



**George v Republic (Criminal Appeal E050 of 2022)
[2024] KEHC 1750 (KLR) (22 February 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E050 OF 2022
MW MUIGAI, J
FEBRUARY 22, 2024**

BETWEEN

ELIJAH VIDEGEDE GEORGE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment and sentence of the Chief Magistrate’s Court
at Machakos (Hon. M.A Otindo) in Machakos C.M Criminal No. 425 of 2017)*

JUDGMENT

Background

1. The Appellant was charged on 25th September,2017 charged with six counts of robbery with violence contrary to Section 296 (2) of the Penal Code as amended on 5th December,2017 the charges before the trial were 6 counts of robbery with violence.
2. The Appellant pleaded not guilty on both charges and the matter went to full trial.

Prosecution Case at the Trial Court

3. The Prosecution case was anchored on the evidence of twelve (12) witnesses.
4. PW1was Zacchaeus Mukabane Mandu. He testified that he was living at a place known as Kwa Mwalimu. It had 8 rooms in a plot with a perimeter wall and a gate with a toilet and bathroom in the room. They lived in room three switched the light at 7:00 P.M. and all the rooms were occupied by University Students. PW1 had lived there for one year and had never experienced any problem. PW1 recall on the night of 15th, 16th May 2017,between 12 p.m. – 2.00 a.m. with Dickson Mwirikia (deceased) and George (who is still ill) they all lived in the same room. Dickson and PW1 were leaders in Machakos University Travelling Theatre. They got back home at about 3-4 p.m. at about 5-6 p.m.,



- they left for rehearsals, he felt as if someone was following them. PW1 was a bit suspicious but ignored. When they got to the school gate this person disappeared. They finished the rehearsals at about 9:00 P.M and left the University Compound. They got to their house and latched both bolts. It was not locked.
5. PW1 testified that they normally left the room light on and the three of them slept on the same bed. At about midnight PW1 heard the gate open and heard George scream but he was hit on the head using a metal bar, he became unconscious. When PW1 opened his eyes he saw three people, PW1 was hit on the mouth using the metal bar. His lower jaw was dislocated. PW1 was stabbed on the head. At the time Dickson was still asleep. PW1 felt pain and could feel from a distance. He was stabbed on the face and ear. Testifying that these people said they wanted phones, laptops and money.
 6. Dickson woke up and told them to take everything. Stating that they took their phones every document, money and laptop that Dickson had. After they took everything they started cutting Dickson all over the head and face. PW1 could see as they were using a sharp object. When they tried look at one of them, he threw a sword or panga at PW1 but he missed. Another one hit him severally with a metal bar and he became unconscious he woke up and found himself at Kenyatta Hospital. These three people had locked all the other rooms from outside after taking all their phones. PW1 woke up the next day in the evening.
 7. On 17th May 2017, PW1 learnt that Dickson passed on. PW1 stayed was in hospital for three weeks and was discharged 1st June, 2017. According to PW1 as this incident was going on, he saw one of the attackers before he was affected. He saw the 1st accused who was closest to him. He was wearing something like a Marvin. The 2nd accused was at a distance but he saw him. He was wearing a jacket. PW1 cannot remember the 3rd person very well. PW1 stated they were called at the police station to identify the attackers at Machakos. It was PW1, Moses Mwangi, Mary, Pauline and Patricia Mwikali and Kamau. They were told to sit outside then they were called in one by one. After going in one walk out through another way. When PW1 walked in he identified the accused. They went in twice. PW1 identified the 1st accused the 1st time. He identified Identification parade Form MFI 6. The 2nd time PW1 was with Moses, Patricia, Pauline and Kamau. PW1 was able to identify the 2nd accused identification parade form MFI 7
 8. In cross-examination, it was the testimony of PW1 that he was asked to record a statement after the identification on how he was able to identify the attackers. PW1 narrated as someone wrote the statement at the station. PW1 he saw three men enter their room but PW1 could only identify two of them. Their room was No. 3 and the light was on. Two 4x 6 beds would get into the room and a small space is left. The room was about 3-4 meters squared. PW1 the 1st accused saw very well he was sure. The 1st accused was not brown. The Marvin worn by the 1st accused was covering only his head. PW1 could state what clothing he was wearing. PW1 thought these attackers had an intention of finishing Dickson. PW1 did not have the opportunity to observe all the details as he was hit and he did not immediately wake up.
 9. In Further cross-examination, PW1 testified the light was on their room. He identified a slim brown man. That he saw the 2nd attacker, that 2nd accused had a stripped T-Shirt on. PW1 saw the 1st accused vest because he was closest to him and that only the 1st Accused had a Marvin. PW1 saw the 2nd accused well but not as well as the 1st accused. 2nd accused took not more than 30 minutes in PW1's room.
 10. In re-examination, PW1 told trial court that he attended the identification parades and identified both accused person. For the 1st accused it was face and voice identification while for accused 2 it was face.



That there was no mistake. PW1 did not record the 2nd accused description because he had just come from the hospital and could not express himself well.

11. PW2 was Moses Njenga Mwangi. He told Trial Court that he was living with Patricia Mwikali and after they prepared food they slept at about 11:30 a.m. He testified that at about 12:30 a. m they were woken up by some disturbance. The doors were being knocked and Patricia woke him up. PW2 heard people outside saying 'Fungueni milango haraka'. He heard the students in Room 3 making noise, one of them said 'niache'. The walls were being knocked. PW1 then heard their door close and the people approached his room; his lights were off.
12. PW2 locked his doors both from inside. They spotted lights for a while and left. PW2 heard them saying even if they shouted no one will help. They passed and went ahead and demanded for a laptop. Then they went to room 3, one could hear things being knocked. They came to their room saying 'fungueni mlango wasichana', PW2 could hear Prisca begging them to let them negotiate. The girls refused to open the door so they broke the windows.
13. He testified that these people were persistent so the girls in room 4 opened. PW2 heard one of them ask for the laptops and phones. Prisca called Dickson while Mary called PW2. They took the laptop and phones, they beat up the girls and came to his room, broke his window and spotted light on him and PW2 opened the door.
14. PW2 switched on the light and opened the door, one of the attackers got in and asked for his laptop. PW2 gave it out very fast. He asked for the charger which PW2 gave out. According to PW2, he was holding a crow bar or machete, the other one came from behind him and took the laptop and charger which he gave him. That the 3rd person was standing at the window. PW2 gave his phone Hauwei and Nokia. He then did as if to hit PW2 but he begged and he left. The girl was still on the bed so they left. PW2 locked the door very fast and switched off his light.
15. According to PW2 he spoke face to face with the assailants so he recognized them very well. That the 1st accused is the one who took his property and passed it over to the 2nd accused. He testified that the 1st accused was wearing jackets he had a big head and was wearing a Marvin whose colour he was not sure. As per PW2 the 2nd accused was wearing a jacket. The 3rd person was not seen well by PW2. He told the trial court that when he got out he could see blood drops from room 3. He was told Zacchaeus and Dickson had been taken to hospital. They were with George who could not talk at all. George was then taken to Level 5 emergency and was referred to Kenyatta Hospital when he came back to school he appeared not so well, so he left school. After he improved he asked Zacchaeus where Dickson was. They later told him that Dickson had passed on.
16. On the 1st identification parade, PW2 identified the 1st accused/ appellant. He recognized him from his head and even voice. He tried to hide his voice because on that night he had a crooked voice. On the 2nd parade, PW2 identified the 2nd accused, he was brown and slim, he also recognized his eyes because he looked PW2 in the eye. They were 7 people in the identification parade, 2nd Accused, he recognized him he lives in Kathemboni.
17. In cross-examination, it was the testimony of PW2 that the 1st accused person was the first person to enter his room. He had a big head and a big face. He was wearing a Marvin. PW2 recognized his voice it was crooked. He said fungueni nataka hiyo laptop- charger iko wapi. He left and came back for the phones. He was the same person who shouted hata mpige kelele hakuna mtu atawasaidia. He also "achana na hiyo akazike hao maiti. Testifying that when he went to record his statement he was asked to describe how these attackers looked like and he did. PW2 picked the 1st accused at the identification parade. He could not remember if it was the 2nd person. PW2 was taken to the parade twice. The first



