Katee & 2 others v Republic (Criminal Appeal E047, E048 & E049 of 2021 (Consolidated)) [2024] KEHC 1893 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1893 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL APPEAL E047, E048 & E049 OF 2021 (CONSOLIDATED)

RK LIMO, J

FEBRUARY 22, 2024

BETWEEN

DENNIS MUTIA KATEE ..... 1ST APPELLANT

JACKSON KYALO MUTHOKA ..... 2ND APPELLANT

MUSYOKA MAUNDU ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Dennis Mutia Katee, Jackson Kyalo Muthoka and Musyoka Maundu the appellant herein in this consolidated appeal were jointly charged for the offence of Robbery with violence contrary to Section 296(2) of the *Penal Code* in Kitui CM's Court Criminal Case No. 92'A' of 2018.

2. The particulars of charge are captured in the charge sheet as follows: the appellants on the 11th day of July 2016 at around 4.30am at slaughter estate area, Kalundu Sub-location, Kitui township location within Kitui County while armed with offensive weapons namely somali sword, a jembe wrapped with a light blue cloth, jointly robbed Joseph Katuta Nguvi cash 1,000/-, neon smart phone valued at Kshs 3,999/- all valued at Kshs 4,999/- and at or immediately after such robbery used actual violence to the said Joseph Katuta Nguvi.

3. All the Appellants who were 1st, 2nd and 3rd accused respectively in the case denied the charge but after full trial, all of them were found guilty and were convicted. Each of the appellants was sentenced to death.

4. Before I look at the grounds raised in this appeal, I will in summary outline the evidence tendered by the prosecution and the appellants in their defence.

5. The prosecution case at the trial hinged on the doctrine of recent possession and the direct evidence based on identification parade on the side of the appellants. The 1st appellant defence was that he was framed while the 2nd and 3rd appellants mainly raised alibi in their defence. Below is the summary of the evidence tendered at the trial court.

6. Joseph Katuta Nguvi (PW1) the complainant testified that he was in the business of selling bread and that he was on his way to Mjini state to pick a delivery on the material day at around 4.30 am when he met someone behind M.O.M hotel. He testified that the person (1st appellant) ordered him to stop but before he could comply, the person hit him on the head with a jembe. That there was light from the street lights. That two other people (2nd and 3rd appellants) joined in and while one flashed a torch on his eyes, the other proceeded to frisk him (3rd appellant) and took his phone. He testified that he attempted to run away but he was viciously attacked with a jembe and almost lost consciousness. He proceeded that the assailants left and he dragged himself to the main street where he was found by a boda boda operator who took him to his hotel where he met his wife (PW2) who called his brother and they both who took him to hospital.

   He stated that he recognized the attackers as he used to see them prior to the attack. He proceeded that he was called by the police on 22nd July 2016 to participate in an identification parade where ten people had been arraigned. He stated that he participated in a total of three identification parades and was eventually able to pick out the 1st and 2nd Appellants from the parade as his attackers. He stated that the 3rd appellant was held in Kitui GK prison over another matter at the time. He stated that he lost a Neon smart phone and Kshs 1,000/- He also identified a jembe and sword together with blood stained clothes in court and confirmed that he saw them at the scene.

7. Gladys Mumbi (PW2) a wife to PW1 stated that her husband (Pw1) stated that her husband (PW1) was brought to their hotel business while injured on the morning of the material day and that she called her brother in law (PW3) and together, they took the complainant to Kitui District Hospital for treatment and that she thereafter reported the matter at Kitui Police Station.

8. Kelvin Ngau a brother to the complainant gave a brief testimony that he was notified that his brother had been attacked by robbers and he took him to hospital when he found him with bad injuries. he recalled his brother telling him the attackers used a panga and jembe to attack him and that he could recognize them if he saw them.

9. Bernard Munyoki (PW4) stated that he was a boda boda operator and that he borrowed a phone from his cousin Andrew Nditi Kyalo (Pw5) on 16th July 2016 for use. He testified that he used the borrowed phone and returned and later came to learn that it was a stolen phone after he was called by the police. He stated that he accompanied the police as they arrested Andrew Kyalo who told the police that he had gotten the phone from Musyoka Maundu (the 3rd appellant) also a boda boda operator. He testified that Musyoka Maundu fled after Andrew Kyalo was arrested. He stated that the 3rd Appellant (Maundu) was arrested three months later. The witness identified the phone in court (Pexh 7) saying that he had used it for four days after getting it from Andrew (PW5).

10. Andrew Nditi (PW5) stated that he was approached by the 2nd and 3rd Appellants on 15th July 2016 and that the 3rd Appellant offered him a Neon phone in exchange of Kshs 1500/- which he stated he needed to pay his rent. The witness testified that he gave the 3rd Appellant the 1500/- in exchange for the phone which he then gave to PW4 to use. He testified that he ended up getting arrested over the same phone. He identified the phone in court as the one that was sold to him by the 3rd Appellant.

11. Dr Joseph King'oo (PW6) testified on behalf of Dr. Mutuku (who was then on sick leave but later died). The doctor tendered a P3 form for the complainant (PEXH 1) showing that the complainant suffered a cut on the forehead measuring 6 cm, left scapula fractured, glenoid, cut wounds on the abdomen, left buttock and cut wound on the right palm. He stated that the complainant also suffered fractured left mid shaft of left ulna and wounds on both legs. He also produced an appointment card (PEX3) and admission form (PEX4).

12. Inspector Baraka (PW7) the investigating officer stated that the incident was reported at the station by PW2 on 11th July 2016. He stated that he interviewed the complainant who gave the police an account of how the robbery took place as well as a description of the attackers. The officer stated that he arrested the 2nd Appellant near Jordan hospital and also conducted a search on his house where they recovered a jembe and somali sword (P EX 7&8) respectively. He stated that he later arrested the 1st Appellant on the same day and the two were identified by the complainant from an identification parade. The officer testified on how he utilized forensic technology to procure phone record data from the complainant's phone which indicated that it had been used by PW4 days after the robbery. The officer stated the police later apprehended PW4 who led them to PW5 eventually led them to arrest the 3rd Appellant who was at the time serving term at Kitui G.K prison. The witness also produced a Neon phone serial number 353675073698260 (PEXH 1, a receipt from Safaricom shop dated 13th June 2013 (PEXH 6) and Identification parade report for the 1st and 2nd Appellants marked PEXH 5 (a & b).

13. When placed on their defence, all the 3 appellants denied committing the offence.

14. Dennis Mutia Katee (1st appellant) gave a sworn statement and testified that he was arrested on 22nd July 2016 and stated that he had been framed.

15. Jackson Kyalo Muthokeu (2nd appellant) gave a sworn statement and denied committing the offence. He testified that he was working in a hardware at the material time and that he had been arrested for another offence. He also testified to having participated in an I.D parade.

16. Musyoka Maundu (3rd appellant) also gave a sworn statement and denied committing the offence. He stated that he was a boda boda operator and that he had taken a customer to Mutomo on 10th July 2016. He also stated that he was serving term at Kitui G.K prison when he was arraigned in court for charges in this matter.

17. The trial court evaluated the evidence tendered and found that the prosecution's case had been proved against the 3 appellants to the required standard and convicted them. The three appellants were sentenced to death.

18. Being dissatisfied with the conviction and sentence meted out to them, the Appellants filed individual Petition of Appeals on 30th December 2021. The court gave directions consolidating the appeals for purposes of hearing on 10th May 2023.

