the scene of crime. Some of the witnesses gave varying descriptions of the person they saw at the scene; for example: H, who said he was *"dark with a big upper lip and a broken tooth"*, or had a *"scar on your face and big lips"* according to R and A, or *'a short guy"* according to M. Kariuki was arrested by R from a bus as he travelled home. R did not say he arrested him because he found anything incriminating on him or because he fitted any of the descriptions stated above. All R had was a photograph. In those circumstances, an identification parade was imperative but none was arranged in accordance with the Force Standing Orders which was a fatal omission. The one where Kariuki was purportedly identified more than one year after the event was for a different person.

43. In evaluating the evidence on this aspect, the High Court stated as follows:

> **"On the evidence which was tendered with regard to the identification parade, we concur with the 3rd appellant's written submissions, in which he submits that PW11, Ag. IP Nilson Yegon, conducted an identification parade in respect of one John Kariuki Mwangi alias Karish, while the 3rd appellant is known as Harrison Kariuki Mwangi alias Karish, the suspect for whom an identification parade was conducted was also known as Harrison Kariuki Mwangi the appellant now before court, we cannot assume that they are one and the same person."**

Strangely, however, despite that finding, the court went ahead to make a finding that Kariuki was properly identified.

44. We have said enough to show that the conviction of Kariuki was fraught with doubts and he was entitled to the benefit of those doubts. Accordingly, we allow the appeal of the third appellant, quash the conviction and set aside the sentence of death imposed on him. He shall be set free, unless he is otherwise lawfully held. We so order.

Dated and delivered at Nairobi this 23RD day of May, 2014.

P.N. WAKI

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

W. OUKO

…………..……………

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR