IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 613 OF 2010

BETWEEN

PETER NJAGI MUCHANGI …..... 1ST APPELLANT

DOUGLAS MAINA MATHENGE …..... 2ND APPELLANT

WILLIAM MUGAMBI NYAMU …..... 3RD APPELLANT

ABDALLA MWANGI CHEGE …..... 4TH APPELLANT

AND

REPUBLIC …..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (Okwengu & Khaminwa, JJ.) dated 23rd September, 2005

in

H.C.CR.A NO. 97, 98, 99 & 100 OF 2003)

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JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court (Khaminwa & Okwengu, JJ.) dated 23rd September, 2005 wherein the court upheld and confirmed the appellants' conviction and sentence. This being a second appeal, only points of law fall for our consideration, but for reasons that the appellants have raised the ground of appeal that is commonly raised and cuts across both issues of law and facts, that is the High Court failed to re evaluate the evidence and arrive at its own independent conclusions, we have to revisit the background evidence that resulted in the convictions and sentence of the appellants.

[2] ***Peter Njagi Muchangi, Douglas Maina Mathenge, William Mugambi Nyamu, Abdalla Mwangi chege***, the appellants herein, were jointly charged in the Senior Principal Magistrate's Court at Embu with three counts of robbery with violence contrary to ***section 296(2)*** of the ***Penal Code,*** Chapter 63, Laws of Kenya; two alternative charges of handling stolen property contrary to ***section 322(2)*** of the ***Penal Code***; and one count of malicious damage to property contrary to ***section 339 (1)*** of the ***Penal Code .*** The particulars of the first count of robbery with violence were that on 23rd June, 2001 at Gikuuri Village in Embu District within the then Eastern Province, the appellants jointly robbed Ann Muthoni Muhoro cash Kshs. 8,600/=, one radio cassette valued at Kshs. 4,600/= and at or immediately before or after the time of such robbery, used actual violence by cutting her with a panga.

[3] The particulars of the second count of robbery with violence were that on the above mentioned date and place, the appellants jointly robbed Ruth Wanjiru Njiru of cash Kshs. 500/= and at or immediately before, or after the time of such robbery used personal violence by cutting her with a panga. The particulars of the third count of robbery with violence were that on the above mentioned date and place, the appellants jointly robbed Justin Muhoro Warui of two shirts, one pair of spectacles, one wrist watch make Avolin and cash Kshs. 300/= all valued at Kshs. 4,800/= and at or immediately before or after the time of such robbery used actual violence on him.

[4] The particulars of the first alternative charge of handling stolen property were that on the said date and place, the appellants jointly, otherwise than in the course of stealing, dishonestly received or retained one radio cassette make National Star knowing or having reasons to believe it had been stolen. On the second alternative count of handling stolen property the particulars were that the on the above mentioned date and place, the appellants jointly otherwise than in the course of stealing dishonestly received or retained one shirt valued at Kshs. 500/= knowing or having reasons to believe it to be stolen. The particulars of the fourth count of malicious damage to property were that on the said date and place, the appellants wilfully and unlawfully damaged one radio cassette make Sony valued at Kshs. 10,800/= the property of Ann Muthoni Muhoro.

[5] The prosecution called a total of nine witnesses in support of its case against the appellants. It was the prosecution's case that on the night of 22nd June, 2001 PW1, Ann Muthoni Muhoro (Ann), was in her house in the company of PW6, Ruth Wanjiru Njiru (Ruth) and her son, PW2, Justin Muhoro Warui (Justin). Ruth had sought accommodation for the night at Ann's house because she had misplaced her house keys. At around 9:30 p.m Ann went to sleep in her bedroom while Ruth slept in the sitting room. Justin went to bed in the house which was adjacent to his mother's house. At around 4:00 a.m there was a loud bang on the sitting room door which prompted Ruth to scream. Suddenly, the door was broken down and unknown assailants entered the house. The attackers demanded money from Ruth who was then in the sitting room. Ruth told the attackers that she did not have any money; the robbers cut her severally with the pangas that they were armed with. The attackers who were identified at the hearing as 1st and 3rd appellants dragged Ruth into Ann's bedroom and pushed her under the bed.