- time PW2 raised his hands and touched him but was told to go back to the line and be sure. The 2nd time chose him. He could not remember what position he was in the parade. He asked two people to speak so he could identify the voice. He did not ask the others to speak. He told the trial court that the police did not tell them that robbers were in the parade or whether there was a suspect. Testifying that there were approximately seven people in the parade who were almost alike. Some did not have ears as the 1st accused person, he could not remember if they all had shoes, they were 7 people almost alike colour height and ears. He had not seen the 1st accused at the police station before the parade.
18. In cross-examination by the 2nd Accused, PW2 testified that he is the victim the accused attacked that he does not know the 2nd accused but he went to PW2's place. Testifying that the plot had 8 rooms, he was a tenant and his room had light on. PW2 attended the parade and there about 7 people, the people were not wearing uniform and they looked alike. He stated that he described the attackers and maybe the police did not write. He recorded in his statement that he recognized the 1st Accused's voice.
 19. In re-examination, it was PW2's testimony that the witness statement was not in his writing, he narrated as the police recorded. PW2 has stated what happened. PW2 described the 1st accused to the police and he identified him at the parade.
 20. PW3 was John Kamau Njoroge. He testified that on the night of 15th- 16th May 2017 he was in his room asleep. At about midnight he heard a bang on his neighbour's wall. That his neighbour was in room 3 while PW3 lived in room 2. When PW3 woke up he heard people's voices speaking outside. He sat silently to listen. He told trial court that in room 3 there was three occupants. He noticed the voices were foreign. PW3 then heard those voices telling Mary and Priscah to open the door then he heard window panes breaking. PW3 then heard them leave room 4 for room 5 occupied by Priscah and Moses.
 21. It was his testimony that when they left room 5 he heard footsteps walk to room 1 then they told the occupants to open the door then they were asked for their phones. After that they went to PW3's room and knocked. They asked PW3 to open he opened and was pushed to the wall and asked to give money that he had but he said he had none. There was a power bank and a phone, they took the power bank and placed in a bag and bottles of soda. They then pulled him and in the process saw his wallet and took Ksh1,500. PW3 was not able to see the faces of these people but he saw a crow bar after they parked the things in the bag, one threatened to hit him but the other one told him 'wachana na yeye atatusaidia kuzika yule tumeua'. PW3 testified that after they left, he went back to sleep until police officers came.
 22. They introduced themselves so he opened. In room 3, PW3 learnt that Dickson had been seriously injured so was Zack. The police took them to the hospital. They realized later that George was seriously injured as he could not talk. Mary was also hit. Later PW3 visited Dickson in Hospital. Dickson died. PW3 told the Trial Court that his lights were off but after he opened the door, the robbers switched on the lights. PW3 was not able to recognize any of them and that none of his belongings was recovered.
 23. In cross-examination, PW3 testified that he recorded his statement soon thereafter. He was not injured. His statement was read to him and he was asked to do any corrections. He saw the body of a masculine make and brown though he did not see his face. That the 1st accused is neither masculine or light skinned.
 24. In cross-examination by the 2nd accused, PW3 told the trial court that he did not recognize any of the voices of the attackers. That person who was masculine and light skinned is not in court.
 25. PW4 was Mary Nyambura, she testified on oath that on the night of 15th- 16th May, 2017, she was watching a movie on her roommate's laptop Priscah Wanjiru. She then fell asleep with the lights on. That after minutes to midnight, she heard as if the wall to room 3 was being hit. Priscah then asked her



- if she heard something but she told her to go back to bed as she was dreaming. In room 3 there was Dicky and some freshers who had come to crash. That the room was for Peter and Dicky. They heard as if there was a fight. Then they heard them knock the window saying nyinyi wasichana fungueni hapa. They broke the window and removed the curtain. They told them to open the door. At this time, they were hiding behind the door. They kept on hitting the window grill for about 15 minutes.
26. PW 4 stated that if they did not open the door and they manage to get in they would kill them. They finally opened, they pushed them on the bed. PW4 looked at one of them who hit her with a crowbar on her right shoulder. The other one told him he did not want violence. They took her roommates laptop earings and money. PW4 testified that two people entered their room and that the person who hit her was brown while the other was wearing a black Marvin but she did not look at him so she could not tell how he looked. PW4 could recognize the person who hit her. It was the 2nd accused who hit her. That after they took whatever they wanted, they went to room 5. They did not bother to close their door and after about 15 minutes the police came. PW4 later learnt that door 3 Dicky was unconscious while Zack was injured seriously on the ear. They were taken to hospital. She went to Machakos Level 5 the next day for treatment. Zack was fine but Dicky died. She went for his burial in Nakuru. None of the items was stolen was recovered.
 27. PW4 said that there were security lights around the washrooms and another outside the gate. The same could not light the whole plot. PW4 told the trial court that after Dicky's burial her roommate said she had seen the 2nd accused at a certain bar in Kathemboni. They later went to identification parades. PW4 identified the brown man. She produced her P3 Form MFI 8.
 28. In cross examination, it was PW4's testimony that she was in room 4 and there was security lights outside the bathrooms and outside the gate. She did not see the 1st accused. PW4 identified him according to the description by her colleagues.
 29. Testifying that she identified the 1st accused by his voice. Her roommate told her the one who had a black Marvin is the one who said fungueni hapa nyi wasichana. He had a husky voice. She told the trial court that there were around 6 or 7 people in the parade. She cannot recall which number the 1st accused was. She told him to say nyi wasichana fungueni hapa and he did. They were not allowed to make any statement after identification. According to PW4 she asked about 3 men in the parade to speak. They were not of the same height or body built. She did not remember if any had a Marvin or shoes. They dressed normally. PW4 did could not remember the dates she went for the identification parade but it was around 2, 3 or 4. It was not 6.00 pm. It was in the afternoon.
 30. In cross-examination by the 2nd accused, it was the testimony of PW4 that the 2nd accused is the one who hit her. Testifying that there were 8 rooms in the plot but she cannot tell how many occupants. They had a light on so she was able to see the 2nd accused. She told the police there was light. That it was not recorded. She said the person who hit her was brown (it was not recorded) she cannot remember the date of the parade but there were between 6-10 people. These people were all different. Testifying that 2nd accused is the one who hit her because she looked at him so he saw the 2nd accused well. 2nd accused is brown. That he had a black jacket. They were not called to record a statement after the parade. PW4 gave 2nd accused Kshs. 900/= . This is what was stolen. She recorded that Kshs. 1,100 was stolen.
 31. In re-examination, she testified that she narrated as the police recorded her statement. What she had stated is what happened. That she recorded there was enough light in her room. She had the 1st accused speak but it was her roommate who told her he had a husky voice. She identified him through what she was told by her roommate. She recognized the 2nd accused well. The parade was between 2-4 p.m. or thereabouts.



32. PW5 was Priscah Wanjiru Mureithi, she testified that on the night of 15th -16th May,2017, she was in her house No.4 living with Mary. She was asleep when she heard some voices outside. She woke up and asked her if she heard anything. She told her to go back to sleeping because she was dreaming. Testifying that they then heard their window break. The light was on so they heard them say in a harsh voice fungueni mlango. They got out of the bed and hid behind the door. They threatened to kill them so they opened the door because they had bent the grills. They entered the room as they went to the bed. They took her laptop and money. They then told them to close the door. She told the Trial Court they were two people who entered the room. He was not a tall guy- medium, brown and sunken eyes. Only one spoke asking her hii ni laptop gani and she responded. The other person told her roommate to stop looking at him then hit her. She could have identified the one who took her laptop. After they left their house they went to house No. 5 after some minutes the police came. They got out and the ones who were injured Dickson, George and Zack were taken to Machakos Level 5. PW5 went to see them. She learnt that they were taken to Kenyatta- Zack and George are okay. That the other one died. She went for his burial in Nakuru. It is the 2nd accused who took her laptop. (points at accused 2). PW5 identified the 2nd accused with the sunken eyes.
33. In cross-examination, it was her testimony that she was able to identify the 2nd accused. She only participated in one identification parade. She did not identify the 1st accused. PW5 said she could positively have identified the attackers if she saw them. She identified the 2nd accused. She did not identify the 1st accused. She went for the 1st identification parade where she identified the 2nd accused.
34. In cross-examination by the 2nd accused, it was testified that she recognized the voice of the person who took her laptop. She recorded this with the police. She might have omitted to record this with the police. The lights were on. She recorded with the police.
35. In re-examination. She told the trial court she narrated to police as he recorded. Whatever she had stated what happened. She attended only one parade. She was not able to know whatever the parade she attended was the 1st or the 2nd. PW5 said that there was light. She did not know if the police omitted to record.
36. PW6 was PC Hassa Musa Kibucho. He testified that he is attached at Machakos Police Station. He recalls on 21/9/2017 at about 5.30. PW6 was called by his informer from Makutano Junction Kyumbi that there were men whom they had been looking for over crimes committed were seen at the stage. PW6 called PC Kibuga and asked him to accompany him to Makutano junction. They took a private car and rushed there and on their way, they called the OCS and informed him of what was going on. On arrival they met the informer who told them he was suspecting one of the two young men and pointed him to them. They stood and watched this man's movement, he went to the Machakos stage and entered a Maruti Nissan Vannette. PW6 got into the Nissan while his colleague followed.
37. PW5 stated that when they got to a road block, the vehicle was stopped as they had called the police at the road block. He got out and they introduced themselves and he pointed out to the suspect who told them he is Videgede. They got him out of the Nissan as they released the vehicle. It was PW6's testimony that they brought him to Machakos Police Station and handled him over to the CID. Later they were informed Videgede had been positively identified at a parade for various offences.
38. In cross examination, he told the trial court that he could not say that the accused was arrested out of suspicion. He was not involved in the identification parade. he did not recover anything suspicious or illegal from the accused. The accused told him he is a hustler. He stated that his duty was not to investigate this case, he only arrested the accused.