19. The 1st appellant filed Petition for appeal raising the following grounds of appeal;

    i. That the learned trial magistrate erred in law and in facts when she relied on evidence of the prosecution which had doubts to pronounce a conviction.

    ii. That the learned magistrate misdirected herself and erred in law and facts while not on view that appellant was identified at the court during the trial which is illegal in law.

    iii. That the learned magistrate erred in law and fact when basing the conviction and sentence in a case which was not proved beyond reasonable doubt.

iv. That the Hon. magistrate erred in both law and facts when she relied on uncorroborated evidence from the prosecution side and finally convicted the appellant on the same.

v. That the learned trial magistrate erred in law and facts that the parade conducted by the victim and police was not framed as the rule of the law required.

vi. That the learned trial magistrate erred in both law and fact when she relied on PW1 evidence that he saw the appellant at the scene of crime and same not given name nor no personal identified to establish the appellant.

vii. That the learned trial magistrate erred in law and facts when through sworn defence of the appellant which was strong and demonstrated that the defence based by accused was after thought defence.

viii. The sentence imposed upon the appellant of death is manifestly excessive.

20. The 1st appellant submits that the complainant did not recognize any of the assailants, that the parade comprised of 10 people of different ages who were not in uniforms as such and that he was not positively identified. He faults the doctors report was dated 2015 while the incident occurred in 2016. Further, that the police report was made by PW1 and PW2 in 2017 while the incident took place in 2016. He further submits that he was not in possession of any of the recovered items.

21. He also filed rebuttal submissions on 4th October 2023 where he submits as follows; that he was not positively identified. He attributes the same to the time the offence took place, failure of the complainant to give intensity of light from the street lights and the fact that the complainant failed to give a description of his attackers. He also faults the identification parade stating that it comprised ten people instead of eight and that it was conducted severally before the complainant identified him as one of the assailants. He also submits that his right to fair trial was infringed as the hearing took place one year after plea taking. He also submits that the charge was defective failing to indicate that they were charged under section 295 as read with section 296 (2) of the *Penal Code*.

The 2nd Appellant's grounds of appeal

22. The grounds of appeal are as follows;

i. That the learned trial magistrate erred in both law and fact when she held that the prosecution case had been proved beyond reasonable doubt when the case itself had not been proved.

ii. That the learned trial magistrate facilitated both law and fact when she convicted the appellant by the case which had gaps of contradiction and same contributed conviction

iii. That the learned trial magistrate erred in both law and fact when she relied on the prosecution evidence and not view that the exhibit argues in this offence was not proved as the law required.

iv. That the learned trial magistrate erred in law and fact by stage managing the case of the prosecution and not in view that the identification parade conducted for positively identified the appellant was irregular as the law required.

v. That the learned trial magistrate erred in law and fact when hold and said the identity from the scene of crime was established whereby the identity of the appellant was at the court.

vi. That the learned trial magistrate caused in law and in fact when hold that the statement appellant adduced to prove at the court was after thought on defence and same proved whereabout of the material day when offence committed.

vii. The sentence imposed was manifestly excessive.

3rd Appellants grounds of appeal case.

23. The grounds of appeal are as follows;

i. That the learned trial magistrate erred in both law and fact when she relied on evidence from the prosecution and not on view that the verdict exhibit which linked the appellant on this case was not proved beyond reasonable doubt as the law required.

ii. That the learned trial magistrate erred in both law and fact by stage managing the case and conclude that the case of the prosecution was proved beyond reasonable evidence from the scene of crime.

iii. That the learned trial magistrate erred in both law and fact when she said that the verdict exhibit linked appellant in this offence when they were no documents signed by the appellant and the buyer at the time of selling the said phone.

iv. That the learned trial magistrate erred in both law and fact when she misdirected herself in a case which was not reported against the appellant.

v. That the learned trial magistrate faulted in law and in fact when she held and linked the appellant in this case when not aware that the exhibit was found on the hand of PW3 brother and who didn't appear at the court during the trial of this case.

vi. That the learned trial magistrate erred in both law and fact when challenged appellant sworn statement and ruled it by saying that it was after thought evidence

vii. That the learned trial magistrate also faulted in both law and in fact when not on view that appellant had not done identification parade for positive identification by the complainant and same pronounced conviction and sentence of death penalty.

viii. That the sentence imposed upon the appellant was manifestly harsh, cruel and too excessive.