[6] The attackers then turned on Ann and demanded money from her. She testified that she was also cut severally with a panga by one of the attackers whom she identified as the 1st appellant. Thereafter, the attackers ransacked her house and took Kshs. 8,600/= from the pocket of the dress she was wearing. They also tore her mattress and poured paraffin on her clothes, and while they were looking for a match stick to ignite fire, Ann distracted them by telling them to go and get more money from her son, Justin, who was in the next house. Justin had by then heard screams from the main house and as he was coming out of his house, he met some of the attackers who ordered him to lie down on the ground. One of the attackers went into Justin's house and stole his money and shirt. They then led Justin to his mother's bedroom.

[7] The attackers started destroying Ann's Radio Cassette make Sony by cutting it with the pangas they were armed with. That is when Ann told them that she had more money in the kitchen and the 1st appellant gave her his torch to go and get the money. With the aid of the light from the torch that was given to her, Ann was able to identify the 3rd appellant who was in the bedroom. She testified that she saw the 3rd appellant holding her son's shirt. While Ann was in the sitting room looking for the key to the kitchen, she saw the 2nd and 4th appellants. When she got out of the house instead of going to the kitchen,

she ran towards the maize plantation screaming. In response to the screams neighbours started approaching Ann's house and that prompted the attackers to run away. They stole Ann's radio cassette make National Star and Justin's shirt in addition to the money.

[8] Laban Simba Njiru (PW4), (Laban), gave evidence that on 22nd June, 2001 at around 10:00 p.m four men who turned out later to be the appellants and who were unknown to him went to his house and said they were looking for his brother, Danson Munyi. Upon inquiring from the men why they had gone to his house that late in the evening, one of the men who turned out to be the 3rd appellant informed Laban that they were running away from a police crackdown in Embu town. Laban informed the men that his brother was at Gikuuri and they left saying they had gone to look for him. Being suspicious of the men, Laban informed John Njeru Charagu (PW2), (John), who was the assistant chief of the area, about the visit. John directed Laban to monitor their movements and report back to him. At around 5:00 a.m on 23rd June, 2001 the men returned to Laban's house and informed him that they had not been able to find his brother. Laban testified that the men came carrying some items which he suspected were stolen.

[9] The men requested Laban to give them food to eat, Laban lied to them that he would go and get food from his brother's shop. He locked the four men inside the house from outside and he quickly ran to John's house and informed him that the men were in his house. John gathered some elders and youths and they proceeded to Laban's house where they found the men with a radio cassette make National Star and a shirt which were later identified as stolen property. That is how the appellants were arrested.

[10] According to Laban, the appellants confessed that they had robbed Ann. John sent Laban and, Michael Njagi Nthiga (PW5) (Michael), to go for Ann so as to identify the items which were found in the possession of the appellants. On their way to Ann's home, they met Justin who identified the radio and shirt as those that had been stolen from them that fateful night. It was Justin's evidence that he did not identify any of the appellants and that he found them already arrested by members of the public. Ruth also gave evidence that she lost consciousness when she was pushed under the bed and only came to be while in the hospital. She was also not able to identify any of the attackers. Ann maintained that she was able to identify the appellants in the cause of the robbery using the light from the torches they had. She also testified that the incident took about 30 minutes which enabled her to positively identify the appellants.

[11] IP Johnson Karisa (PW9) (IP Johnson), testified that on 29th June, 2001 at around 5:30 p.m he was requested by his superior to conduct identification parades in respect of the four appellants. He stated that he explained to each appellant the purpose of the identification parade and they all agreed to participate. According to his evidence he conducted four separate identification parades in respect of each appellant. He testified that Ann identified each of the appellants by touching them. He further testified that the appellants were satisfied that the identification parades were carried out fairly.

[12] C.I Dickson Muriuki (PW8), (C.I Dickson), on 2nd July, 2001 while at Runyenjes Police station recorded statements of inquiry from the appellants. He stated that the appellants confessed to committing the offences they were charged with. He maintained that before recording their statements, he cautioned them that they were not obliged to say anything unless they so wished; and that whatever they said would be written down and could be used as evidence against them. C.I Dickson testified that the appellants gave their confession statements voluntarily and also executed the statements signifying that the same was true records of the statements they had given.

