Mwania & another v Republic (Criminal Appeal E064 of 2021)
[2024] KEHC 3727 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3727 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E064 OF 2021

MN MWANGI, J

MARCH 15, 2024

BETWEEN

MUTUKU MWANIA ..... 1ST APPELLANT

SIMON SAMMY KIMEA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the original conviction and sentence delivered by Hon. D. Wangeci, Principal Magistrate, in Voi Chief Magistrate's Court Criminal Case No. 978 of 2016)

JUDGMENT

1. The appellants herein were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code in Count I. Particulars thereof were that on the 5th of December, 2016 at around 11.00 p.m., along the Mombasa Road between Mackinon and Maungu Trading Centres within Taita-Taveta County, being armed with a dangerous weapon namely a knife, robbed Kelly Werunga Kerere a motor vehicle registration number KCA 257 J Isuzu FRR, 224 cartons of syringe with needles, a techno mobile phone, a wallet, national identity card, and a sofa set all valued at Kshs.6,146,241.00 and immediately before or immediately after the time of the robbery used actual violence on the said Kelly Werunga Kerere.

2. In Count II, the 1st appellant was charged with the offence of handling stolen goods contrary to Section 322(1) & (2) of the Penal Code. The particulars of the charge were that on the 6th day of December, 2016 at Malili area along the Nairobi-Mombasa Road, within Makueni County, otherwise than in the course of stealing, received and retained a motor vehicle registration number KCA 257 J FRR for his benefit and unknown others (sic), knowing or having reason to believe it to be stolen goods.

3. In Count II, the 1st appellant was acquitted under Section 215 of the Criminal Procedure Code. In Count I, the appellants were found guilty. The 1st appellant was sentenced to serve 20 years imprisonment. The 2nd appellant was sentenced to 30 years imprisonment.

4. The appellants being aggrieved by the Trial Magistrate's decision lodged separate appeals, which were consolidated for hearing. After lodging his appeal, the 1st appellant amended his grounds of appeal, which were filed on 4th April, 2022. He raises the following issues in the amended grounds of appeal –

   i. That the learned Trial Magistrate erred both in law and fact for finding that there existed proper identification of the 1st appellant whose fact was erroneous and not contained in law;

   ii. That the learned Trial Magistrate erred in both law and fact by charging, convicting and sentencing the 1st appellant on a defective charge sheet (sic);

   iii. That the learned Trial Magistrate denied the 1st appellant a right to fair trial as envisioned under Article 50(2) of the Constitution of Kenya, 2010;

   iv. That the Trial Court erred both in law and fact by failing to evaluate and observe that the case was poorly investigated and it had contradictions and discrepancies, immaterial cogent sufficient evidence which was inconsistent as between evidence availed before the Court and the report given to the police during reporting time (sic);

   v. That the learned Trial Magistrate erred both in law and fact by failing to find that the complainant did not give a description of his assailants after the attack to the police or anyone;

   vi. That the complainant in cross-examination clearly told the Court that he could not identify anyone and also, he had not described his attackers to the police;

   vii. That the learned Trial Magistrate failed in both law and facts by failing to find out that when any person has hands tied at the back and mouth tied, and somebody sits on his back while placed facing downwards, he cannot see in front or behind lying at the bed in the cabin behind the driver's seat (sic);

   viii. That the learned Trial Magistrate erred in both law and facts in convicting the 1st appellant in the present case which is a total fabrication, based on being framed and incriminated;

   ix. That the learned Trial Magistrate erred both in law and fact by failing to order the prosecution to serve him with the occurrence book extract as requested;

   x. That the learned Trial Magistrate erred both in law and fact by siding with the prosecution instead of intervening as a mediator and rule equally whereby all the time she favoured the prosecution (sic);

   xi. That the learned Trial Magistrate erred in both law and fact by watering down his alibi defence;

   xii. That the learned Trial Magistrate erred in both law and fact by failing to order or summon the two witnesses who were arrested in possession of the ID Card of the complainant John Kitonyi Mbindyo, and Daniel Kyalo Munywoki who was arrested in possession of the delivery note of the complainant and were released on allegations that they were passengers;

   xiii. That the learned Trial Magistrate erred in both law and fact by convicting him without cogent and sufficient evidence;

xiv. That the learned Trial Magistrate erred in both law and fact in acquitting the two persons who handled the stolen goods i.e. Felister Njeri Njogu and Lazarus Odhiambo Ombugu by reversing its orders dated 23/1/2018;

xv. That the learned Trial Magistrate erred in both law and fact by convicting him in the present case which had no circumstantial evidence on the doctrine of recent possession already having acquitted him of the second count of handling (sic);

xvi. That the learned Trial Magistrate erred in law by accepting the parade form to be produced by C.I.P Gichuki who never conducted it, it ought to have been produced by one I.P Langat who was the author of the document; and

xvii. That any other ground would be adduced during the hearing of this appeal.

5. The 1st appellant's prayer is for the appeal to be allowed, conviction quashed, sentence set aside and he be set at liberty.

6. The 2nd appellant lodged his appeal and thereafter filed amended grounds of appeal on 6th April, 2022 raising the following issues-

i. That the learned Trial Magistrate erred both in law and fact by finding that there existed proper identification of the appellant, a fact of which was erroneous and not based on any law;

ii. That the Trial Court charged and convicted and sentenced him based on a defective, consolidated charge sheet (sic);

iii. That the Trial Court denied him the right to a fair trial envisioned under Article 50(g)(h) of the Constitution of Kenya, 2010;

iv. That the offence however defective was not proved to the required standard;

v. That the learned Trial Court failed to find and see that the case was poorly investigated;

vi. That the Trial Court failed to observe that the case had contradictions and the evidence had inconsistences and it had discrepancies and there was no material evidence to sustain convictions between the evidence availed before Court and report given to the police during reporting time (sic);

vii. That the Trial Magistrate erred both in law and fact when she convicted him by present case yet she failed to find that it was nowhere on record that he was among the two persons who robbed the complainant and tied his hands at the back and mouth tied with socks and forced him into the motor vehicle at the cabin at the bed behind the driver's seat, his face facing down and one man sat at his back in the OB. 2 dated 6th December, 2016 at 400 Hrs (sic);

viii. That the Trial Magistrate erred both in law and fact when she convicted him and sentenced him to 30 years imprisonment in the present case yet she failed to find that in 2016 and 2017 up to date of his arrest in the whole file nowhere was he mentioned or was he being wanted by police or said that he was at large or having a warrant of arrest (sic);

ix. That the Trial Magistrate erred both in law and fact when she convicted and sentenced him in the present case yet she failed to find and see that the evidence of PW5, PW6, PW9, PW10, PW12, PW14 and PW15 misled the Court and misdirected the Court alleging that he was involved in this robbery of 2016 which was pending before Court upon 3 accused (sic);

x. That the learned Magistrate erred both in law and facts by failing to serve him with the miscellaneous application which he requested police requesting 14 days to complete their investigation to have access on it and enable him to prepare his defence and also to know the cases which were to be investigated. Also the Trial Court failed to order the prosecution to serve him with the booking in at Voi Police Station after being escorted from Railways Police Station on 21/5/2018 and book out to Court on the same day 21/5/2018 and also he wanted to see what was recorded during the Misc. application of the police if his complaints were on record and also what the Court ruled upon his complaints in Court under Article 35(1)(a)(b) and (c) (2) and Article 49(1)(a) of the Constitution of Kenya, 2010 and Article 29(a)(c)(d)(e)(f) (sic);

xi. That the Trial Court erred both in law and fact by throwing his defence alibi (sic) and all his defence witnesses 3 of them which she did not consider and also expunging his defence exhibits witnesses documents he produced before Court i.e. bus ticket, statements of Michael Kokani alleged arresting officer, statement of Joan Wanjiru Gachanja, the ID parade officer statements of his arresting officer Joel K. Chepkong and statement of Paul Cheruiyot and statement of his co-accused No. 1 Mutuku Mwania of 6 pages, his written complainant of which he served the Court and also his two co-accused persons Mutuku Mwania and Evans Nduati Kimuhu who have now been acquitted by appeal and he made his complaint under Section 89 Cap 75 of the CPC (1)92)(3)(4)(5) (sic);

xii. That the learned Magistrate erred both in law and fact by reversing her order;

xiii. That the learned Trial Magistrate erred both in law and fact by relying on previous conviction of file No. 549 of 2018 in which he was acquitted by the High Court;

xiv. That the learned Trial Magistrate erred both in law and fact by convicting him in the present case yet she failed to find and evaluate and see the evidence of source of arrest; and

xv. That the learned Trial Magistrate erred both in law and fact by convicting him in the present case yet she failed to make a fair decision in the judgment and give him the benefit of doubt in his favour, only favouring prosecution (sic).

7. The 2nd appellant prays for his conviction to be quashed and sentence set aside.

8. Edward Cheruiyot Maritim testified as PW4. His evidence was that on 6th December, 2016 at about 2.00 a.m., he was called by police from Voi Police Station and informed that his driver had been carjacked and robbed of motor vehicle Reg. No. KCA 257J Isuzu FRR, which was jointly owned by CFC Stanbic, as the financier, and Samai Agencies, a company in which he is a director. That upon being called, he immediately called the car track company that had installed a tracking device in the vehicle and they informed him that the motor vehicle was at Makindu enroute to Nairobi. He stated that he talked to the DCIO Emali, who radioed all the road blocks along the road from Mtito-Andei to wait for the lorry, and at about 4.00 a.m., the lorry was intercepted past Emali.

9. It was PW4's evidence that the following day, he travelled to Emali Police Station where he identified his vehicle which was empty at the said time, as the luggage that had been on board had already been removed. He was informed and showed the 1st appellant as the person who had been arrested.

10. During cross-examination by the 1st appellant, PW4 stated that there were three people who had been arrested at Emali, but the police confirmed that the other two were passengers that had been given a lift by the 1st appellant. Further, that when he arrived at Emali, he realized that the puncture was on the left inner rear tyre, and the left outer rear tyre was okay.

11. PW5 was Kelly Werunga Kerere, the driver of the motor vehicle Reg. No. KCA 257J Isuzu FRR. He is the complainant in this case. He testified that when he was driving from Mombasa to Nairobi at around Mackinon area, he heard sounds on the rear tyres as if there was a tyre burst. He alighted from the motor vehicle to check and found that the outer tyre on the co-driver's side had no air. He stated that he had a small torch which enabled him to confirm the same. That when bending over the tyre, he felt someone hold his neck, and a cold object which he believed to be a gun was placed on his neck. It was his testimony that when he stood over, one person cut his hand just above the elbow and at that point he saw that the person was holding a small knife.

12. It was PW5's evidence that only one person talked and told him to shut up or he would shoot him, but he was attacked by two people. It was his evidence that his hands were tied behind his back and he was tied on the mouth with his socks. The persons then laid him on the cabin bed behind the driver's seat face down and one person sat on his back, while the other took control of the motor vehicle.

13. PW5 stated that after driving for about 1KM, the vehicle stopped and a fat i.e. heavily built person with a brown sweater boarded the motor vehicle. That he could see all this from the space between the conductor's seat and the body of the said vehicle. PW5 stated that the driver and the person who had just boarded the vehicle started talking as if they were arguing. That they were speaking in vernacular with a word or two in Swahili and PW5 could hear them saying that the luggage was not lucrative

14. He further stated that after driving for about 30-45 minutes, the person who was seating on his back, and the one who had boarded the vehicle after 1KM alighted with him, and they pushed him into the sisal plantation as the driver drove off with the vehicle. He stated that he was able to see all the three attackers when they took him down from the vehicle and pushed him into the sisal plantation. He identified the 1st appellant as the driver of the motor vehicle and the 2nd appellant as the person who boarded the vehicle after the 1st appellant had driven for about 1KM.

15. PW5 testified that on 8th December, 2016 he participated in an identification parade at Wundanyi Police Station and he was able to identify the 1st appellant as the one who took up driving of the motor vehicle after he was carjacked.

16. During cross-examination by the 1st appellant, PW5 stated that he did not identify the two people who attacked him and placed a cold metallic object on his neck initially when the attack happened. He further stated that when placed on the bed in the cabin, his head was placed on the conductor's side and when facing down, one cannot see. It was his testimony that when he was forced out of the motor vehicle, there were lights of passing vehicles which enabled him to see the three attackers. PW5 informed the police that he could identify them, but he did not describe the attackers in his 1st report. He indicated that during interrogation he gave the description of those who attacked him.

17. It was stated by PW5 that the person who cut him was slim with a beard and a slim face. That he had recorded his statement after he had participated in the identification parade wherein he identified the 1st appellant but he did not describe the 1st appellant in his statement.

18. On being cross-examined by the 2nd appellant, PW5 stated that when he lay on the cabin bed, he turned his head and he could breath and see, hence he saw when the 2nd appellant was getting into the motor vehicle from the space between the body of the vehicle and the conductor's door. He further stated that he did not describe him in his first report, and he did not direct the police to arrest him. PW5 stated that he identified the 2nd appellant in an identification parade that was conducted in the year 2018.

19. PW5 was recalled for further cross-examination. When cross-examined by the 1st appellant, he denied stopping at Miritini and/or picking up the 1st appellant at any given time in his journey. He stated

that he stopped to eat supper at Mackinon before he stopped where he was attacked. He denied eating supper with the 1st appellant at Maili Kubwa. PW5 stated that the 1st appellant cut his hand before pushing him onto the bed, he bled but he does not know whether the stained garments were seen. He asserted that he first reported the incident to officers at an SGR camp.

20. In re-examination, he stated that he was informed that the 1st appellant was the one who was found with the vehicle after he identified him in the identification parade.

21. He indicated that he identified the 2nd appellant in an identification parade at Voi Police Station.

22. PW9 was PC Michael Kokani. He testified that he arrested the 2nd appellant on 19th May, 2018 after they received information from an informer that there were persons at Maili Kubwa Market who were suspected to be dangerous criminals. He indicated that at the time of arrest, the 2nd appellant did not have a pending warrant of arrest against him, and he was not found committing any offence.

23. PW10, IP George Sande Anthony who arrested the 1st appellant testified that they were informed at 0200 hrs, on 6th December, 2016 that the vehicle Registration No. KCA 256J Isuzu FRR which the complainant had been robbed of on 6th December, 2016 was heading to Malili past Sultan Hamud, he took officers under his command and followed the motor vehicle, and 1KM from Malili, they traced it and forcefully stopped it at Mukaa. That in the said vehicle there were three people, who were the 1st appellant and two other people, namely, Kitonyi and Kyalo. On searching the said motor vehicle they did not find any cargo but in the cabin, they traced a delivery note showing that the motor vehicle was carrying syringes heading to Nairobi. He stated that they arrested all of them and took them to Emali Police Station together with the motor vehicle. Thereafter, he handed over the matter to DCI Voi. He identified the 1st appellant as one of the men they arrested when they intercepted the motor vehicle.

24. During cross-examination by the 1st appellant, PW10 stated that the 1st appellant took them to the place where the goods had allegedly been offloaded in Kibarani. He further stated that there was no blood in the motor vehicle. PW10 also said in cross-examination by the 1st appellant that the said appellant was the one who was driving the motor vehicle and he was the one who drove the motor vehicle back to Emali under the escort of the police. That the 1st appellant claimed that it was the original driver of the lorry who told him to deliver the goods to Kamuti who has a store and resides in Kibarani area just after Kiundwani Township. That the 1st appellant took them to an empty room that was not locked. PW10 stated that he did primary investigations at the scene and neighbours said that they had not seen any load/cargo.

25. PW12 Sergeant Gregory Simiyu testified that they were led to a Centre where the 1st appellant informed them that he had been directed to take the cargo but when they arrived at the house, it was empty. After interrogating the neighbours, they were informed that there had been a consignment that had been moved later. Further, the 1st appellant informed him that the two other people he was arrested with were not with him when he started his journey, and that he had picked them along the way.

26. Still on being cross-examined by the 1st appellant, PW12 indicated that he took the suspects to Wundanyi Police Station where they were subjected to an identification parade that was conducted by IP Langat, and that PW5 identified the 1st appellant as one of the people who had stolen the motor vehicle when he stopped to check on the vehicle's tyres. He stated that when the vehicle was handed over to him, it did not have a puncture. He indicated that the report was made at 0315hrs at Voi Police Station, and he did not know how PW10 received the report at 0020hrs. PW12 stated that he interrogated PW5 before he started his investigations and PW5 described the people who attacked him, in that one was short and dark, the other was tall, dark and well built, whereas the third one was medium

size but they did not put everything reported to them in a written statement. He further stated that he cannot confirm whether PW5 gave the 1st appellant the motor vehicle.