39. PW7 was Dr. John Mutunga. He told the trial court that he is stationed at Machakos Level 5 Hospital qualified from University of Nairobi with MbChb Practice No. A3932. PW7 had a P3 form for Zacchaeus Mukabane aged 21 years. That it is alleged that he was assaulted on 15/5/2017 by persons well known to him. He suffered blunt injury to the mouth involving the lower incisor teeth which became loose and were wired. Cut wound on right ear which was stitched. He told the trial court that it had taken 6 months before examination, probable weapon used was blunt or sharp. He had been seen by a dentist. PW7 formed the opinion that degree of injury as grievous harm on 30/11/2017. PW7 relied on treatment notes and case summary from Kenyatta National Hospital. He produced the treatment notes and case summary dated 5/6/2017, PExb 1, Lab request form PExb 2 (a), Radiology request form PExb 3. Receipt for Lab PExb 4 and P3 Form PExb 5
40. PW7 also had the P3 form Mary Nyambura Mbugua aged 20 years. It was alleged that she was assaulted on 15/5/2017 and sustained blunt injury to the right shoulder, bruise on right shoulder. It had taken 6 months before the examination. Probable object used was blunt. She had been treated. He assessed the degree of injury as harm. PW7 produced the P3 form as exhibit PExb 8. He did not know the patients before his examination or the perpetrators.
41. In cross examination, he testified that according to the report from the police, Exhibit 5 stated that they were robbed by thugs not persons known to him so is Exhibit 8.
42. In cross examination by the 2nd accused, he lamented that Zacchaeus did not mention names of persons who injured him. According to PW7 Part 1 was filled at the police station. the date of injury was stated in Part 1 and time is 10.00 p.m. Mary did not mention any names.
43. PW8 was PC James Mwaura. He told the Trial Court that on 20/11/2017 he was called by OCS Machakos to his office where he found Inspector David Kemboi, PC Samuel Kibuga and PC Geoffrey Ngetich. That the OCS briefed them that he had information of wanted suspect having been seen with Tumba area entering a chang'aa den. They proceeded to the area and entered the den where they found the suspect. They arrested him and brought him to the station. the suspect was in a group that was seated outside the house. They arrested him immediately before they identified themselves but some of them were in uniform. Testifying that he was wanted for several crimes. He did not know him before the arrest. 2nd accused attempted to run away but they caught him.
44. In cross examination, it was PW8's testimony that he knows the suspect was charged with robbery with violence. He did not arrest the 1st accused.
45. In cross examination by the 2nd Accused; it was testified that the Picture of the 2nd accused was in the records of the police as he was wanted. PW8 told the trial court that all he did was to arrest the 2nd accused and the scene of crime was about 4km from court. The 2nd accused were not in possession of anything at the time of his arrest.
46. PW9 was Inspector Simon Muinde Mutisya. He testified that he is No. 232872 Deputy DCIO Kathiani formerly the investigator DCI Machakos. He recalled on 22/9/2017 at about 5.15 p.m. – 6.00 p.m. he was requested by No. 440/330/17 the investigating officer Anthony Mwanguya CPL to conduct an identification parade for Videgede George (accused 1). He used Form 156 identification parade form. He used No. 46 a-n of the Force Standing Orders. He inquired from him if was willing to take up in the parade he accepted and signed the Form. He signed that his advocate and family were far so he would go on he indicated his I.D card and put a thumb print. According to PW9 he picked 9 people who had similarities with the suspect.



47. He recorded the names of the witnesses in the parade those on the line up. The identification parade was within the OCPD's office exit and entry was one. Testifying that the suspect stood between number 3 & 4 and was identified by Mary Nyambura Mbugua a student at Machakos University. Further that the witnesses were not meeting each other. The suspect then changed and stood between No. 5 & 6. He told the trial court that Moses Njenga Mwangi did not identify the suspect. That suspect then stood between No. 7 & 8. That Priscah Wanjiru Mureithi identified him touching him. According to PW9 the suspect then stood between No. 6 & 7 and Zacchaeus Mukabane identified him by touching. That the 5th witness, Pauline Wangari Gatharu identified the suspect by touching. At about 6.00 p.m. when the identification parade was concluded the suspect said he was satisfied. He placed his thumbs print and I.D number. PW9 signed the Parade form. The witnesses did not see the suspect before conducting the identification parade. The investigating officer was also not present. He took the suspect back to the cells.
48. The witnesses told him the lights were on at the time of the incident so they saw the suspect well. PW9 did not know the suspect before all he did was conduct the identification parade. The suspect was in court (he identified the 1st accused).
49. PW9 also testified that he also recalls on the 20/11/2017 from 10.00 a.m. to 10.30 a.m. that while at work station, the investigating officer No. 74794 CPL Anthony Wanguya requested him to conduct the identification parade for Benson Nzioki Muasya alias Kanyoki (accused 2). Testifying that the investigating officer was not present at the identification parade. He inquired from the suspect if they could conduct the identification parade to which he had no objection. He said no to his suggestion on whether he needed an advocate and his family present. He accepted the parade and wrote down his name. that there were five witnesses present to do the identification. He picked eight persons from the cells. After they were put on line he called the suspect and asked him to take a position that he wished.
50. The people were of the same age, height, weight and appearance. He stood between No. 3 &. Mary Nyambura identified him by touching the shoulder. The suspect said he will not change position throughout the parade. Moses Mwangi Njenga, Patricia Mwikali Mulinge, George Nabwite and Zacchaeus all identified him by touch. PW9 stated that the suspect was satisfied with the parade. He wrote his name on the form which he then signed. The suspect also signed. PW9 complied with the procedures fully as per the force standing orders. That the witnesses were consistent in the identification the witnesses stated that the lights were on so they recognized the suspect. PW9 produced the report as Exhibit 7. He did not know the suspect before this identification parade. The witnesses never met. He called them one by one.
51. In cross examination, he told trial court that he did not inquire how long the 1st accused had been in the cells or to his health status. The other members were from the cells. There were several people in the cells. He had eight members for the 1st suspect. He did not know how long they had been in the cells. He informed the suspect and those in the cells that he was to conduct the identification parade at the same time. He informed the members when they were at the parade. The suspect has a right to have an advocate or friend present. PW9 was not the one of the investigators in this case but he was an investigator under DCI.
52. The 2nd accused consented to the identification parade because he signed. According to PW9 he did not talk to the witnesses before the identification parade. He spoke to each witnesses at the parade. The witnesses had stated in their statements that they would recognize the suspect if they saw them. PW9 did not have a hand in the arrest of the 1st accused neither did he know how he was arrested. The witnesses were able to identify the 1st suspect. He did not fix the 1st accused.