[13] Placed on their defence, the appellants gave sworn evidence. The 1st appellant testified that on 23rd June, 2001 he left Kibugi and went to Kawanjara to purchase paw paws for his business. After purchasing the paw paws and other fruits he went to the stage to board a vehicle back home. While at the stage, a group of people approached him and asked him to identify himself. Upon identifying himself, he was requested to accompany them to Runyenjes Police Station where he was arrested and charged. He denied committing any of the offences he was charged with. The 2nd appellant testified that on 26th June, 2001 at around 7:00 a.m while taking milk to the Kenya Co-operative Creameries at Runyenjes he met three people who asked him to identify himself. He gave the people his National Identification Card and after inquiring where he was staying they informed him they would treat him as a suspect in a robbery incident

that had occurred in the area. He was arrested and taken to Runyenjes Police Station. He was later charged after three days. He denied committing any of the offences.

[14] The 3rd appellant stated that on 23rd June, 2001 he left Nairobi and went to Kawanjara to buy miraa. At Kawanjara he was directed to go and buy miraa at Gikuuri. At Gikuuri he met with a group of people who inquired where he was coming from. After informing them that he was from Nairobi he was beaten and arrested by the said people. He testified that the said people tied him up and removed his shoes, watch and took Kshs. 1,400/= that he had. He was later taken to Runyenjes Police Station where he was interrogated over a robbery incident that had occurred at Gikuuri. He denied committing any of the offences he was charged with. The 4th appellant testified that on 23rd June, 2001 he boarded a vehicle and arrived at Gikuuri at around 7:30 a.m. While looking for miraa to buy he met a group of people who asked him to identify himself. After identifying himself and informing the crowd that he had left his Identification Card at home, he was ordered to lie on the ground. According to him the group of people removed his shoes, belt and took Kshs. 1,800/= that he had. He was later taken to the police station and charged. He also denied committing any of the offences he was charged with. The appellants also denied recording the aforementioned confessions. They maintained that they executed the some statements in the mistaken belief that they were executing documents which would secure their release. They further maintained that they never made the said confessions.

[15] Being satisfied that the prosecution had proved its case beyond reasonable doubt; the trial court convicted the appellants on two counts of robbery with violence and sentenced them to death on each count. The trial court also convicted the appellants of the offence of malicious damage to property and sentenced them to four years imprisonment. We shall address the issue of the sentences in a later paragraph of this judgment. Aggrieved with the said decision the appellants appealed to the High Court. The High Court **(Khaminwa & Okwengu, JJ.)** in a judgment dated 10th November, 2005 upheld the appellants convictions and confirmed their sentences. The appellants have now filed this 2nd appeal before this Court based on homemade grounds to avoid repetition we summarise them as follows:-

1. ***The learned Judges erred in law by upholding the appellants' conviction and sentence based on reliance of visual identification evidence which was not free from error.***

2. ***The learned Judges erred in law by relying on circumstantial evidence that was not sufficient to draw the inference of guilt on the part of the appellants.***

3. ***The learned Judges erred in law by upholding the appellants' conviction based on their mode of arrest.***

4. ***The learned Judges erred in law by upholding the appellants' conviction based on alleged confession statements that were not recorded by the appellants.***

5. ***The learned Judges erred in law by rejecting the appellants' defences which were not displaced by the prosecution.***

[16] Mr. Muhoho Gichimu, learned counsel for the appellants, adopted the home made grounds of appeal proffered by each appellant. He submitted that the evidence tendered at the trial court was not subjected to fresh evaluation by the High Court as required by the law. He maintained that had the High Court subjected the evidence to exhaustive analysis they would have realised that PW1, Ann did not give sworn evidence in her examination in chief. After Mr. Gichimu was shown the original records by the trial court, he however abandoned that submission. He further submitted that from the record the appellants may not have appreciated what was going on in court because there was no evidence of interpretation of proceedings. According to him this was evident from the fact that the appellants did not object to the self incriminating confessions. He argued that the appellants were not represented by an advocate both at the trial court and the High Court.