27. PW12 indicated that the 1st appellant informed him that the store where he left the consignment belonged to Kamuti but he has never traced him and he cannot tell whether he was ever arrested and later charged. At this point, the 1st appellant marked for identification an OB extract for OB 2/22/05/18 from Voi Railways Station showing the booking of James Mutinda Kamuti at 0228hrs.

28. On being cross-examined by the 2nd appellant, PW12 stated that he did not link him to the offence herein during his investigations.

29. PW13 Corporal Shem Asha produced photographs of the motor vehicle and a report prepared by CIP David Kiili on his behalf. He testified that he worked with the said CIP David Kiili in Taita Taveta till February 2019 when he left for Nairobi, as such, he knew his signature which was the one that appears on the said report.

30. PW14, IP Peter Kyalo testified that he conducted an identification parade on 28th May, 2018 as per the Force Standing Orders. He stated that before the parade, the suspect was in the police cell, whereas PW5 who was supposed to identify his attacker who was in the DCI general office thus they could not meet. He indicated that he explained to the 2nd appellant that an identification parade was to be conducted and the reason why it had to be conducted and he cooperated. PW14's evidence was that he looked for nine (9) men with close resemblance to the 1st appellant, and he explained to him the line-up and asked him to choose a position, and he chose to stand between No. 3 and 4 of the identification parade members.

31. PW14 indicated that the witness was then taken to the identification parade wherein he identified the 2nd appellant as his attacker by touching him. PW14 stated that after the identification parade was concluded, he filled the parade form and signed it on 28th May, 2018 but the 2nd appellant refused to sign it on ground that he was not satisfied with how the parade was conducted.

32. During cross-examination by the 2nd appellant, PW14 stated that the complainant did not give him a description of the 2nd appellant before the parade.

33. PW15, CP Joan Wanjiru Gachanja, was the Investigating Officer in this case. She stated that on 19th May, 2018, through the assistance of an informer they were able to arrest the 2nd appellant with two other persons at Meli Kubwa on suspicion that they were planning to execute several robberies along the Mombasa-Nairobi highway. She indicated that the 2nd appellant was taken to Court on 21st May, 2018 where they sought for more time to conduct investigations.

34. It was stated by PW15 that according to the written statement of PW5, the description he had given of one of the robbers fitted that of the 2nd appellant thus PW5 was requested to go and identify various suspects they had in their custody. PW15 testified that in the identification parade, PW5 identified the 2nd appellant. Thereafter, she recorded a further statement of PW5 on 28th May, 2018 which led to the 2nd appellant being jointly charged in this case. In addition, she stated that the informer whose information led to the arrest of the 2nd appellant indicated that the 2nd appellant was also part of the robbery herein.

35. In cross-examination by the 1st appellant, PW15 stated that the description of the complainant's attackers is well documented in the complainant's witness statement. She denied any knowledge of one Kamuti.

36. In cross-examination by the 2nd appellant, PW15 stated that the fact that the case in the lower Court was pending before the Court does not mean that other people could not be joined to the case. She further stated that the informer who led to the arrest of the 2nd appellant was not an eye witness to the robbery that happened in the year 2016. She indicated that when the 2nd appellant was arrested; he was neither found committing an offence nor was there a warrant of arrest that had been issued against him.

37. PW16, CIP Joseph Gichuki produced the identification parade form for the 1st appellant on behalf of IP Christopher Langat who conducted the 1st appellant's identification parade. PW16 explained that IP Christopher Langat was sick and admitted in the hospital and he could not attend Court to produce the identification parade form. PW16 stated that he had worked with IP Christopher Langat before he was transferred to Kwale from Voi, therefore he was familiar with his handwriting and signature. He confirmed that the signature and handwriting that appears on the identification parade form belongs to IP Christopher Langat.

38. He testified that the 1st appellant was informed by IP Langat the purpose of the identification parade, and he consented to participating in it. He indicated that before the identification parade was conducted, PW5 was placed in the office of the Secretary to the OCPD Wundanyi and the 2nd appellant chose to stand between the 1 and 2 parade members. That thereafter, the 1st appellant was identified by PW5 by touching and subsequently, he was charged with the offence herein. It was stated by PW 16 that the 1st appellant indicated that the parade was fairly done and signed the identification parade form, and IP Langat signed and dated the said form on 7th December, 2016.

39. In his defence, the 2nd appellant stated that he was arrested by an officer by the name Joel Chepkonga on allegations that he had taken away his girlfriend. That on his arrest, he boarded the police motor vehicle and in it were six other young men who were unknown to him. Thereafter, the vehicle left and started heading towards Nairobi but stopped at Mazerari area in Voi. The 2nd appellant stated that at that point, four police officers alighted and the Police Officer who had arrested him told him that if he wanted peace, he should give him Kshs.100,000/=, which he declined to do and that he told the Police Officer that he had not committed any offence for which he should bribe him.

40. The 2nd appellant claimed that the police vehicle then drove towards Railways Police Station where he was booked in without being informed the reason for his arrest.

41. It was stated by the 2nd appellant that on 20th May, 2018, Sgt Otuoma went to his cell, twisted his hand, handcuffed his hands and legs and tortured him while stating that he was still after women. That on 21st May, 2018, he was taken before Court No. 2 alongside four other men and he was charged with the offence of robbery that took place in 2016. He stated that he was framed in this case because of the grudge between him and Joel Chepkong'a because of his girlfriend Doreen.

42. The 2nd appellant further stated he was working as a Manager at his sister's businesses. He claimed that he was not around Taita Taveta County at the time the offence was committed. He also claimed to have traveled from Malindi on 18th December, 2016. He produced a bus receipt to support his claim and said that he could not have committed the offence. He indicated that on 30th May, 2018, he was taken to Court and charged alone.

43. On being cross-examined by the prosecution, he stated that when the officer by the name Chepkong'a arrested him he was not in uniform but the said officer produced his job ID. He further stated that the bus receipt he produced only bears the name Sammy and it was for thirteen days after the offence herein was committed on 5th December, 2016. The 2nd appellant denied being identified by the complainant by touching.

44. DW2 Eva Malieng Kimea testified in support of the 2nd appellant. She stated that she had employed him as a Manager in her firm t/a Konoti furniture. She stated that they worked together in December 2018, but on referring to a piece of paper, she said that it was in December 2016. She further stated that she used to give the 2nd appellant ten days leave.

45. In cross-examination she stated that her staff used to go on leave in December and during Easter holidays. She indicated that the 2nd appellant is her younger brother.

46. DW3 Jackson Musyoki Sammy, testified in support of the 2nd appellant's case. He stated that in 2016, he used to pick and drop the 2nd appellant to and from work. At that point, the Trial Court observed that the witness was referring to a piece of paper. DW3 further stated that in December 2016, he escorted the 2nd appellant to Buscar and they were to resume work in January.

47. During cross-examination by the prosecution DW3 confirmed that the 2nd appellant is a member of his biological family.

48. DW4 (erroneously recorded as DW3 by the Trial Court) Stella Mutua testified in support of the 2nd appellant's case. She stated that she used to work with the 2nd appellant at Comfort furniture in Malindi. She further stated that in December they were away and they resumed work in January. DW4 stated that the 2nd appellant did not leave between 1st to 15th December, 2016.

49. The 1st appellant in his defence testified that he drove his boss and his family to Mombasa on 5th December, 2019 (sic), (confirmed that it was 5th December, 2016, from the handwritten proceedings of the lower court). That they left Nairobi at 5.00 a.m., and arrived at Mombasa at 2.00 p.m. That later on, his boss dropped him at the stage at Miritini but it took him one and a half hours before he could get a motor vehicle. He stated that at around 5.30 p.m., he saw a white lorry, that he approached the driver and asked for a lift to Nairobi. That they agreed on the fare which was Kshs.1,000/=. It was stated by the 1st appellant that they left for Nairobi and made the first stop at Meli Kubwa for supper and he took care of the bill. They then made another stop at Manyatta when the driver of the white lorry stopped and called two people and that when the said driver was talking on the phone, he could hear him asking for one James Kamuti. That shortly thereafter, a Probox arrived with three passengers and the driver alighted and moved to the Probox.