2nd & 3rd Appellants' submissions

24. The 2nd and 3rd appellants submissions are largely the same. The submissions were filed on 5th June 2023 together with additional grounds of appeal. The same were filed without leave of court offending Section 350(2) of the *Criminal Procedure Code*. They submit that they were arraigned in court 30 days after their arrest as they were arrested on 22nd July 2016 and arraigned on 28th August 2016. They also allege that they were charged on an additional charge for which they were arrested on 22nd July 2016 and arraigned on 2nd December 2016.

25. On identification, the 2nd appellant faults the process leading to his identification particularly on the identification parades. He takes issue with the complainant's testimony that he was able to recognize his attackers during the attack and submits that if that was the case, there was no need for conduct of three parades. He also takes issue with the police report on the parades and submits that the same did not have a description of the assailants. He also takes issue with the evidence of identification stating that there was no description on the intensity of light. On his part, the 3rd appellant made similar submissions on the Identification parade but added that he was not subjected to an Identification parade as he was serving time at Kitui G.K prison. The 3rd appellant also submits that there was an additional 4th accused who was not arrested or present during trial. It is his submission that the unnamed 4th person was denied a fair trial.

26. The two submit that they were not linked to the offence as they were not found in possession of the stolen goods or the weapons used during the robbery. They both submit that their defence were not considered by the trial court.

27. The 3rd Appellant filed rebuttal submissions on 4th October 2023 where he reiterates that he was not identified during the Identification parades and further, that he was not found in possession of the stolen phone and that he was framed.

28. State Counsel opposes this appeal vide submissions dated 3rd August 2023 and urges the court to dismiss it. The state submits that it proved its case beyond reasonable doubt and proved the elements of robbery with violence. Counsel submits that the three appellants were armed with a jembe and a somali sword which were recovered from the 2nd Appellants home, and that they attacked the complainant leaving him with serious injuries and also stole from him.

29. On identification, the respondent submits that the three appellants were positively identified and linked to the robbery. Counsel submits that there was sufficient lighting at the scene from street lights and further, that the complainant identified the 1st and 2nd Appellants from an Identification parade conducted on 22nd July 2016. With regards to the 3rd Appellant, counsel submits that he was linked to the robbery as he was found in possession of the stolen phone which was unearthed by data from Safaricom which showed that the phone had been used by PW4 who informed the police that he had gotten the phone from his cousin PW5, who informed the police that he bought the phone from the 3rd Appellant at Kshs 1500/-.

30. The respondent further submits that the contradictions pointed out by the appellants were not material to their case and has pointed out that the P3 form tendered in evidence is dated 29th August 2016 and not 25th August 2015 as alleged adding that the date of the offence was 11th July 2016.

31. This Court has considered both the appellants case and the Respondent's rebuttal. This being the first Appellate Court, this court is required to examine and analyse all evidence adduced in the trial court and arrive at its own independent finding. This principle was upheld in the case of *Okeno V. Republic* [1972] EA 32 where the court stated as follows:

> The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala -V- R.* (1975) EA 57). 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.

32. These consolidated appeals have raised the following issues for determination;

    i. Whether the charge sheet was defective

    ii. whether the prosecution proved the offence of Robbery with violence to the required standard

Whether the charge sheet was defective

33. The 1st Appellant has faulted the charge sheet presented at their trial for indicating section 296 (2) of the *Penal Code* and leaving out 295 of the *Penal Code*. This court has looked at the charge sheet which clearly reads that the appellants were charged with the offence of robbery with violence contrary to section 296 (2) of the *penal code*. The cited section disclosed an offence defined under that section

whose sanction is death sentence. The particulars that have been highlighted at the beginning of this judgment disclosed the offence under section 296(2) of the *Penal Code* and all the appellants pleaded to the charge knowing clearly what they faced. The charge sheet was proper, regular and in tandem with the evidence tendered. It was not defective.