53. In cross examination, by the 2nd accused, it was stated by PW9 that he was the one who conducted the identification parade the investigating officer was not present. That 2nd accused consented to the parade. PW9 would not know if the investigating officer photographed the 2nd accused before the parade and showed his pictures to the witnesses. PW9 was not present when Mary testified but what he knew was that the members of the parade were looking alike. That the 2nd Accused his name at the identification parade and it is not true that he was forced to write his name on the parade form. He was not in uniform. According to PW9 he informed members that they were going to conduct the identification parade.
54. In re-examination, it was testified that he granted the 1st accused a chance to state if he wishes to have an advocate or family members present and he said hakuna haja. The suspect consented because he signed. Testifying that if a suspect says no, they would not proceed with the identification parade. Witnesses are spoken to at the parade. Exhibit 7 shows No. but the accused consented to have the parade that is why he wrote his name and I.D number. PW9 inquired from accused 2 if he wished to change position but he said he wished to remain in the same position.
55. PW 10 was Dr. Joseph Ndungu. He testified that a pathologist and lecture at UON. And that he worked as a pathologist for 14 years and as a doctor for 21 years. He told court that the documents before him was a post-mortem report for Dickson Mwithia. PW10 performed the post-mortem on 22/5/2017 at Kenyatta National Hospital. That the body was identified by Simon Muchiri the deceased grandfather and Robert Wahome his uncle. Testifying that body of an African male aged 20 years. Good physique. The body had a bandage on the right elbow. Stitched cut wound about 6 cm on the left eye brow 8.5 cm cut would on the left side of head stitched. Left ear 4.5 cm laceration stitched. Part of the earlobe was missing. Contusion on the left shoulder. On internal examination, internal bleeding in the subdural and subarachnoid. Fracture on base of skull. He concluded that the cause of death was sue to head injury caused by blunt trauma. He signed the report and produced it as exhibit.
56. PW 11 was George Kundu Wabwire. He told the trial court that he recalls on 15/5/2017 at about midnight it was now 16th. They were living in room 3 from the gate. He was with Zacchaeus and the late Dickson. It was a single room. That they were asleep when PW11 heard a loud bang. When he woke up he felt himself being with an iron bar on the left side of the head. PW11 screamed once then he heard a voice tell him rudi ulale na hutawai niona siku ingine. That Dickson and him were sleeping on the bed while Zack was sleeping on the floor. These people kept cutting Dickson and beating him up. They cut him seriously on the head. They were demanding money, electronics. They took their laptop and phones. PW11 was peeping through his sheet and could see them cutting Dickson and the people then left. After about 20 minutes him and Zack got out. Dickson could not move.They got out of room and found fellow students outside. Zack's ear was cut and jaws beaten. Zack and Dickson were carried in the landlord's vehicle. At this time, he was not able to speak. PW 11 fell so they were all taken to Level 5 Hospital on 16th at night. He saw two people that night. One was short and brown wearing a Marvin. He saw him well because he is the one who hit him. The other was tall and chocolate in complexion. He is the one who was cutting up Dickson. The room had lights. They had not switched off the lights. PW11 was admitted for two weeks. When PW11 regained consciousness. He was in the same room with Zack, he kept asking about Dickson. He later learnt that he passed on. Before PW11 recorded his statement, he attended an identification parade where he identified the man who was beating him. The identification parade was on 20/11/2017. The person he identified is in court (points at accused 2). That the parade had about 10 people.
57. In cross examination, he testified that they were three in their room. Zacchaeus slept on the floor while him and Dickson were on the bed. Their heads were on same side but he was the one facing the door. PW11 covered his head but kept peeping. He never uncovered his head fully. The person who was



cutting Dickson was lying next to the wall. He was tall and chocolate in complexion. It is not true that the man who was cutting Dickson was short. PW11 recorded a statement on 10/1/2018. That the person who was beating Dickson was short in height. PW11 attended an identification parade in November. According to the PW11 he identified one man not two MFI 7 identification parade form, he was the 4th witness. He identified Benson Musyoki. MFI 6- Identification parade form, the suspects name is Elijah Videgede he was not a witness. He did not identify him. He did not record a statement after the identification parade. PW11 had never seen the 1st accused before. He was not in the identification parade. PW11 did not know how they were arrested. That people looked alike. The person did not have any special mark apart from his height and complexion. There is nothing peculiar about accused. The bulb was on. The room was about 10 x 10 feet.

58. Cross examination by accused 2. He identified parade Form that reads that PW11 identified 2nd Accused by touching. Testifying that at the time of the incident PW11 saw two people. He recorded his statement in January 2018. When he saw the 2nd accused on the night of the incident. He was still conscious. PW11 was confused but not unconscious. The lights were on. He indicated in his statement that the room was lit. (not in the statement). According to PW11 he lived in room 3 from the gate. He did not hear any commotion before he was attacked. He did not know how the attackers got into his room. He was able to identify the person who hit him by complexion and heights. The brown complexion was not unique nor the height. He could not remember what the attackers had on but the one who hit him had a Marvin. The one who was beating Dickson had a black jacket. That the P3 Form was filled on 30/11/2017 while the identification parade was on 20/11/2017. That he had fully recovered and experienced memory lapses up to early November.
59. PW12 was Anthony Mwanguya. He testified that he is No. 74794 DCI Machakos. He works with the DCIO Machakos. He recalls that a report was made at the station that students had been attacked on the night of 15th -16th May, 2017. That the attack was at Kwa Mwalimu hostels in Kathemboni. The students in hostel suddenly heard a loud bang on the door and their windows being broken. He told the trial court that they were ordered to open the door or they be killed or harmed. In the hostel 1 Priscah lost Kshs 200/= they threatened to injure them. In hotel 2 the attackers ordered Kamau to open the door or they harm him. He lost an ITEL Phone and power bank. All these while the attackers were armed with iron rods and panga and were wearing marvins. Their faces were uncovered. In Hostel 3 there were three students Zacchaeus Mukabane, George Wabwire and Dickson Mwirika. The three were beaten seriously and harmed. The attackers appeared to be running in and out of the hostels whenever they stole. Dickson lost consciousness and a lot of blood. The other two were injured on the heads. George Wabwire lost his phone. In hostel 4 where Mary Nyambura and Patricia Mwikali were, Mary lost her phone ITEL, Kshs. 1,500/=. She was hit on the shoulder with an iron bar. In Hostel 5 where Moses Njenga was with Patricia Mwikali, Moses lost two phones make Nokia and Huawei, HP laptop and charger. After a short while, the police were informed and when they got to the scene, the attackers had left.
60. The students narrated to the police what had transpired. The three who were injured were taken to Machakos Level 5 hospital but later transferred to Kenyatta National Hospital in critical condition. They were admitted in ICU. On 17/5/2017 Dickson passed on. Postmortem was done on 22/5/2017. Later one suspect George Videgede was arrested. He was seen with another in kyumbi. Testifying that they identified the attackers at the identification parade though he was not present. That there are witnesses whom he had not availed to testify.
61. In cross examination, he told the trial court that the witnesses stated the attackers had a Kamba accent. He could say the 1st accused was brown. The 2nd accused was almost of the same complexion as the 1st accused. PW1 appeared in both identification parades. He identified the 1st accused by touching



on 22/9/2017. In his statement he indicated that he could only identify one man. As witness 5 he identified another suspect. That PW2's statement was not recorded by him. He cannot remember who recorded it. He did not indicate if he could identify any of the attackers. He is a witness in the identification parade. Testifying further that PW3 John Kamau was able to see a muscular and light skin man. He did not indicate that he would be able to identify this man if he saw him. He did not participate in the parade. PW12 did not record PW1 and PW2's statement after the parade. PW4 Mary Nyambura did not give a number of how many attackers she could identify. She did not give specifics of how she could identify the attackers. She participated in both parades and identified both accused persons. PW5 Prisca stated that she could positively identify the attackers but did not give details. She participated in the identification parade.

62. In cross examination by the 2nd accused, it was testified that the 2nd accused was brought to the station on 19/11/2017. The identification parade conducted on 20/11/2017. That the attackers had marvins and heavy black jackets. The witnesses said the lights were on. He recorded in his statement that the lights were on.

THE RULING ON A CASE TO ANSWER

63. The Trial Court vide its Ruling dated 14/12/2021 by the Trial Court Hon. C.A.Ocharo SPM who took evidence of ALL Prosecution witnesses upto close of the Prosecution case found that a prima facie case had been established against both the accused and placed them on their defence.

The Defence Case.