50. The 1st appellant further stated that the driver came back with two people who were not known to him and told him that he should proceed with the journey and they would link up later, then he went to the Probox. The 1st appellant contended that the two people unknown to him took control of the motor vehicle with him sitting in the middle. That they proceeded to Kibarani and on arrival, Kamuti and the driver of the white lorry alighted from the Probox and thereafter, Kamuti called six men who offloaded the consignment that was in the motor vehicle after it had been reversed into a building. The 1st appellant stated that the driver who is also the complainant herein was left behind with Kamuti, while he and the two unknown persons continued with the journey to Nairobi in the motor vehicle at around 1230hrs. He stated that at 0330hrs they were stopped by the police past Malili town and ordered to alight from the motor vehicle and identify themselves and at this point, he realized that the people who were with him in the motor vehicle were called Joseph Kitonyi and Daniel Munyoki.

51. The 1st appellant asserted that they were arrested on suspicion of theft of motor vehicle registration No. KCA 257 J and that they were booked at Emali Police Station vide OB 5/06/12/2016 at 0539hrs. He stated that the complainant's ID was found with John Kitonyi, whereas the delivery note was found with Daniel Charo Munyoki who was the person driving the motor vehicle from Manyatta up to the roadblock. He further stated that when he was searched, nothing was recovered from him.

That he was booked out vide OB No. 7/06/12/2016 which he produced as D. exhibit No. 6 and he escorted Inspector George who was interrogating him to the building where the consignment had been offloaded. He claimed that neighbours confirmed that the building where the consignment had been offloaded was owned by James Mutinda Kamuti and the said consignment had been moved at around 5.00 a.m. He indicated that thereafter he was taken back to Emali Police Station and booked back through OB No. 15/06/12/16 which he produced as D. exhibit No.7.

52. The 1st appellant alleged that the following day, the Investigating Officer asked him to buy his freedom by giving him Kshs.100,000/= but he declined. He further alleged that identification parade was done twice, and that the first time, the complainant did not identify anyone, and that the second time, he identified Joseph Kitonyi and Daniel Munyoki. The 1st appellant claimed that the complainant said that he was just a passenger. He asserted that James Kamuti was arrested on 21st May, 2018 and taken to Railways Police Station but he was released on 22nd May, 2018.

53. During cross-examination by the prosecution, the 1st appellant stated that the motor vehicle was given back to the owner in good condition and it had no sign of a puncture. He further stated that it was possible to repair a puncture between the place it was stolen and where it was intercepted by the police.

54. This appeal was canvassed by way of written submissions. The 1st appellant relied on the case of R v Turnbull [1976] 3 All ER 549 and submitted that theTrial Court failed to follow the directions in the case of Republic v Turnbull (supra). He submitted that the law provides for a specific procedure to be followed by the police while conducting identification parades. He further submitted that in the instant case, the said directions ought to have been strictly followed since there was no other evidence connecting him to the offence he was charged with.

55. In stating that the complainant did not identify his attackers at the scene of crime since if he had identified them, he could have described them to the police at the time he reported the incident, the appellant relied on the case of Roria v Republic [1967] EA 583. He further stated that it is trite that for identification to be proper and lawful, the perpetrator must be described to the police at the time of making the initial report which was not the case herein as can be seen from the extract of O.B. 2/6/12/2016.

56. The 1st appellant cited the case of Karanja & others v Republic [2014] eKLR, where the Court of Appeal affirmed the directions given in the case of Republic v Turnbull (supra) and held that the Court must warn itself of the special need for caution before convicting an accused person while relying on the correctness of identification.

57. The 1st appellant submitted that the complainant testified as PW5 and in his testimony, he stated that he could not identify any of the assailants/perpetrators who attacked him. Further, that he did not describe the attackers in his first report, instead, he stated that he could identify them. That the complainant stated that he gave the description of those who attacked him during his interrogation.

58. It was the 1st appellant's contention that from the evidence, it was clear that the complainant had seen the him before the identification parade was conducted, first, at Voi Police Station where he was remanded without being booked in a cell, secondly, when he was being transferred to Wundanyi Police Station, where PW5 was taken and put in the same cell where the 1st appellant being held in, and thirdly he was shown to PW6 who is an employee of PW5, thus there was a possibility of communication between PW5 and PW6. The 1st appellant argued that the other members who participated in the ID parade were not of the same age, stature, height and general appearance as him, and as such, the Kenya Police Identification Parade Rules provided under Cap 46 of the Force Standing Orders were flouted

59. The 1st appellant asserted that the charge levelled against him singly and the consolidated charge are all defective for failing to comply with the provisions of Section 214 of the Criminal Procedure Code for reasons that it does not accord with the evidence in committal proceedings and there is a mis-description of the alleged offence in the particulars alleging that he was charged on 30th May, 2018, whereas he was charged in the year 2016 alone. That thereafter, he absconded while out on bond due to sickness and he was re-arrested on 18th May, 2018 and arraigned in Court for disobedience of Court orders on 5th June, 2018. He stated that for the said reason, the Trial Court contravened the provisions of Article 50(2)(b) of the Constitution of Kenya, 2010.

60. It was submitted by the 1st appellant that he was denied his right of representation by an Advocate as provided for under Article 50 (g) & (h) of the Constitution of Kenya, 2010.

61. He referred to the case of Teper v Republic [1952] AC and contended that there are inconsistencies and/or contradictions in all the evidence adduced by witnesses such as the evidence availed before Court and the report given to the police during the 1st report. He stated that the complainant's evidence is immaterial and cannot be relied upon by the Court. He submitted that there was no robbery that took place, but instead, the complainant herein sold the motor vehicle to someone by the name Kamuti and thereafter lied to the police that he had been robbed of the said vehicle. He stated that he boarded the motor vehicle at Meli Kubwa in Mackinon as a passenger, although the said fact was denied by the complainant since he was not allowed to carry passengers as per the policy of the company he was working for.

62. In submitting on the doctrine of recent possession, the 1st appellant contended that the perpetrators of the robbery herein have since been acquitted. Further, that there was nothing linking him to the robbery such as being booked with anything connected to the said offence or recovered from him as an exhibit. He stated that the identification parade form was not produced by the author of the said document thus he did not give evidence as to how the identification parade was conducted, which could have been examined through cross-examination.

63. The 1st appellant relied on the case of Bukenya & others v Uganda CR. APP. No. 68 of 1972 and submitted that the Trial Court ought to have issued summons or warrants of arrest to the two persons whom he was arrested with when they were intercepted at Malili road block, since their evidence was crucial to the determination of this case.

64. The 2nd appellant's defence was that none of the prosecution witnesses other than PW5 and PW6 whom he was shown at the Police Station cells at Emali and Voi after being arrested, testified that they either knew him or had seen him before. He submitted that his right to cross-examine the makers of certain documents was violated since the scenes of crime document was not produced by its author and the photographs of the motor vehicle were not produced by the person who took the said photographs.

65. The 2nd appellant relied on the case of Republic v Turnbull (supra) and submitted that he was not properly identified by the prosecution witnesses. Further, that the Trial Court did not adhere to the directions enumerated therein bearing in mind that it wholly relied on his identification in arriving at a guilty verdict since there was no other evidence connecting him to the offence charged. He contended that no identification parade was conducted on him on 28th May, 2018 or at any other date.

66. The 2nd appellant asserted that the case against him is fabricated to cast suspicion on him because there is nothing that links him to the case of 2016 which was pending before Court against the 1st appellant, Felisters Njeri, and Lazarus Ombungu. In addition, he was never mentioned by the police, accused persons and/or witnesses who testified in the said case in the years 2016 & 2017 as being connected to

the said robbery where three accused persons were intercepted with the motor vehicle at Malili road block.