Whether the prosecution proved its case against the three appellants

34. The appellants submitted that the prosecution failed to discharge the burden of proof placed upon them in law. They submit that the offence of robbery with violence was not proved. The three appellants' main contention was on identification. They all claim that positive identification was not established and that the evidence tendered did not link them with the offence. For an offence of robbery with violence to be proved, certain critical ingredients must be present. These ingredients are stipulated under Section 296 (2) of the *Penal Code* which provides as follows;

> " If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death".

35. The Court of Appeal in the case of *Oluoch –Vs – Republic* [1985] KLR restated the ingredients of robbery with violence as set out under Section 296(2) as follows;

> " Robbery with violence is committed in any of the following circumstances:
>
> a. the offender must be armed with any dangerous or offensive weapon or instrument; or
>
> b. the offender must be in the company of one or more other person or persons or;
>
> c. at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.....".

36. In the case of *Dima Denge Dima & Others v Republic* [2013] eKLR, the Court of Appeal stated that;

> " The elements of the offence under Section 296 (2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction".

37. This court is called upon to establish whether the prosecution was able to prove beyond reasonable doubt that; (i) the offenders were armed with dangerous and offensive weapon or instrument; or (ii) the offender was in company with one or more person or persons; or and (iii) at or immediately before or immediately after the time of the robbery the offenders wounded, beat, strike or used other personal violence on the complainant.

38. PW1 stated that he was on his way to pick his bread delivery when he met someone behind M.O.M hotel. He stated that the person ordered him to stop but before he could comply, the assailant hit him on his head with a jembe. That immediately after, two other people re-emerged. He stated that one of them shone a light against his eye while the other frisked him. He stated that he got hold of one of the attackers but he was cut on his palm. That he then decided to run but was again hit using a jembe, he fell down and the assailants attacked him viscously until he almost lost consciousness. Regarding the element of use of an offensive weapon PW1 stated that the attacker was armed with a jembe and a

sword which were produced as PEXH 7 & PEXH 8 respectively. The element of violence was proved to the required standard.

39. The prosecution case on the element of use of violence was also hinged mainly on the medical evidence that showed that the complainant suffered serious injuries. Dr. Joseph Kingoo (PW6) tendered a P3 Form signed by the late Dr. Mutuku who at the time PW6 testified was reported to be away on sick leave. Unfortunately, PW6 failed to lay proper basis as stipulated under Section 33 of the *Evidence Act* to testify on behalf of Dr. Mutuku. The law required the prosecution to lead evidence regarding the length of time PW6 worked with Dr. Mutuku (deceased) and if he was familiar with his handwriting and signature. The prosecution should have shown that Dr. Mutuku could not be possibly availed without unnecessary costs or delay.

40. The witness also tendered the admission/discharge summary (PEX4). The discharge summary is signed by one Dr. Wanyama and is dated 12.7.2016. PW6 also failed to lay a basis as to where the author was and if he was familiar with his handwriting and signature.

41. The P3 Form is dated 29th August 2016 and not 25th August 2015 as contended by the appellant's and even if there was a discrepancy on the date on the medical report, this court would have been inclined to disregard but the omission by the prosecution to lay proper basis for PW6 to testify and tender medical documents authored by other medics is a serious matter and cannot be overlooked.

42. This court however finds as bound above that the evidence tendered by PW1, PW2, PW3 and PW7 sufficiently established and proved the element of violence in this case. It is important to note in cases of this nature, proof of any of the elements listed under section 29(2) of the *Penal Code* is sufficient to find a conviction. The other ingredients of being in company of more than one person and use of violence was proved.