64. DWI was Elijah Videgede. He testified that he alighted at Makutano, he boarded another vehicle Nissan Vanelle Matatu. On the way the vehicle was stopped at the police road block Kathome at the police road block. A police uniformed person knocked the window and said ni huyu pointing at him. Testifying that they entered the vehicle and civilian person beckoned him to step out. He did. That he slapped him and was handcuffed. There was a salon car with a civilian number plate. He was put in and driven to Machakos police station. he was not told why. He asked and they said OCS wanted to see him. He told the trial court that when he got Machakos police station, the OCS came and said he had been looking for him for long. He was taken to the police cells. He alone in that cell. DW1's phone was taken away. He slept one night.
65. The next day he was told to come out and while out he found people had queued. He was told to choose where to stand. He was not told what he was going to do. He was called by an officer at the police OB. He remembered that DW9, it was not him who called him from the cell but he found him where other people had queued. They were about 12 people at the parade when he joined the queue, the arresting officer. That they came to the parade. They checked at the queue and they identified him but not all of them identified him. That they came one by one. 3 people identified him. He still did not understand what was happening. He still did not know why he had been arrested.
66. It's not PW9 who got him from the cell he never told DW1 why he was at the police station or inform DW1 to call a family member or advocate. He never told him that his family was far away. His family is here in Machakos. The Identification Parade was done at 5.00 p. m. the records on the documents hakuna haja are not DW1's. He did not know the other people in the queue. Some were short, tall, brown, dark and not similar to him. The clothes were not the same as his, he was the only one in a white shirt. He was never told to change clothes. That one of the Officers asked him to speak so that they could hear his voice. The others on the parade were not told to do so. That he saw the person who went to identify him at the OB area. After the parade he was taken to a cell with the others. All of those who



- participated in the parade had been arrested. DW1 came to know of the charges during the parade. He asked Mr. Mutisya the officer who told him the students said he was on those who robbed them.
67. On 16/5/2017 DW1 went and worked at Panafric Dairy Manufacturers at Industrial area Nairobi, Lungalunga road off Mogadishu road. That on the material day he slept in his house Mukuru kwa Reuben. He was arrested while coming to visit his parents. He was on leave. That he was not arrested with anything. Testifying that his phone was taken for data analysis which was never done. It was returned by a Court Order. DW1's told the Trial Court that the 2nd accused, he never met him until the day of the court case. He did not see any Marvin produced in court as alleged. He was not given any Marvin to wear for identification. That this charges are not true. He prayed to be acquitted and that he is a professional and cannot engage in crime.
68. In cross examination, it was testified that his phone data could show he was at work on that material day. He reported at work 8.00 am. He left at 4.30 pm. And would leave at 6.00 p.m. depending on work. He did not explain where he was at the time the incident happened. He had not mentioned one witness. Testifying that the students said they would see the perpetrators very well. They did not say there was light. They said it was dark. he did not have come to identify them and that the inspector mutisya did not call him in his office. he only told him to go to the parade and choose where to stand. She identified DW1 after checking. DW1 thought they were told to choose him. He said so because he was removed from the cell alone and the office may have shown them who he was. He did not have any independent witness who said what happened. It was DW's word and that he said the truth. That he did not commit the offence.
69. In re- examination, he testified that the phone was collected because the police said they wanted to check data. No data was produced. He was not given a right to call any advocate or relative to witness the parade. He was in isolation with no phone. That he informed the court he was in Nairobi at the alleged time of the incident.
70. DW2 was Benson Nzioki Muasya. He testified that on 20/11/2017 at around 6.00 a.m. he was arrested and put in the police vehicle. Testifying that at the police station the OCS Abdi Mwama took a photograph of him, then PC Kithuka and Ngetich went to DW2's isolated cell and asked him if he can get Kshs. 200,000/= so that he cannot be charged. DW2 told them he could not get the money. They told DW2 to call his employer. He told them he had no phone. Testifying that Abdi, the OCS told him that if he could not raise the amount , he would use the photo.
71. That later, parade officer Mr. Simon Muinde Mutisya went and called him and told him to come out of the cell for identification. DW2 asked if they are the same people the OCS had said he will send the photo to. He told DW2 to get out. DW2 asked why the people were to identify him. He told DW2 it was for parade purposes. He refused to do the parade. Mr. Mutisya Simon forced him to do it. He forced DW2 to stand between person 3 and 4. He was among the people who were in the cell and others picked from outside. The Identification parade was conducted at 9am he stated that the persons were not similar at all. He was denied a right to call a family or an advocate to witness. The parade officer told court that where a suspect requests to attend parade none will happen. He did not say why he proceeded when he had requested. He produced the parade report as an exhibit showing that he did not sign. He testified that people who identified had his photo before the parade, that the case was framed.
72. According to DW2 the OCS did not appear to testify why he was arrested. When the prosecution witness testified that the doctor who produced the P3 form of Mr. Zacchaeus Mukabane. That the charge sheet showed that the incident happened on 16/8. The P3 shows that the incident was reported on 17/5/2017 and the incident occurred on 15/5/2017 at about 10.00 p.m. that the same P3 form showed that the injured Zacchaeus said he could not identify the perpetrators. He wished to produce



the P3 for evidence. He told the trial court that he informed court that he was forced to admit the charges. the court intimated that he taken to hospital. A P3 form was filled and issued to him. The police wanted to hide the truth. It shows that he was treated on 16/5/2017 and that he suffered a scratch during the incident. In OB 9/11/2017 at around 0115hours it is the OB of his booking at the police station. it showed that when he was put in the cells. That he had no scars, no injury. He was normal. He produced the OB and his P3 form in evidence.

73. In cross examination, it was the testimony of DW2 that before the incident he was in Nairobi working in Mathare Distilling Chan'gaa. That before his arrest he was working in Mutituni area. That the bus receipts show that he was not at the scene. He told the trial court that the receipt had no signature or stamp. He was not aware of the River Road receipts. He said he was framed. He said he is law abiding person. He was brewing chang'aa at the time of incident. That he did not have a license and there were patrons who ran away. He was the only one arrested. Abdi, the OCS DW2 only knew him at the time of arrest. He did not know the OCS before the incident and that he could say that the OCS had a grudge. The photo was taken when he was at the police station. the OCS took a photo using his phone. He did not know if it was his or the government or not. He could not know if it was the government's phone. The phone was with OCS. He did not know if it was his or the government or not. The OCS has never appeared in court. the investigation officer did not say where the OCS was. The OCS did not record a statement. DW2 did not know if prosecutors can choose who to testify or not. He was not forcing OCS to testify. If he had been given a chance. He would have called a family or advocate. He had an advocate in court. P3 forms are not truthful because of dates and time. He knew the doctor treats does not investigate. Not all complaints were rushed to hospital so they should remember the date. The doctor said P3 is filled after someone heals. The time said the exact date. The case is about 5 complainants. He had not known when report was made. The investigation officer asked him for the money at the same time they were 5 of them. He is not guilty. He was not involved in this case. The court may make a decision.

The Trial Court Judgment

74. Vide a judgment dated 19th September,2022, the Trial Court found that the Accused persons guilty as charged and the case against accused persons was proved to the required standard on Counts 1,2,3,4 and 6 and they convicted accordingly under Section 215 of the CPC. For count 5, the complainants did not confirm identity of the perpetrators or the accused and thus the trial court found that it was not adequately proved and both persons were acquitted on count 5 under section 215 of the CPC.

The Appeal

75. Dissatisfied with the judgment the Appellant vide amended petition of Appeal dated 10th July,2023 and filed in Court on 14th July, 2023 in which the Appellant sought to appeal against the conviction of the trial court. The Appeal was premised on the following grounds that:
1. The learned Trial Magistrate who took over the hearing of the case after the original Magistrate had been transferred erred in law and in fact by failing to comply with mandatory provisions of Section 200 (3) of the Criminal Procedure Code.
 2. The Police Identification Parade used by the Learned Magistrate to link the Appellant with the crimes charged was flawed for reasons that-
 - a. It was not conducted on the basis of the description made by the victims to the police but rather on the basis of an informer's suspicion that the Appellant was a criminal.