67. It was stated by the 2nd appellant that there was no description that was given to the police at Voi Police Station in the complainant's initial report or anywhere else on record that could have been used by the police to implicate him in the robbery herein, arrest him, and/or conduct an identification parade upon him. He further stated that there was no way he could have participated in an identification parade and failed to comment on how the parade was conducted, and give reasons why he refused to sign the parade form in the event he declined to sign the said form. The 2nd appellant contended that his signature and that of the complainant which would have been proof that they attended and/or participated in the identification parade that was done on 28th May, 2018 were missing from the parade form. He submitted that for the said reason, the identification parade form cannot be relied on, hence it should be disregarded by this Court.

68. He relied on the case of Karanja & others v R (supra) and submitted that since there was no other evidence linking him to the offence herein, the Trial Court ought to have warned itself of the danger of faulty identification and since the Trial Court did not follow the directions enumerated in the case of R v Turnbull (supra), it arrived at an erroneous conclusion of convicting him.

69. It was the 2nd appellant's contention that he was not arrested to face the charges in Criminal Case No. 978 of 2016, as he was arrested on suspicion that he was a dangerous criminal planning to commit robberies along the Nairobi-Mombasa highway on 19th May, 2018. He further stated that no evidence was adduced to the effect that he committed an offence on 19th May, 2018 along the Nairobi-Mombasa highway and/or any other robbery that he had planned to take place on the said date. He asserted that he was arrested and framed by the police at Voi Police Station for having snatched Doreen alias baby from their colleague Joel K. Chepkong'a as can be seen from the miscellaneous application filed on 21st May, 2018, where the police requested for fourteen days to complete their investigations.

70. The 2nd appellant submitted that the charge herein was defective for non-compliance with the provisions of Sections 214 and 134 of the Criminal Procedure Code since it indicated that the appellants were charged together on 30th May, 2018, whereas the true position is that he was charged alone on that date and the 1st appellant was charged in 2016, and thereafter, there was consolidation of the cases on 12th July, 2018.

71. He further submitted that his right to a fair hearing as enshrined under Article 50 (g) & (h) of the Constitution of Kenya, 2010 was violated by the Trial Court since he was not informed of his rights as contained therein.

72. It was stated by the 2nd appellant that the offence herein was not proved to the required standard of beyond reasonable doubt since he was neither mentioned by the police, accused persons, and/or prosecution witnesses as being involved in the said robbery and no evidence linking him to the said offence was tendered. To this end, he relied on several cases including the case of Kiarie v Republic [1984] 739 and Simiyu & another v Republic [2005] 1KLR 192.

73. The appellant further stated that the evidence by prosecution witnesses was marred by contradictions and discrepancies, thus not material enough to base a conviction. He asserted that the complainant's evidence of a third person having boarded the motor vehicle after driving a distance of about 1 kilometre is an afterthought since the said information is not in his initial report contained in OB 2/06/12/2016.

74. The 2nd appellant submitted that his alibi defence and that of his three witnesses was not considered by the Trial Court. He claimed that at the time the robbery herein took place, he was serving a

sentence in prison and there was no record that he had escaped from prison. Further, that in the Miscellaneous application filed by the prosecution seeking for 14 days to complete their investigations, the prosecution referred to Criminal Case No. 549 of 2018 and not 978 of 2016.

75. He submitted that the doctrine of recent possession does not apply to him as he was not found in possession of stolen property. He relied on the case of Andrea Obonyo & others v Republic [1962] EA 542.

76. He further submitted that the alleged informer who told the police that he was a dangerous criminal was not availed to testify so that his testimony could be tested through cross-examination.

77. The 2nd appellant claimed that when he was arrested, he was tortured by the police at Voi Police Station causing him to suffer severe injuries thus violating his rights protected under Articles 25(a), (b), & (d), 27(1), (2), (3), (4), (5), (6), (7) & (8) and 29 (c), (d), (e), & (f) of the Constitution of Kenya, 2010. He indicated that he has since been issued with a duly filled P3 form and lodged a complaint at Voi Police Station.

78. He submitted that the prosecution's case herein was riddled with contradictions and inconsistencies of such a magnitude that would make his conviction unsafe.

79. In written submissions filed by Mr. J.K Chirchir, learned Prosecution Counsel for the DPP, he conceded to the appeal and gave the explanation that the Trial Court erred on a point of law hence the entire trial was a nullity. He submitted that by the time Hon. Nderitu, SPM, was transferred, she had already heard the evidence of PW1 to PW9 and when Hon. Wangeci took over the matter from her on 3rd July, 2019, she failed to comply with the provisions of Section 200(3) of the Criminal Procedure Code.

80. The prosecution stated that nowhere in the proceedings and in the Trial Court's judgment is it shown that Hon. Wangeci, PM, complied with the mandatory provisions of Section 200(3) of the Criminal Procedure Code. It was stated by the prosecution that Section 200 of the Criminal Procedure Code entrenches the appellants' rights to a fair trial as provided for under Article 50(1) of the Constitution.

81. The Prosecution Counsel cited the case of the Office of the Director of Public Prosecutions v Peter Odongo & 2 others and contended that the Trial Court's failure to comply with Section 200(3) of the Criminal Procedure Code makes the conviction of the appellants invalid, and that all the subsequent proceedings are veiled with unconstitutionality hence they cannot stand. He submitted that the appellants' conviction is a nullity and prayed for the same to be quashed and for the sentences imposed on the appellants to be set aside. He relied on the case of Samwel Wahini Ngugi v Republic [2012] eKLR and submitted that in this case, a retrial should be ordered before any other Magistrate other than Hon. Wangeci P.M., pursuant to the provisions of Section 200(4) of the Criminal Procedure Code. The prosecution further submitted that the defect in this matter was vitiated by a mistake of the Trial Court for which the prosecution is not to blame. Further, that there is sufficient evidence to sustain a conviction hence a prayer for a retrial.

82. In a joint rejoinder, the appellants submitted that the Prosecution Counsel misled the Trial Court by informing it that Hon. Nderitu, SPM, who had been transferred to another station intended to come and proceed with the hearing by way of a special hearing. That by that time, Hon. Wangeci, PM, who had taken over from Hon. Nderitu, SPM, had already informed them that they could either proceed with the case or start afresh, and they agreed to proceed from where the case had reached. They further submitted that it would be a waste of time and judicial resources to start the case against them afresh since the case had been in Court for several years and they had suffered a lot in remand.

83. The appellants opposed the prosecution's prayer for this Court to order a new trial on account of non-compliance with Section 200(3) of the Criminal Procedure Code for it would be prejudicial to them, as they had proceeded to full trial and judgment was delivered by the Trial Court. They cited the case of Samwel Wahini Ngugi v Republic (supra) and stated that the instant case was not vitiated by a gap in the evidence to warrant this Court to make an order for retrial. They opined that non-compliance with Section 200(3) of the Criminal Procedure Code alone is not enough to warrant an order for retrial. The appellants asserted that non-compliance with Section 200(3) of the Criminal Procedure Code is not one of their grounds of appeal thus the same should be disregarded.

Analysis and determination.

84. This being the first appeal, it is imperative for me to re-examine and analyze all the evidence adduced in the Trial Court and arrive at my own independent finding and conclusion on both issues of facts and the law. That was the holding of the Court of Appeal in regard to the duty of the 1st appellant Court in the case of Kiilu & another v Republic [2005] 1 KLR 174, where the Court stated as hereunder-

> " An Appellant in a first Appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate Court's own decision in the evidence. The 1st Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 1st Appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions, only then can it decide whether the Magistrate's finding 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. …."

85. I have considered the Record of Appeal, the grounds of appeal and the submissions made by the prosecution and the appellants herein. The issues that arise for determination are –

i. Whether non-compliance with Section 200(3) of the Criminal Procedure Code rendered the proceedings before the Trial Court a nullity;

ii. Whether the charge was defective;

iii. Whether the appellant's rights protected under Article 50 (g) & (h) of the Constitution of Kenya, 2010 were violated;

iv. Whether the prosecution's case was marred with massive contradictions and/or inconsistencies; and

v. If the prosecution proved its case beyond reasonable doubt.

Whether non-compliance with Section 200(3) of the Criminal Procedure Code rendered the proceedings before the Trial Court a nullity.

86. Section 200(3) of the Criminal Procedure Code provides that –

> " 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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right." (emphasis added).