Identification

43. It is now settled that identification of the perpetrator is another crucial element that must be proved besides the elements highlighted above in the cited section of the law.

44. The robbery occurred in the early morning of 11th July 2016, around 4.30 am. It was PW1's testimony that he was walking to pick a delivery for his business when the attack occurred. In his testimony, PW1 stated that he was able to see his attackers very well. He stated that there was sufficient lighting from street lights which enabled him to see them well and he told the police that he could identify the attackers. He gave a detailed account of what transpired with each of the appellants as follows;

Cross examination by the 1st appellant;

> "It was you who ordered me to stop before I could stop, you hit me with a jembe. You asked me if I knew you...there was light at the scene which enabled me to see you..."

Cross examination by 2nd Appellant;

> "I saw you before you attacked me...I gave out your physical appearance. I directed police to where you could be found...I know you physically"

Cross examination by 3rd Appellant

> "You personally had a torch. You used the touch to blind me but fortunately, there were homes and street lights. You personally took my phone, you had a torch. I know you physically"

45. It is evident from the evidence tendered that the prosecutions case in respect to identification was based on the evidence of PW1 and the doctrine of recent possession with respect to the 3rd Appellant. A court should be careful when dealing with identification especially where it is based on the evidence of a single witness. Such evidence must be treated with caution because of the possibility of mistaken identity and the miscarriage of justice.

46. It was stated in *Abdullah bin Wendo vs. Republic* (1953) 20 EACA 166, the court stated as follows;

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

47. PW1 was clear in his testimony in terms of identification of his attackers, he indicated that he was able to get hold of one of the attackers before he was cut on his hand, he also stated that he knew them prior to the robbery as he used to see them before the date of the robbery.

48. The prosecution's case in respect to identification was strengthened by the fact that the complainant's stolen phone was recovered and traced to the 3rd appellant.

49. Where identification of a single witness is backed up by evidence of recent possession, the conviction is safe because a court is entitled to draw inference of guilt by virtue of the doctrine of recent possession. This is where an accused is found in possession of recently stolen property in unexplained circumstances. In the case of *Eric Otieno vs. R.* (2006) eKLR, the Court of Appeal summarized the essentials of the doctrine of recent possession as follows;

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

50. Similarly, in *Athuman Salim Athuman vs. Republic* [2016] eKLR the Court of Appeal held;

> " The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how be came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver... ".
>
> The circumstances under which the doctrine will apply were considered in *Isaac Ng'ang'a Kahiga Alias Peter Ng'ang'a Kahiga V. Republic*, Cr. App. No. 272 Of 2005, where this Court stated:
>
> "It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words,

there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other."

51. The item in question in this respect is a mobile phone which was described as Neon smart phone Serial No. 35367507369860 which PW1 testified was stolen during the attack in addition to Kshs 1000/-. The mobile phone was proven to be the actual property of PW1 vide a receipt from Safaricom Shop which was proof of purchase, the same was exhibited as PEXH 6 and PW1 identified it in court as well. PW7, the investigating officer testified that he applied forensic data pertaining to the phone from Safaricom which indicated that the phone had been used by PW4 a few days after the robbery. When called to testify, PW4 admitted to having used the phone but indicated that he had gotten it from his cousin PW5 on 16th July 2016, 4 days after the robbery. PW5's testimony was that he bought the from the 3rd Appellant. He testified that the 3rd Appellant while in the company of the 2nd Appellant approached him and asked him for Kshs 1500/- in exchange of the phone. He testified that the 3rd Appellant told him that he needed the money to pay rent, that he obliged and later gave the phone to PW4. When cross examined by the 3rd Appellant, PW5 maintained that he bought the phone from him while he was in the company of the 2nd Appellant. The 3rd Appellant conceded in his testimony that he indeed knew PW5 as both of them were boda boda riders.