[17] Lastly Mr. Gichimu submitted that the sentences handed by the trial court were not legal because the appellants were sentenced to death on each count of robbery with violence. He stated that the

2nd count of robbery with violence had not been proved to the required standard. He argued that the trial court did not take into consideration the appellants' defences; and that the High Court did not also consider the evidence which raised the issue of whether the appellants were at the scene. He urged the Court to allow the appeal.

[18] On the part of the State, Mr. Lugadiru, Senior Public Prosecuting Counsel, while opposing the appeal maintained that the appellants' convictions were safe. He submitted that ***Section 207*** of the ***Criminal Procedure Code,*** Chapter 75, Laws of Kenya had not been violated. He stated that under ***Section 143*** of the ***Evidence Act,*** Chapter 80, Laws of Kenya there is no required number of witnesses that are necessary to prove any matter. He also submitted that the trial court correctly invoked the doctrine of recent possession which the appellants failed to rebut. He maintained that the two courts below considered the appellants' defences and dismissed them for lacking substance. Mr. Lugadiru further submitted that the confessions recorded were proper and that there was no proof that the same were obtained through coercion or threat. He maintained that the appellants did not object to the production of the confession statements. He lastly submitted that the issue of identification was not relevant in this appeal because the trial court did not place reliance on identification evidence to convict the appellants. He stated that there was direct evidence tendered by John and Laban the owner of the house in which the appellants were arrested and they were found in possession of items that were stolen from Ann's home a few hours before. Mr. Gichimu in response to Mr. Lugadiru's submissions stated that the appellants had testified that they were tortured; and therefore the confession statements were not voluntary.

[19] This is a 2nd appeal, and that being so this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See ***Chemangong -vs- R [1984] KLR 611***. In ***Kaingo -vs- R*** **(1982) KLR 213 at p. 219** this Court said:-

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"***

[20] In view of the aforementioned, and having considered the record of appeal and the submissions by respective counsel we are of the view that the following issues fall for our determination:-

1. ***Were the appellants' convictions based on the evidence of identification?***
2. ***Was the doctrine of recent possession properly invoked by the two courts below?***
3. ***Were the appellants confession obtained voluntarily?***
4. ***Did the two courts take into consideration the appellants defences?***

[21] We shall address those issues sequentially beginning with the evidence of identification. It is clear from the foregoing that the only evidence on identification of the appellants was given by Ann. Both Ruth and Justin who were also present during the robbery testified that they could not identify the robbers. In ***Wamunga- vs- Republic (1989) KLR 424*** this Court held at page 426 that,

> ***"....it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

[22] In this case both courts found that the evidence on identification was not free from error and therefore did not rely it. It was the prosecution's evidence that the robbery occurred at around 4:00 a.m when Ann, Ruth and Justin were asleep; and that the robbers cut and injured Ann and Ruth severally with

the pangas they had. From the foregoing it is quite clear that the conditions that were prevailing during the incident were difficult for a positive identification. Therefore, it was incumbent on the trial court to test the evidence on identification properly and indeed it did and rejected it. Ann stated that she was able to identify the appellants using light from the torches the appellants had during the incident. However, no evidence was tendered in respect of the intensity of the light from the torches. In ***Maitanyi -vs- Republic (1986) KLR 198***, this Court at page 201 held,

> ***'The strange fact is that many witnesses do not properly identify another person even in daylight... It is at least essential to ascertain the nature of light available. What sort of light, its size and it position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into....' See Wanjohi & Others -vs- Republic (1989) KLR 415.'***

[23] The prosecution did not also tender evidence on whether Ann was able to get strong impressions of the attackers on the material day. She did not give any evidence of any descriptions of the appellants which enabled her to identify them as the robbers. In ***Maitanyi -vs- Republic (supra)***, this Court held,

> *"**There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description".***

From foregoing it is clear to us just like the other courts below that the identification evidence by Ann could not have been free from error.