87. The prosecution submitted that Hon. Wangeci, PM, did not comply with the provisions of Section 200(3) of the Criminal Procedure Code when she took over hearing of the case in the lower Court from Hon. Nderitu, SPM, thus the appellants' conviction is a nullity and the same should be quashed and the sentences imposed on them be set aside and a retrial be ordered. The prosecution further stated that since the defect in this matter was by a mistake made by the Trial Court for which the prosecution is not to blame, and there is sufficient evidence to sustain a conviction, the matter should be referred back to the Trial Court for a retrial.

88. The appellants on the other hand submitted that when Hon. Wangeci, PM, took over the hearing of the case, she inquired from them whether they wished to proceed with the case from where it had reached or start afresh and they opted to proceed from where the case had reached.

89. I have gone through the Record of Appeal and it is evident that Hon. Wangeci, PM, did not comply with the provisions of Section 200(3) of the Criminal Procedure Code (CPC) when she took over the matter from Hon. Nderitu, SPM. At page 2 paragraph 5 of the judgment by Hon. Wangeci, PM, she indicated that directions were taken under the provisions of Section 200 of the CPC and the matter proceeded from where it had reached. That is however not correct, as the proceedings of the lower Court do not reflect that position. In the case of Bob Ayub alias Edward Gabriel Mbwana alias Robert Mandiga v Republic [2010] eKLR, cited with authority by the Court of Appeal in the case of John Bell Kinengeni v Republic [2015] eKLR, it was held that -

> "....the mere mention in the judgment that section 200 (3) was complied with is hollow without any evidence from the record that it was actually complied with in accordance with the law." (emphasis added)

90. This Court finds that the mere mention by the Hon. Wangeci, P.M., in her judgment that directions were taken under Section 200 of the CPC, yet the same is not reflected in the proceedings, does not amount to compliance. I therefore find that said Hon. Magistrate did not comply with the provisions of Section 200(3) of the Criminal Procedure Code when she took over the hearing of the case from Hon. Nderitu, SPM.

91. In light of the above finding, this Court now has to determine whether the said non-compliance rendered the proceedings before the Trial Court a nullity. The Court of Appeal in John Bell Kinengeni v Republic (supra) also cited the case of Richard Charo Mole NRB Criminal Appeal No. 135 of 2004 and stated the following –

> " ...this Court approved the principles set in Ndegwa versus Republic [1985] KLR 534 and stressed that the duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and that failure to comply with that requirement would in an appropriate case render the trial a nullity as section 200(3) requires in a mandatory tone that the succeeding magistrate (read judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate..."

92. Section 200(4) of the CPC empowers an appellate Court to order a retrial where it is of the view that an accused person has been materially prejudiced in a trial by non-compliance with Section 200(3) of the CPC. Each case must howeverbe decided in its own circumstances, and in this case I am of the considered view and I so hold, that non-compliance with Section 200(3) of the Criminal Procedure Code did not render the trial a nullity. The appellants herein are vehemently opposed to a retrial and

stated that it would be a waste of time and judicial resources to start the case against them afresh since the case was in the Trial Court for several years and they had suffered a lot in remand.

93. It is worth of note that the trial before the lower Court commenced in the year 2018 as against both appellants, after consolidation of their cases, with a total of sixteen witnesses testifying for the prosecution before two Magistrates, and thereafter judgment was delivered on 22nd June, 2021. In Joseph Kamau Gichuki v. R CR. Appeal No. 523 of 2010, cited in Nyabutu & Another v. R [2009] KLR 409, the Court decided not to hold a retrial and stated thus-

> " In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time militated against the trial being started de novo. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded."

94. I am guided by the above decision, and having considered the age of this case where the offence was committed in December 2016, the length of the trial before the lower Court, and the number of witnesses that testified before the said Court, being 16 in total for the prosecution, and 3 witnesses for the 2nd appellant, it is my finding that it will not be in the interest of justice to refer the matter to the Trial Court for a retrial. From the appellant's submissions, it is clear that the appellants are content with how the trial was conducted by Hon. Wangeci, PM.

95. In regard to non-compliance with Section 200(3) of the CPC, they do not feel that they were prejudiced in any way by the fact that the said Hon. Magistrate did not inform them of their rights as provided for therein. This Court notes that PW5 who was the complainant and a material witness for the prosecution had on 10th April, 2019 been recalled for further cross-examination at the instance of the appellants. Although the said further cross-examination happened before Hon. Nderitu, SPM, it is my finding that the appellants were given an opportunity to clarify any outstanding questions they had with the complainant, when he was recalled. I therefore find that non-compliance with Section 200(3) of the CPC in this case did not render their trial a nullity.

96. It must also be noted that the appellants actively participated in the hearing of the case by extensively cross-examining prosecution witnesses and requesting for numerous documents from the prosecution during the entire course of the proceedings. In essence, they left no stone unturned and they are justified in opposing a retrial.

Whether the charge was defective.

97. The appellants submitted that the charge was defective. They cited the provisions of Sections 134 & 214 of the CPC and argued that the charge did not accord with the evidence. They submitted that the charge indicates that they were charged together on 30th May, 2018, whereas the true position is that the 2nd appellant was charged alone on 30th May, 2018, whereas the 1st appellant was charged alone in 2016 and thereafter, there was consolidation of their cases on 12th July, 2018.

98. On sufficiency of a charge, Section 134 of the Criminal Procedure Code provides the following-

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

99. In addition, Section 137 of the Criminal Procedure Code provides for the manner in which a charge should be drafted. It states as follows–

> " The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code-
>
> SUBPARA a.
>
> (i) Mode in which offences are to be charged. – a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;
>
> (ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;
>
> (iii) After the statement of the offence, particulars of the charge shall be set out in ordinary language, in which the use of technical terms shall not be necessary:
>
> Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in hit paragraph shall require more particulars to be given than those so required;
>
> (iv) The forms set out in the Second Schedule or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable, and in other cases forms to the same effect or conforming of offence being varied according to the circumstances of each case;
>
> (v) Where a charge or information contains more than one count, the counts shall be numbered consecutively."

100. In the case of Isaac Omambia v Republic [1995] eKLR, the Court considered the ingredients which need to be captured on a charge sheet and stated thus-

> " In this regard, it is pertinent to draw attention to the following provisions of Section 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge. Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

101. In this case, it is not disputed that the charge sheet contained a statement of the specific offence(s) with which the appellants were charged, together with particulars of the said offence(s). The appellants'

contention is that they were not charged together on 30th May, 2018 as indicated in the charge sheet, as the 1st appellant was charged alone in 2016 and thereafter the second appellant was charged alone in 2018, and then the cases were consolidated. In the case of BND v Republic [2017] eKLR, the Court outlined the test to be followed in determining if a charge is defective as hereunder -

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear an unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence."

102. The fact that the charge sheet in this case indicates that the appellants were charged together on 30th May, 2018, whereas they were initially charged separately and on different dates, on its own is not enough to render a charge defective. I agree with the Trial Magistrate at page 26 paragraph 82 of her judgment, where after citing the provisions of Section 136 of the Criminal Procedure Code she held that consolidation of the cases was done on 12th July, 2018. She indicated that she looked at the charge sheets before consolidation, and established that the particulars of the offences relate to the same date and time, the same place and the same complainant. She stated that the purpose of the consolidation was to bring the accused persons together so that the trial would proceed simultaneously.

103. This Court has not seen any prejudice that was occasioned on the appellants as a result of the consolidation of the changes, or by the mere fact that the consolidated charge sheet shows that the 2nd appellant was charged in the year 2016 and not in the year 2018. That on its own is not a factor that would lead this Court to quash the conviction of the 2nd appellant without considering the merits of the evidence adduced against him. This Court finds that the charge before the Trial Court was not fatally defective.

Whether the appellants' rights protected under Article 50 (2) (g) & (h) of the Constitution of Kenya, 2010 were violated.