- b. Where identifying witnesses to hear the Appellant speak, not all members of the parade were made to speak contrary to mandatory provisions of Rule 7 (5) (i) of the Service Standing Orders,2017;
 - c. Contrary to mandatory provisions of Rule 7 (5) (a) of the Service Standing Orders, the Appellant was not informed that if he desired, he may have a counsellor or friend present when the parade takes place;
 - d. The Appellant did not consent to the parade prior to its being conducted as required by mandatory provisions of Rule 7 (3) of Service Standing Orders according to entries in the identification parade Form 156.
 - e. Members of the identification parade were of different physical attributes and general appearance contrary to mandatory provisions of Rule 7 (5) (d) of the Service Standing Orders.
 - f. The identifying witnesses had seen the Appellant prior to the identification parade contrary to mandatory provisions of Rule 7 (5) (c) of the Service Standing Orders.
3. The Learned Magistrate did not venture to examine or interrogate at all the difficult and uncertain circumstances in which the identification was conducted, convicting the Appellant on the basis of extremely low quality identifying evidence; in spite of absence of supporting or corroborating evidence to the prosecution's extremely weak evidence of identification.
 4. The Learned Magistrate erred in law and in fact in failing to warn herself of the need to exercise extreme caution before convicting the Appellant solely on the basis of identification evidence; failing to consider the possibilities of mistaken identification which present themselves glaring from the evidence.
 5. The Learned Magistrate erred in law and in fact in failing to appreciate that failure by any of the identifying witnesses to ask members of the identification parade to be made to wear marvins to aid in proper identification weakened their evidence, reaching a conviction on the basis of hearsay evidence and circumstantial evidence.
 6. The Learned Magistrate erred in law and in fact in failing to find that in the circumstances of this case the evidence of the informer was necessary to determine the innocence or guilt of the Appellant; in cases relying solely on the evidence of identification, it was imperative that the description of the offender made by the victim during the first report to the police be recorded and later produced in evidence and the opportunity weakened their evidence that they had seen and recognized the Appellant as one of the robbers who raided their houses during the material night.
 7. The Learned Magistrate erred in law and in fact in failing to find that the Appellant's unchallenged evidence that he had never met the 2nd accused person before this case was exculpatory.
 8. The Learned Magistrate erred in law and in fact in shifting the burden of proof to the Appellant on his alibi defence; in the way she evaluated and analyzed the alibi defence taken by the Appellant by finding that he had contradicted himself with regard to where he was staying at the time of arrest notwithstanding his clear testimony that he was staying in Easleigh at the time of arrest and at Mukuru kwa Reuben when the incident allegedly happened.



9. The Learned Magistrate erred in law and in fact in failing to find that the offence charged had not been proved beyond reasonable doubt and the Court convicted and sentenced the Appellant of the offence charged notwithstanding, prosecution failed to prove case beyond reasonable doubt and the prosecution case was riddled with contradictions, inconsistencies and fabricated evidence that resulted in selective judgment.
76. The matter was canvassed by written submissions.

Submissions

The Appellant's submissions

77. The Appellant in his submissions dated 31st July, 2023 and filed in court on 9th August, 2023 wherein counsel for the Appellant relied on Section 200 of the Criminal Procedure Code (CPC) and submitted that by the time the Learned Magistrate took over the hearing, this matter at the trial court, 12 witnesses had already testified before her predecessors Hon. Ocharo. Although she did not have the opportunity to assess the demeanor and credibility of the witness. Contending that she failed to inform the Appellant of his right to resummons the witnesses as required by mandatory provisions of the CPC. Credence was placed on the case of *George Gitonga Mwendia & Another Vs Republic* [2011] eKLR to buttress his position on the rationale of Section 200 (3) CPC.
78. Further reliance was made on the cases of *Ndegwa vs Republic* [1985] eKLR quoted in the case of *Abdi Adan Mohamed Vs Republic* [2017] eKLR and *David Kyalo Justus Vs Republic* [2013] eKLR.
79. It was submitted that the learned magistrate made a fundamental error in failing to comply with the mandatory provisions of Section 200 (3) of the CPC.
80. It was the Appellant's contention that the only link between the Appellant and the crime alleged to have been committed was the identifying evidence in the ID parade conducted by the police on 22nd September, 2017. To buttress this limb of the identifying evidence, counsel quoted the case of *Turnbull and Others* [1976] 3 ALL ER, and submitted that for the identifying evidence to meet the requisite threshold, the ID parade must have a strict legal pedigree. Opining that an ID parade ought to have been conducted in accordance with strict provisions of the law without sacrificing, violating or abandoning any of the provisions. Counsel relied on Chapter 42, paragraph 7 of the National Police Service Standing Orders 2017 as the prevailing law on the conduct of the ID parade.
81. It was contended that the information leading to the Appellant's arrest is said to have been supplied to the arresting officer by an informer. The arresting officer gave hearsay evidence that the informer told him that he suspected the Appellant of having been involved in the incident of 16th May, 2017. Contending that the Investigation Officer later testified that the informer told him that the Appellant matched witness description. To buttress his position that the informer ought to have been called to give evidence how he was able to identify the Appellant, Counsel relied on the cases of *Paul Mwangi Githinji & 3 Others Vs Republic* [2010] eKLR, *Joseph Otieno Juma Vs Republic* [2011] eKLR, *Ntelejo Lokwam Vs Republic* [2006] eKLR, *Peter Kariuki Ndumberi Vs Republic* [2016] eKLR, *Morris Gikundi Kamunde Vs Republic* [2015] eKLR and *Maitanyi Vs Republic* [1986] eKLR.
82. Submitting that although nearly all the witnesses testified either that one or all of the assailants were wearing marvins at the time of the incident, none of them asked the members of the parade to wear marvins so as to recreate their images as closely as possible to reduce cases of mistaken identity. Opining that these are fundamental contradictions and inconsistencies which the learned magistrate completely did not consider.



83. On the relationship between the 2nd accused and the Appellant, it was argued that failure by the prosecution to lead evidence that the Appellant and the 2nd accused person knew each other prior to the incident to displace the Appellant's testimony that he had never the 2nd accused was exculpatory.
84. On alibi defence, it was submitted that save for the learned magistrate's erroneous dismissal of the appellant's defence of alibi, no attempts were made by the prosecution to rebut and/or challenge the defence of alibi. To buttress this position, reliance was placed on the cases of Republic Vs Brian Nzioki Muli [2020], Philip Mathenge Mwangi Vs R [2018] eKLR, FKW Vs R [2018] eKLR and David Kyalo Justus Vs Republic [2013] eKLR.
85. Submitting that nothing prevented the prosecution from utilizing the benefits granted to it under Sections 212 and 309 of CPC to rebut and/or challenge the defence of alibi. Contending that failure to rebut and/or challenge the defence of alibi was a fatal error which must be construed to the Appellants benefit.
86. It was contended that the Appellant's conviction was unsafe and unsatisfactory and prayed that the conviction be set aside and that he be set at liberty.

Respondent's Submissions

87. The Respondent in its Submissions dated and filed in court on 19th September, 2023, wherein the state counsel submitted on the following grounds sequentially.
88. On non-compliance with Section 200 (3) CPC, it was submitted that the prosecution availed twelve witnesses to prove the guilt of the Appellant. That Hon Ocharo heard the twelve witnesses and she went on transfer and that on 21st April, 2022 Hon. Otindo took over this matter and proceeded to do the defence hearing without taking directions with regards Section 200 (3) CPC. Counsel relied on section 200 of the CPC and in the case of Director of Public Prosecutions Vs Peter Onyango Odongo & 2 Others [2018] eKLR and submitted that the trial succeeding magistrate failed to adhere to Section 200 (3) of CPC hence rendered the proceedings a nullity.
89. As to the ingredients of robbery with violence sufficiently proved by the prosecution, state counsel placed his reliance on Section 296 (2) of the CPC and the case of Oluoch Vs Republic [1985] eKLR, and submitted that the testimony of PW1, PW2 clearly placed the Appellant in the crime scene. He was properly identified as the perpetrator of the heinous crime. contending that the prosecution adduced direct and documentary evidence to prove the guilt of the Appellant. Averring that the ID parade was well conducted by PW9 who adhered to the guidelines appropriately.
90. It was submitted by the state that the conviction and the death sentence imposed by the trial court against the Appellant was unsafe due to the non-compliance of Section 200 (3) CPC. The state conceded to this appeal and prayed for an order of retrial.