[24] The other evidence by the prosecution was that Ann identified the appellants through an identification parade on 29th June, 2001. There are clear inconsistencies on the evidence of how the parade was conducted. On one hand Ann, testified that she participated in one identification parade where she was able to identify all the appellants herein; and that the parade comprised of twenty people standing in a straight line. On the other hand, IP Johnson testified that he conducted four different identification parades in respect of each appellant and that each parade consisted of ten members. The discrepancy on how the identification parade was conducted casts doubt as to whether the same was properly conducted. Therefore, the trial court was correct in observing as follows in the judgment:-

> ***"Though the 1st complainant, Ann Muthoni said in her evidence that she identified the accused persons during the robbery at her house and later at the police station, I find that the conditions pertaining at the time of the alleged offence were not conducive for the positive identification of the robbers. I also find that her evidence and that of IP Karisa (PW9) as to how she identified the accused persons at the police station has discrepancies. I will disregard her evidence identifying the accused persons."***

[25] The appellants herein raised a similar ground of appeal in the High Court that the trial court erred in basing their conviction on identification evidence. The High Court in correctly holding that their convictions were not based on identification evidence stated:-

> ***"The trial magistrate found that the circumstances of identification were not satisfactory both at the scene and at the identification parade. Her (Ann) evidence at the parade is contrary to what PW9 conducting the parade said and what is supported by the identification forms. The trial Magistrate disregarded this evidence on identification. The first main ground of appeal is rejected."***

Based on the foregoing the two courts below correctly disregarded the identification evidence because it was not free from error. The appellants' conviction was not based on identification evidence. Therefore, this ground raised by the appellants has no basis and ought to be rejected.

[26] The next issue is whether the doctrine of recent possession applied in this case. This Court has decided in several cases and outlined when the principles of recent possession may be applied to a case. In ***George Otieno Dida & Another -vs-Republic*** ***[2011] eKLR*** the appellant therein had been found in possession of the stolen goods less than five hours after the robbery and this Court held that:-

> ***"There are concurrent findings of fact by both the trial and first appellate courts that indeed there were robberies, several items including the ones produced in court were stolen in the course of those robberies, and the appellants were found in possession of the same only five hours or less after the robberies.....In our view, the evidence against the appellants though circumstantial, raised a rebuttable presumption of fact under section 119 of the Evidence Act, Cap 80 Laws of Kenya, that they were either the thieves or guilty receivers. The evidence excludes the latter because they were found in possession only less than 5 hours after the theft and it is not reasonably possible that the goods would have within that short time have changed hands."***

In ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic -Criminal Appeal No. 272 of 2005,*** this Court held,

> ***"….It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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."***

[27] In this case Laban testified that the appellants went to his home on the material night at 10:00 p.m looking for his brother; and that they later returned at 5:00 a.m with goods which he suspected were stolen. Immediately thereafter, Laban informed John the area assistant chief and the appellants were arrested on 23rd June, 2001 in his house. The appellants were found in possession of a radio cassette make National Star and a shirt which were identified by both Ann and Justin as the items that were stolen from them during the robbery. The robbery occurred at around 4:00 a.m on 23rd June, 2001. The appellants did not offer any reasonable explanation of how they came to be in possession of the stolen items. Therefore we agree with the two courts below that the appellants were in recent possession of items which had been stolen a few hours before their arrest. From the foregoing there can be no explanation other than that the appellants were involved in the robbery. In the case of ***Francis Kariuki Thuku & 2 others -vs- Republic [2010] eKLR*** this Court held that:-

> ***"Concerning the application of the doctrine of recent possession to the facts in the case, we are of the view that the appellants did not offer any reasonable explanation of their possession and therefore the reliance by the superior court on the holdings in the cases of R. V. Loughin 35 Cr. Appl. 269 by the Lord Chief Justice of England and this Court's own decision of Samuel Munene Matu V. R. Criminal Appeal No. 108 of 2003 at Nyeri demonstrates that the doctrine was properly applied. The recovery of the items in the case before us was within 7 days whereas in the MATU case (supra) a period of 20 days was held to be recent. We accordingly uphold the superior court's view of the law on the point. In this regard we would re echo the decision of this Court in the case of Hassan -vs- Republic [2005] 2 KLR 11 where as regards recently stolen goods it delivered itself thus:-***
>
> ***"Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver."***

In *R v Loughin 35 Cr App R 69*, the Lord Chief Justice of England said:-

> ***"If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop breaker."***

The conclusions by the trial court and the 1st appellate court were based on evidence of recent possession of stolen items that was not at all shaken by the appellant's respective defences and after considering the entire appeal we find the two courts rightly arrived at this conclusion and the doctrine of recent possession was properly invoked.