104. It was submitted by the appellants that their rights under Article 50 (2) (g) & (h) of the Constitution of Kenya, 2010 were violated since they were not informed of their rights as contained therein, hence they were denied their right of representation by an Advocate. Article 50 (2) (g) & (h) of the Constitution of Kenya, 2010 provides as hereunder –

> " Every accused person has the right to fair trial, which includes the right to-
>
> (g) to choose, and be represented by, an advocate, and to be
>
> informed of this right promptly;
>
> (h) to have an advocate assigned to the accused person by the State
>
> and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

105. On perusal of the proceedings before the Trial Court, it is evident that the appellants were not informed of their rights to legal representation as provided for under Article 50 (2) (g) & (h) of the Constitution of Kenya, 2010. Legal representation is important in criminal matters, especially in a case of this nature due to the severity of the sentence. It is however worth noting that there is a distinction between the right to representation by an Advocate of one's choice and the right to representation at the expense of the State. The right to legal representation at the expense of the State is not an absolute right, as it

is only necessary where substantial injustice would otherwise result as provided for under Article 50 (2) (h) of the Constitution of Kenya, 2010.

106. The Supreme Court in the case of Republic v Karisa Chengo & 2 others [2017] eKLR, in considering the implementation of the provisions of Article 50 (2) (g) & (h) of the Constitution of Kenya, 2010 held as follows-

> " Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:
>
> i. the seriousness of the offence;
>
> ii. the severity of the sentence;
>
> iii. the ability of the accused person to pay for his own legal representation;
>
> iv. whether the accused is a minor;
>
> v. the literacy of the accused;
>
> vi. the complexity of the charge against the accused."

107. In this case, the appellants were charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code which is a capital offence thus a serious offence, which attracts a severe sentence. At this juncture, it is impossible for this Court to determine the ability of the appellants to cater for their own legal representation as they should have raised the issue of being provided with legal representation at the cost of the State before the Trial Court. The appellants are adults as can be seen from the charge sheet and from the manner in which they cross-examined the witnesses before the Trial Court and from the quality of submissions they prepared and filed before this Court, I am of the considered view that they are not illiterate or ignorant that they could have looked for an Advocate to represent them, if they so wanted.

108. If anything, the appellants had and still have a good grasp of the charges that they were facing and the elements the prosecution ought to have proved beyond reasonable doubt in order to sustain a conviction. They actively participated in the hearing of the case in the lower Court and time and again, they applied to be supplied with witness statements, OB extracts and other documents. They were very much aware of their rights as accused persons and what they were entitled to. As earlier stated, they extensively cross-examined witnesses. Consequently, this Court finds that in as much as the Trial Court did not inform the appellants of their rights to legal representation as provided under Article 50 (2) (g) & (h) of the Constitution of Kenya, 2010, no injustice and prejudice was occasioned to them.

Whether the prosecution's case was marred with massive contradictions and/or inconsistencies.

109. The appellants argued that there were contradictions and inconsistencies with respect to the time the complainant reported the robbery to the police as PW4 stated that he was notified by police from Voi Police Station at around 2.00 a.m., that his driver had been car jacked and robbed of the motor vehicle. PW12 testified that the report was made at 0315hrs at Voi Police Station by PW5. It must be recalled that after PW5 was robbed of the vehicle he was driving, the cargo on board and some personal effects, he was tied up in a bush but he managed to escape and went to an SGR camp from where he assisted and he managed to call PW4 whom he informed about the robbery. PW4 then contacted the motor vehicle tracking company and that had installed a tracking device in the said vehicle and requested it to help in tracing the vehicle. Back at the SGR camp, police officers who were there assisted to take PW5

to Voi Police Station where he made a formal report of the robbery. From the said chronology of events, it is clear that the contention that there was inconsistency as to the time the offence was reported to the police is not correct.

110. The 1st appellant submitted that PW5 did not describe his attackers to the police when he made his first report therefore his evidence in Court contradicted what he reported at the Police Station. In my view, this does not amount to contradictory evidence on the part of the prosecution. It only casts doubt on the veracity of the testimony of PW5 which was tested during cross-examination by the appellants herein. It is also evident that upon being interrogated by the police, PW5 said that he would be able to identify his attackers. He also gave a description of the persons who attacked him in his statement to the police. PW15 and PW12 testified to the said fact. PW15 recorded PW5's witness statement.

111. On perusal of the proceedings before the Trial Court, PW4 Edward Cheruiyot Maritim the owner of the motor vehicle testified that on 6th December, 2016 at about 2.00 a.m., he was notified by the police from Voi Police Station that his driver (PW5) had been carjacked and robbed of the motor vehicle. Once the motor vehicle was tracked and its location identified, the DCIO Emali radioed all the road blocks along the road from Mtito Andei to wait for the lorry. Consequently, at about 4.00 a.m., the lorry was intercepted past Emali.

112. PW10 IP George Sande Anthony who was the arresting officer on the other hand testified that after they were informed that the vehicle was heading to Malili past Sultan Hamud, and he took officers under his command and followed the motor vehicle, and1 KM from Malili, they traced the motor vehicle and forcefully stopped it.

113. From the above it is evident that there are some inconsistencies in the prosecution witnesses' testimonies, on how the vehicle was intercepted. It is not clear whether it was intercepted in a road block or if it was forcefully stopped by PW10 after following it and finally tracing it 1 KM from Malili.

114. This Court also agrees with the appellants that there was an inconsistency as to the positioning of the tyre that had a puncture. PW4 testified that when he arrived at Emali, he realized that the puncture was on the left inner rear tyre, and that the left outer rear tyre was okay, whereas PW5 testified that when he alighted to check the vehicle, he found that the outer tyre on the co-driver's side had no air.

115. In Erick Onyango Ondeng' v Republic [2014] eKLR, the Court stated as follows in regard to contradictions-

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

116. Although there some inconsistencies and contradictions in the evidence adduced by prosecution witnesses in the case against the appellants, this Court is of the view that they are not so massive as to vitiate the fact that on 5th December, 2016 at around 11.00 p.m., PW5 was robbed of the motor vehicle and the cargo that he was transporting to KEMSA Nairobi, and that he was also robbed of some of his personal items. The said contradictions/inconsistencies on their own cannot set aside the conviction of the appellants. The only question now left is to determine whether PW5 was attacked and robbed by the appellants herein. Further, in a case that involves so many witnesses as in this one, it is difficult for the evidence adduced to run like a script that has been memorized to perfection.

If the prosecution proved its case beyond reasonable doubt.

117. The elements of the offence of robbery with violence were laid down by the Court of Appeal in the case of Oluoch v Republic [1985] KLR as hereunder -

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

118. Further, in the case of Dima Denge Dima & others v Republic [2013] eKLR the Court of Appeal held 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..."

119. In his defence, the 1st appellant stated that PW5 agreed to carry him to Nairobi in motor vehicle registration No. KCA 257 J at a cost of Kshs. 1000/=. That when they arrived at Manyatta, PW5 stopped the vehicle and called two people, and that he could hear him asking for one James Kamuti. The 1st appellants stated that shortly thereafter, a Probox arrived with three passengers and the driver of motor vehicle registration No. KCA 257 J alighted and moved to the Probox. That afterwards, the complainant went back with two people who were not known to him and told him that he should proceed with the journey and they would link up later. He claimed the two people unknown to him took control of the motor vehicle with him sitting in the middle. That they proceeded to Kibarani and on arrival, Kamuti and PW5 alighted from the Probox. That Kamuti then called six men who offloaded the consignment that was in the motor vehicle after it had been reversed into a building.

120. He stated that PW5 was left behind with Kamuti, while he and the two unknown persons continued with the journey to Nairobi, but at 0330hrs they were stopped by the police past Malili town and ordered to alight from the motor vehicle and identify themselves and at that point, he realized that the people who were with him in the motor vehicle were called Joseph Kitonyi and Daniel Munyoki. The 1st appellant alleged that on being searched by the police, PW5's ID was found with John Kitonyi, whereas the delivery note was found with Daniel Charo Munyoki who was the person driving the motor vehicle from Manyatta up to the roadblock. The 1st appellant stated that when he was searched, nothing was recovered from him.

121. To this Court, it is clear that the defence raised by the 1st appellant was farfetched and untruthful. He claimed to have been given a ride in the vehicle PW5 was driving as a fare paying passenger as he paid Kshs. 1,000/- to PW5. He also claimed to have been sandwiched between two strangers who boarded the motor vehicle after PW5 alighted from it and boarded a Probox. If that was the case, then the 1st appellant could not have been found driving the motor vehicle that PW5's had been robbed of. The 1st appellant also claimed that the John Kitonyi was found with PW5's identity card and Daniel Munyoki was found with a delivery note for the consignment. PW10 who arrested the 1st appellant stated that they searched the motor vehicle and found a delivery note in the cabin. The said police did not state

that it was found on the person of Daniel Munyoki or that the identity card of PW5 was found with Joseph Kitonyi.