52. The Court of Appeal in *Athuman Salim Athuman v Republic* (supra) held that one the doctrine of recent possession is not confined to physical possession of the stolen property and that two, identification of an accused person can be corroborated by the doctrine. The court held as follows;

> " Identification of an accused person therefore may be properly corroborated by the doctrine of recent possession. Indeed in *Bogere Moses & Another V. Uganda*, CR. APP. No 1 of 1997 the Supreme Court of Uganda suggested that the doctrine of recent possession may be more reliable form of identification evidence, when it stated:
>
> > " It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye witness evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable, while the latter solely depends on the credibility of the eye witness."

53. The trial court evaluated the evidence tendered with respect to the doctrine of recent possession as follows;

> " The 3rd accused's argument that the stolen phone was in possession of PW2 rather than in his own possession has no merit because possession under the doctrine is not confined to physical possession of the stolen property. Section 4 of the *Penal Code* defines "possession" to include:
>
> "...not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place

(whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person."

54. Although the appellants were not found in actual possession of the stolen phone, the explanation given by PW5 and PW7 on how they came to be in possession of the stolen phone was plausible and corroborated. The complainant's testimony on identification of the 2nd and 3rd Appellants in the robbery. To further implicate the 2nd Appellant, the investigating officer while acting on the description given by the complainant was able to arrest him. He stated that he was incidentally looking for the 2nd appellant in relation to another theft related incident report and when he conducted a search in the 2nd Appellant's house he recovered a jembe and a somali sword which matched the description of the weapons used in the robbery. The items were produced in court and marked PEXH 7 & 8 respectively.

55. This court finds that the doctrine of recent possession directly links the 2nd appellant (because he was found with a jembe that clearly matched the description given by PW1) and the 3rd appellant who was directly linked to the appellant's stolen phone. The 3rd appellant gave no explanation whatsoever as to how he came into possession of the phone other than the fact that he was one of the robbers that robbed the complainant of his phone after inflicting serious injuries to him. The fact that he fled the place he used to operate as a boda boda operator immediately after the incident as narrated by PW4 (also a boda boda operator) further implicated him to the crime committed. The evidence by the investigating officer and in particular the evidence from Safaricom nailed him.

56. I will now turn to the evidence tendered in regard to the 1st appellant (Dennis Mutia Katee). The evidence tendered that linked him to the offence was by the complainant who said he saw him and was able to pick him out of the identification parade.

57. The evidence of the investigating officer was to the effect that he and fellow officers were in the process of arresting the 2nd appellant when they saw the 1st appellant and noted that he matched the description given to them by the complainant that he was short, dark with red eyes. The investigating officer had him arrested and the complainant positively identified him in an identification parade conducted on 22.7.2016. the 1st appellant complained that the identification parade contained 10 people instead of 8 but what prejudice did he suffer? None. The Force Standing Order 6(iv) (d) states as follows:

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

The standing order therefore provides that at least 8 persons should attend the parade with a suspect among them. The identification parade in this instance contained 10 persons and the 1st Appellant has no reason to complain. The identification parade report in respect to 1st Appellant unlike the other reports was duly signed and was tendered as P exb 5 (a). The report shows that the 1st appellant was positively identified. From the foregoing, this court finds that the prosecution's case against the 3 appellants herein was proved to the required standard in law and there was no doubt in the mind of the trial court that they were involved in the crime. I have re-evaluated the evidence tendered at the trial court and I have come to the same conclusion. In the premises this court finds no merit in this appeal on conviction. The 3 appellants herein were properly convicted based on the evidence tendered.

58. On the sentence given, due to recent jurisprudence, this court is inclined to set aside the death sentence because it is too harsh and, in its place, the appellants are each sentenced to serve 35 years imprisonment

to run from the date of arraignment in court on 25th July 2016 because they were in custody throughout their trials.

14 days right of appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 22ND DAY OF FEBRUARY, 2024

HON. JUSTICE R. K. LIMO

JUDGE