[28] The allegations that the confessions were not recorded voluntarily need to be examined further as an issue before us. C.I Dickson gave evidence that the appellants by way of statements of inquiry admitted to committing the robbery in question. During the hearing at the trial court the appellants did not object to the production of those confessions and only retracted the same after they were produced.

Section 25 of the ***Evidence Act,*** Chapter 80, Laws of Kenya defines a confession as:-

> ***"..Comprising words or conduct, or combination of words and conduct, from which whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence."***

Section 25 A (1) *of the* ***Evidence Act*** provides:-

> "***A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a Judge, a magistrate or before a police officer (other than the investing officer), being an officer not below the rank of Chief Inspector of police and a third party of the person's choice."***

[29] In this case C.I Dickson was not the investing officer. He testified that he cautioned all the appellants before they made their confessions and that they chose not to have a third party present during their confessions. C.1 Dickson in his evidence maintained that the said confessions were given voluntarily by the appellants. The appellants did not deny executing the statements of inquiry recorded by C.1 Dickson. However, they testified in their defences that they executed the same in the mistaken belief that they would be released. In ***Tuwamoi -vs- Uganda (1976) EA 84*** at page 588, the predecessor of this Court held,

> ***"...a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to retract, take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that statement was not a voluntary one."***

Further in the above mentioned case, the predecessor of this Court at page 91 held as follows:-

> ***"We would summarize the position thus- a trial court should accept any confession which has been retracted or repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that***

the confession cannot but be true."

See also ***Munyao -vs- Republic (2002) 2 KLR 504*** and ***Komora -vs- Republic (1983) 583.***

In ***M'Riungu -vs- Republic (1983) KLR 455,*** this Court held at page 463:-

"***As was stated in R-vs- Baskerville (1916) 2 KB 658 that corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime, and we agree that it must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him-that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.."***

In this case the appellants' confessions were corroborated with the evidence of recent possession of the stolen items. Therefore, the two courts below were correct in admitting the evidence.

[30] The last issue for us is whether the defence evidence was considered. The trial court and the 1st appellate court each considered the defence by each of the appellants and had a concurrent finding. The trial court in its judgment stated:-

"I also find that though the accused persons in their defence gave evidence which tended to retract their confessions to CI Muriuki. Their statements confessing to commission of the offence are corroborated by the evidence of all the other prosecution witnesses. I have also noted the coincidence in the circumstances under which the accused persons allege to have been arrested. I have come to the conclusion that the accused persons' defences were rehearsed. I reject them."

The High Court in its judgment held:-

"The record shows that the trial magistrate considered all the statements made by the accused in their defence. However, their stories cannot be believed considering the prosecution's evidence that they were all arrested by members of public led by PW2 and they were in the vicinity of the robbery scene."

Consequently, the appellants' evidence was taken into account by both courts. Both courts having arrived at concurrent findings on the defence of the appellants this Court cannot interfere with such findings which are not based on any misapprehension of the evidence or the law. See **Chemangong *-vs- R (supra).***

[31] The last issue to deal with is regarding the sentences. The trial court convicted the appellants on two counts of robbery with violence and sentenced them to death in each count. The trial court also convicted the appellant of the offence of malicious damage to property and sentenced them to four years imprisonment. These should have been held in abeyance. In ***Abdul Debano Boye & another -vs- Republic- Criminal Appeal No. 19 of 2001,*** this Court held,

"We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reasons for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In the case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term"

Therefore, the trial court erred in applying multiple sentences to the appellants and we hereby substitute

them with the proper sentence, that is; the appellants are sentenced to death on count one of robbery with violence and the sentences in respect of the other count of robbery with violence and the offence of malicious damage to property are accordingly held in abeyance.

[32] For the foregoing reasons, the appeal herein is dismissed for lacking in merit.

Dated and delivered at Nyeri this 10th day of October, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy to the original.

DEPUTY REGISTRAR