Determination/analysis

91. The Court considered the appeal pleadings and written submissions by parties and the Trial Court proceedings record and judgment.
92. The issues appealed against are condensed as follows;
 - a. The Section 200 CPC was not applied by the Incoming Trial Court during conduct of proceedings that culminated to conviction and sentence.
 - b. Identification parade conducted was not in tandem with the law and Force Standing Orders



- c. The evidence on record was not sufficient to discharge the burden of proof and standard of proof that is beyond reasonable doubt.
93. The Court has outlined the evidence adduced during trial and is mandated to evaluate and reexamine the evidence on record and reach an independent decision.
94. In *Okeno Vs. Republic* (1927) E.A 32 it was stated that;
- “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”
95. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller vs. Ministry of Pensions* (1947) 2 All ER, 372 stated as follows:
- “That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice.”
- In *Bakare vs. State* (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria stated as follows:
- “Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.”

Evidence taken by different Trial Courts

96. In *Adan Mohammed vs Republic* Criminal Appeal No 1 of 2017, the Court of Appeal considered an appeal from Criminal Appeal 271 of 2012 where the Trial Court applied Section 200 CPC to have the hearing start de novo changed its mind upon application by the prosecution to invoke Section 34 of the [Evidence Act](#) after it failed to procure the attendance of the witnesses who had previously testified.



97. The Court referred to the case of *Ndegwa vs Republic* (1985) KLR 535 where Madan, Kneller & Nyarangi JJA (as they then were) stated;

It could also be argued that the statutory and time-honored formula that the Trial Magistrate being the best person to do so; he should himself see, hear, assess and gauge demeanor and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the 2nd Magistrate did not himself see and hear all prosecution witnesses even though he said that he carefully ‘observed’ the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanor of all witnesses in the cases. A fatal vacuum in this case in our opinion.....for these reasons we have stated in our view the trial was unsatisfactory.

98. In *Joseph Kamau Gichuki vs Republic* Criminal Appeal 523 of 2010 cited in *Nyabutu & Another*, the Court stressed that;

“By dint of Section 200(1) (b) of the CPC, a succeeding Judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely, but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete trial..... See *Ndegwa vs R* (1985) supra. In this case the Trial Judge passed on after having fully recorded evidence of 7 witnesses....in fact [he] had summed up to the Assessors. The trial, moreover, was not a short one but a protracted one which had taken 5 years to conclude. The passage of time militated against the Trial being started de novo.....”

99. The Appellant submitted that the Section 200 (3) CPC was/is mandatory and since the incoming Trial Court did not apply the same to the Appellant it was contrary to Article 50 (1) Constitution and deprived the Appellant fair trial.

100. The Appellant relied on the case of *George Gitonga Mwenda & Anor vs Republic* 2011 eKLR where the matter proceeded for hearing and after all prosecution witnesses testified, the prosecution applied to amend the charges from ‘possession’ of to ‘trafficking’ bhang and amended charge was read to Appellants as mandated by law. The Trial Court did not inform the Appellants of their right to have recall of witnesses or matter starts de novo as provided by Section 200 (3) CPC. The High Court quashed the conviction and ordered a retrial under Section 200 (4) CPC.

Section 200 (1)CPC that provides;

- (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—
 - (a)
 - (b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.
- (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resubmitted and reheard and the succeeding magistrate shall inform the accused person of that right.



101. This Court gleaned the Trial Court record that disclosed the following;

The Ruling at the close of the Prosecution case was delivered by the Incoming Trial Court Hon M.A.Otindo PM on 20/1/2022 on behalf of the Trial Court on 20/1/2022 on behalf of Hon. C.A. Ocharo SPM which read as follows;

Upon close of the Prosecution case and after consideration of the submission on no case to answer, the Court finds a prima facie case has been established against both Accused persons- who shall be placed on their defence. Section 211 CPC explained to both Accused who reply.

101. The Appellants sought that the hearing continued and was to be heard by Hon.C.A. Ocharo. The Trial Court on 3/2/2022 placed the matter before Chief Magistrate for administrative directions.
102. On 29/3/2022 CM sent e-mail to Hon C.A. Ocharo SPM to take up the matter and conduct hearing from where the matter stopped.
103. The Court record shows the Trial Magistrate Hon.C.A.Ocharo was present from her station to hear the matter. Mr.Makundi for 1st Accused person was present but the 2nd Accused was absent. The Trial court was informed by Mr Makundi that the 2nd Accused promised to attend Court when they met the previous day but Counsel learnt the 2nd Accused person was mugged and lost his phone and thus the matter was adjourned. The trial Court returned to the new station in Kisii.
104. From the above facts as elicited by the Trial Court record, the Trial made a finding of case to answer after evaluating the evidence and found a prima facie case established against the Accused persons.
105. At this point the Trial Court was not commencing trial and not part of the evidence was recorded as envisaged by Section 200 (3) CPC but the matter was at the tail-end conduct of Defense Hearing as per the finding of the Trial Court in its Ruling. To act to the contrary would amount to setting aside the evidence on record and Ruling by a Court of similar competent and equal jurisdiction as the Trial court and start de novo yet Section 200 1 (b) CPC provides opportunity to proceed.
106. The appellant was allowed to continue the matter with the Trial Court but 2nd Accused failed to turn up for further hearing when the Trial Court had come all the way from Kisii.
107. From the above circumstances this Court finds the Section 200 (3) CPC was not applicable as the Trial Court heard ALL Prosecution witnesses and rendered Ruling of case to answer. Further, on request by the Appellant and another that the Trial Court resumes hearing the request was acceded to and the trial Court travelled back to attend to the defense hearing only for the Co Accused person not to appear in Court for unverified reasons.
108. I find Section 200 (3) CPC was not applicable in the circumstances as the Appellant sought the Trial Court on transfer to complete the hearing. The Incoming Trial Court acceded to the request and the Trial Court came back but the hearing did not proceed as one of the Accused persons did not attend Court. So, whereas it is mandatory to read the rights of Accused under Section 200 CPC, in this instant the Incoming Trial Court went further and granted the application the matter proceeds before the Trial Court.
109. Does Section 200 CPC mandate that every part heard must start de novo without considering the specific circumstances of a particular case? I think not.
110. In the circumstances of this case the incoming Trial Court applied Section 200 (1) CPC.



Identification Parade

111. The Court of Appeal in *Samuel Kilonzo Musau vs Republic* [2014] on identification parade indicated thus:

“The purpose of an identification parade, as explained in *Kinyanjui & 2 Others Vs 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.” It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness’s attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification.”

112. In the case of *Robert Gitau vs. Republic* Criminal Appeal No. 63 of 1990 (Nakuru) the Court of Appeal stated as follows:-

“It was held in *Abdullah Bin Wendo and Another vs. R* 1953 Volume KXX 166 and *Cleophas Otieno Wamunga vs. R* (Criminal Appeal No. 20/89) that evidence of identification should be tested with great care especially when it is known that the conditions favouring a correct identification were difficult. The witness who testified that they could identify the appellant in circumstances of shock and fear could easily be mistaken because the duration of observation was short. We are doubtful whether the witnesses could have identified the Appellant’s face in the manner described by the witness. We are also doubtful how the witnesses were able to identify the Appellant in the identification parade. In this respect, the Appellant complained that it was easy for him to be picked up because in the parade he was the only one from the cell.”

113. The case of *R. vs. Turnbull & Others* [1973] 3 All ER 549 has set out the factors to consider when dealing with the issue of identification. It was held that:

“...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?”

Identification of Appellant by Witnesses

114. The evidence by Prosecution witnesses; namely the University students residing in the Hostels on the fateful night of 16/5/2017, they testified that on the said night with electricity lights they saw 2 of



the assailants, each of them interacted by talking, they demanded the doors to different rooms of the hostel opened, assaulted the victims, occasioned violence with weapons and resulted in injuries on the victims and specifically one of them, Dickson succumbed to his death as a result of the robbery with violence. During the scuffle, each of them lost assorted items, money, phones laptops etc.

115. PW1 testified that as this incident was going on, he saw one of the attackers before he was affected. He saw the 1st accused who was closest to him. He was wearing something like a Marvin. The 2nd accused was at a distance but he saw him. He was wearing a jacket. PW1 stated they were called at the police station to identify the attackers at Machakos and was able to identify the 1st Accused/Appellant.
116. PW2 identified the 1st accused/ appellant. He recognized him from his head and even voice. He tried to hide his voice because on that night he had a crooked voice. On the 2nd parade, PW2 identified the 2nd accused, he was brown and slim, he also recognized his eyes because he looked PW2 in the eye. The 2nd Accused, he recognized him he lives in Kathemboni.
117. PW 3 did not recognize or identify any of the Accused persons.
PW4 recognized the person who hit her. It was the 2nd accused who hit her.
118. PW5 testified that it is the 2nd accused who took her laptop. PW5 identified the 2nd accused with the sunken eyes.
119. PW11 One was short and brown wearing a Marvin. He saw him well because he is the one who hit him. The other was tall and chocolate in complexion. He is the one who was cutting up Dickson.