122. Since the 1st appellant was found driving motor vehicle Reg. No. KCA 257J Isuzu FRR, 4 to 5 hours after the robbery, the doctrine of recent possession applies and the conclusion to be drawn is that the 1st appellant was one of the men who robbed PW5 of the said motor vehicle and gives credence to the evidence of PW5 that he was robbed of the motor vehicle, the consignment that was on board the said vehicle and his personal effects, and that it was the 1st appellant who took control of driving the motor vehicle after the robbery.

123. In addition to the 1st appellant being found driving the motor vehicle that PW5 was robbed of, on 8th December, 2016 he attended an identification parade at Wundanyi Police Station and PW5 was able to identify the 1st appellant as one of the robbers and the person who drove off with the motor vehicle after the robbery. Although the appellant has challenged the production of the identification parade form by PW16 the proceedings of the lower court show that he had no objection to PW16 producing the said identification parade form. He cannot now and appeal beat a hasty retreat to his non-objection in the lower Court.

124. The evidence of PW5 was that he managed to identify his attackers from light emanating from motor vehicles that were passing by, and he was able to see all the three attackers, when they took him down from the motor vehicle. Although the 1st appellant alleged to have shared a cell with PW5 at Wundanyi Police Station, and alleged that PW5 had seen him at Voi Police Station before the identification parade was done, he did not cross-examine PW5 on that issue.

125. The 2nd appellant was arrested on 19th May, 2018 on suspicion that he was part of a group that was planning to commit robberies along the Nairobi-Mombasa highway. The evidence of PW5 was that the 2nd appellant boarded the motor vehicle he had been robbed of about 1KM from the scene of the robbery. Failure by the 2nd appellant to sign the identification parade forms does not vitiate the fact that he was positively identified in a properly conducted identification parade.

126. The 1st appellant and another robber bundled PW5 on the bed behind the cabin in the lorry and drove along with him. The said appellant after driving for 1KM stopped the vehicle and the 2nd appellant boarded the vehicle and PW5's was able to see him from the space between the body of the vehicle and the cabin as he boarded the vehicle that he was a heavy set man. It was PW5's evidence that although he had been tied up and put on the bed facing downwards, he was able to turn his head and managed to see the 2nd appellant. When the vehicle stopped later on, the 3 robbers alighted from the vehicle with PW5, and he was able to see them from light from cars that were passing by. From the said circumstances, this Court holds that the circumstances were ideal for positive identification, as there was sufficient light from motor vehicles that were passing by. He stated that he was with the robbers for 30-45 minutes. In this Court's considered view that was sufficient time for positive identification. Both PW12 and PW15 testified that PW5 gave a description of the robbers in his statement.

127. In his defence, the 2nd appellant claimed to have been arrested because of being a boyfriend to a woman by the name Doreen who was a girlfriend to a Police Officer by the name Chepkong'a. This Court notes that it would be so farfetched for PW5 to agree to implicate the 2nd appellant in a robbery with violence case just because he had a love affair with Chepkonga's girlfriend. The 2nd appellant did not demonstrate the nexus between the alleged police officer and PW5, or if they even know each other. In his defence, the 2nd appellant stated that he was in Malindi on the date when the offence was committed. He called 3 witnesses and produced a bus ticket to show that he travelled out of Malindi on 18th

December, 2016, 13 days after the offence herein occurred. In so saying, the 2nd appellant raised an alibi defence

128. In the case of Erick Otieno Meda v Republic [2019] eKLR, the Court of Appeal set down the following parameters to be considered when an alibi defence is raised-

> "(a) An alibi needs to be corroborated by the other witnesses, not just a mere regurgitation of the events from the accused's point of view.
>
> b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
>
> c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
>
> d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail" (emphasis added).

129. Although the 2nd appellant raised an alibi defence, the same cannot hold in light of the fact that he did not inform the prosecution beforehand, enough at the preliminary stage of the hearing, that he would be raising the said defence in order to give the prosecution time to countercheck the said alibi. As the Trial Magistrate noted, the bus ticket relied on by the 2nd appellant only bears one name "Sammy". It is my finding that nothing turns on the said bus ticket and I find that the 2nd appellant's defence despite calling 3 witnesses was dislodged by prosecution evidence.

130. As per PW5, the offence took place at around 2300hrs on 5th December, 2016. In view of the fact that the alleged offence took place in the night, it is trite that the evidence of identification should be watertight in order to justify a conviction. The case of Republic v Turnball & others (supra) applies.

131. PW5 did not describe his attackers in his first report. He however stated that during his interrogation, he gave the description of those who attacked him and in his witness statement. The said fact was confirmed by PW12 and PW15. To this end, I am bound by the Court of Appeal holding in the case of Kamau Mugwe v Republic [2009] eKLR, where it was held that, a parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect.

132. In Wamunga v Republic [1989] KLR 424 the Court of Appeal held that -

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

133. In this case, Hon. Wangeci, PM, undertook a detailed examination of the evidence adduced by the prosecution and the appellants and the witnesses called by the 2nd appellant and found that the evidence against the appellants was overwhelming.

134. This Court has done a detailed analysis and re-examination of the evidence adduced before the Trial Court. To conclude, the 1st appellant Mutuku Mwania, was found in possession of the motor vehicle that PW5 was robbed of on the night of 5th December, 2016. The 1st appellant was stopped by the police when he was driving the said vehicle. It is my finding that there was no break in the possession of the motor vehicle Reg. No. KCA 257T Isuzu FRR, from the time PW5 was robbed of it, up to

the time that the 1st appellant was arrested. The doctrine of recent possession applies in so far as the 1st appellant is concerned and this Court arrives at the conclusion that he was one of the robbers who accosted PW5 and robbed him of the lorry he was driving and the consignment of cargo that was in the said lorry. PW5 was also robbed of his personal effects. Even if this Court was to disregard the identification parade form for the 1st appellant, the inevitable conclusion is that he participated in the robbery and he was arrested whilst driving the motor vehicle PW5 was robbed. He cannot extricate himself from the said fact. It is my finding that he was properly convicted on sound evidence. I hereby uphold his conviction.

135. I note that the 1st appellant absconded from Court in the course of the proceedings in the lower Court. He was rearrested and presented in Court on 12th July, 2018. Since the motor vehicle and cargo of goods that PW5 was robbed of was recovered, I hereby reduce the sentence of 20 years to 15 years imprisonment. His sentence will be computed from 12th July, 2018.

136. The 2nd appellant was positively identified in an identification parade that was conducted by PW14. Although he alleged that PW14 did not sign the ID parade form, this Court has perused the said forms and confirmed that PW14 signed the same. The 2nd appellant's failure to sign the identification parade form does not render his identification a nullity. As earlier stated in this judgment, the circumstances under which PW5 was able to see him on the night of the robbery were ideal for positive identification. PW5 gave a description of the 2nd appellant as a heavily built man. In the judgement by Hon. Wangeci, P.M., she noted that the description given of the said appellant matched his stature. This Court has made a finding that the 2nd appellant's alibi defence was untruthful.

137. The falsity of the 2nd appellant's defence is reinforced by his written submissions where he stated that he was in prison serving sentence when the offence was committed as he had been charged with another offence. If that was the case, the 2nd appellant could not have been in Malindi on 5th December, 2016 as he claimed to be, when the offence was committed.

138. The 2nd appellant was not a first offender as he had been convicted previously for an offence similar to the present one. In this case, he was sentenced to serve 30 years imprisonment. By parity of reasoning, as the stolen goods were recovered save for PW5's personal effects, I hereby reduce the sentence for the 2nd appellant from 30 years to 25 years imprisonment from 19th May, 2018. His appeal on conviction is dismissed. His appeal on sentence is partly successful.

It is so ordered.

DELIVERED, **DATED** and **SIGNED** at **NAIROBI** on this **15th** day of **March, 2024. Judgment delivered through Microsoft Teams Online platform.**

NJOKI MWANGI

JUDGE

In the presence of:

1st appellant

2nd appellant

Mr. Sirima, Prosecuting Counsel for the DPP

Ms B. Wokabi – Court Assistant.

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