Conduct of identification parade

120. The Appellant submitted that the identification parade was not conducted in compliance of the Force Standing Orders.

The accused/ suspected person should always be informed of the reason for the parade and that he may have a solicitor or friend present when the parade is being conducted.

Contrary to mandatory provisions of Rule 7 (5) (a) of the Service Standing Orders, the Appellant was not informed that if he desired, he may have a counsellor or friend present when the parade takes place;
121. In the case of David Mwita Wanja & 2 Others vs. Republic, the first appellant contended that his rights were violated as he was not allowed to have a friend present then. However, the court held that Mwita's parade was conducted properly. It was an omission on his part to provide an address of a friend he wished to call or a name that led him not having a friend present.
122. The Identification Parade officer PW9 stated that the 1st Appellant said his advocate and family were so far and he would go on. The Identification Parade form indicates 'Hakuna haja'

The witness or witnesses should not see the accused before the parade
123. If witnesses are allowed to see the accused before the parade, it will be prejudicial to the accused and would greatly undermine the evidential value of the parade. The police should take steps to ensure that this does not happen.
124. In the case of Livingstone Mwangi v Republic 2007 eKLR the court held that the identification parade was not worthy of any evidential value since the identifying witness had already been shown the suspect who was already arrested.



125. In Omar v. Republic the court clearly upheld the rule that the witness or witnesses should not see the accused before the parade. It stated as follows: ‘Though the parade had been properly conducted, the appellants success in proving that he had been seen by the witness prior to the parade meant that the parade was useless.’
126. No evidence was produced before the Trial Court that the Suspects were shown to the Prosecution witnesses before or during the Identification parade. The trial Court in its judgment noted;
- ‘The 1st Accused did not provide evidence of specific incidence where he was first brought out for the Complainant to see him for any purpose. His evidence is of suspicion and could not tell if the people who were sitting at the OB were Complainants or not.’
127. Further, this Court notes that each of the witnesses in their evidence described the events of the fateful night differently, in their evidence on Trial Court record. If they were shown the suspects before/ during the identification parade, then the witnesses would have ALL identified the Appellant and 2nd Accused, yet as per the evidence on record the witnesses identified either the 1st Accused/Appellant or 2nd Accused or both or neither of them.
128. The Identification Parade Officer PW9 was not Arresting, Scene Visiting or Investigation Officer of the case to have a keen interest to influence the identification of suspects and then record the witnesses that identified the appellant and those that did not identify him or anyone at all.
- It was not conducted on the basis of the description made by the victims to the police but rather on the basis of an informer’s suspicion that the Appellant was a criminal.
129. The Court perused the Trial Court file and did not see the OB extracts of the 1st Reports of the witnesses to the Police nor their Witness Statements save for the issue raised during cross -examination of witnesses and reference was made to OB and statements by PW12, the Investigation Officer but these were not produced as exhibits. This Court cannot confirm or deny the allegation in the absence of tangible or cogent evidence.
- Where identifying witnesses to hear the Appellant speak, not all members of the parade were made to speak contrary to mandatory provisions of Rule 7 (5) (i) of the service Standing Orders,2017;
130. The evidence by Moses PW2 and that Mary PW4 is that each person asked some of the persons on the Identification parade to speak and not all of them so as to identify the suspect by voice as they heard on the fateful night. Whereas the Identification parade Officer PW9 stated that he made all persons speak and it is a contradiction. Apart from alleging name of the persons provided cogent and tangible evidence.
- The Appellant did not consent to the parade prior to its being conducted as required by mandatory provisions of Rule 7 (3) of Service Standing Orders according to entries in the identification parade Form 156.
131. PW9 in cross examination by Counsel for 1st Accused stated that the Appellant gave consent in Exhibit 6 Identification parade Form. It is one word against the other, again there is no evidence to prove the Appellant did not consent, the ID Form is duly filled in.
- Members of the identification parade were of different physical attributes and general appearance contrary to mandatory provisions of Rule 7 (5) (d) of the Service Standing Orders.
132. The identifying witnesses had not seen the Appellant prior to the identification parade contrary to mandatory provisions of Rule 7 (5) (c) of the Service Standing Orders.



133. The Identification parade was conducted according to the Force Standing Orders.

Informer's Evidence

134. PW 6 PC Hassa Musa Kibucho testified that on 21/9/2017, he was called by Informer from Makutano Junction and was told the men they were looking for due to commission of crime were seen at the stage. On arrival, the Informer stated that he was suspecting one of the 2 young men he pointed at, They watched him and he boarded a Maruti Nissan Vannette. He boarded the same vehicle and at the roadblock he arrested him, the Appellant and he arrested him took him to the Police Station. He did not recover anything suspicious or illegal from the Accused person.
135. PW 12 CPL Anthony Mwanguya stated in cross examination that the 1st Accused was not arrested at the scene nor any items recovered at the scene. He stated that the Appellant was suspected to be one of the attackers at the Kathemboni. The witnesses saw the Appellant and identified him. When he was arrested his mobile phone was seized for purposes of investigations and was not subjected to forensics. The Appellant did not tell him that he lived in Eastleigh Nairobi and he did not go to his house. At the time of arrest he was not with the 2nd Accused.
136. The only evidence save for identification during the fateful night by PW1 & PW2, is the tip of information from undisclosed informer to the Arresting Officer. The Appellant stated that the Arresting Officer gave hearsay evidence that the informer told him that he suspected the Appellant of having been involved in the incident of 16th May, 2017. Contending that the Investigation Officer later testified that the informer told him that the Appellant matched witness description.to buttress his position that the informer ought to have been called to give evidence how he was able identify the Appellant, Counsel Court of Appeal in Joseph Otieno Juma v Republic [2011] eKLR stated that:
- “Concerning the failure to ask the informers to testify in this case our view is that in the circumstances of this case their evidence was not necessary to determine the innocence or otherwise of the appellant because the prosecution’s other evidence served the purpose. However, we think that if the evidence of the informers is necessary to prove the guilt of the appellant it would have been necessary for them to have testified perhaps outside the glare of the public.”
137. In the above case, the Court of Appeal cited with approval Kigecha Njuga v Republic [1965] EA 773 where it was stated that:
- “informers play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desires the court to hear the details of the information an informer has given to the police clearly the informer must be called as a witness.”
138. There is no evidence, other than hearsay evidence of the Informer’s tip of information and the identification by Pw1 & PW2, there is no evidence as to who identified them to the police to be arrested.
139. There are inconsistencies in evidence. PW1 & PW11 differed on who had the marvin on the fateful night; PW1 said it was the Appellant and the PW11 stated it was the 2nd Accused person.
140. In the case of James Omondi Onyango v Republic, [2014] e KLR the Court of Appeal sitting in Kisumu had occasion to consider a possibility of a mistaken identity by persons who claim to know each other as village mates or neighbors. In such a case of recognition the fact that the name of



the perpetrator is not given to the police when the report is made tends to weaken the evidence of identification.

141. The Appellant has been consistent in denial of commission of the offence from plea taking and throughout the trial. The Pre Bail & Pre Sentence Reports are conclusive that he had no previous engagement with disobedience of the Law unlike the 2nd Accused who was found to have other similar cases and convictions and whose photograph was circulated by Police as wanted for spate of robberies that occurred in the area.
142. In the absence of the evidence of the Informer, and considering that the identification of the Appellant was by PW1 & PW2 only under commotion and violence and robbery of items from various victims, there is the possibility that there was mistaken identity or induced identification. The appellant has consistently and persistently put forward his innocence. Upon full consideration of the matter and in totality of the evidence on record, identification evidence was tainted by the non - disclosure of the Informer and his evidence adduced in Court that the conviction of the appellant was consequently unsafe. For the above reasons, the appellant's appeal is allowed the conviction and sentence are set aside against the Appellant, Elijah Videgede George. The Appellant shall be released from custody.

JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 22/2/2024 (VIRTUALLY/PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

In the presence of:

Elijah Videgede George - the Appellant

Ochieng H/B/ Ongeto for the Appellant

Mwongera - for the Defendant

Geoffrey/Patrick - Court Assistant(s)

