Case Number:	Criminal Appeal 30 & 31 of 2019 (Consolidated)
Date Delivered:	16 Oct 2020
Case Class:	Criminal
Court:	High Court at Kajiado
Case Action:	Judgment
Judge:	Enock Chacha Mwita
Citation:	Dennis Mutinda Matheka & another v Republic [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon. S. M. Shitubi - CM
County:	Kajiado
Docket Number:	-
History Docket Number:	Criminal Case No. 339 of 2017
Case Outcome:	-
History County:	Kajiado
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 30 OF 2019

DENNIS MUTINDA MATHEKA ALIAS STUPID.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Consolidated with Criminal Appeal NO. 31 OF 2019)

ALEXANDER MUTISO PETER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeals from original convictions and sentences by the Chief Magistrate's Court at Kajiado (Hon. S. M. Shitubi, CM) delivered on 14th September, 2018 in Criminal Case No. 339 of 2017)

JUDGMENT

1. These are consolidated appeals. The two appellants were jointly charged with two counts of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. Particulars of the offence in count 1 were that on the 7th day of February 2017 in Kitengela Township within Isinya Sub County of Kajiado County, jointly with others not before court while armed with offensive weapons namely, Pistols, robbed CA a motor vehicle registration No. KBQ xxxx Toyota Premio Silver in Colour valued at Kshs. 800,000 and a mobile phone make Techno Canon C9s valued at Kshs 18,000 all valued at Kshs. 818,000 and at the time of such robbery used actual violence against the said Celine Awuor.

2. Particulars of the offence in count 2 stated that on the same day, 7th February, 2017 at 2100hrs in Kitengela Township, within Isinya Sub County of Kajiado County with others not before court, being armed with offensive weapons, namely; Pistol, robbed Timothy Abong'o a mobile phone make Tecno 3ys valued at Kshs. 6,500 and cash Kshs. 500, all valued at Kshs. 7,000, and at the time of such robbery used actual violence against the said Timothy Abong'o.

3. The appellants pleaded not guilty to the two counts and after a trial in which the prosecution called 12 witnesses and the appellants' defence, they were convicted in both counts and sentenced to death in count 1. Count 2 was held in abeyance.

4. They were aggrieved with both conviction and sentence and lodged separate appeals which were consolidated. **Dennis Mutinda Matheka alias stupid,** herein referred to as the 1st appellant, filed a petition of appeal on 16th July, 2019 in criminal appeal No. 30 of 2019 and raised the following grounds, namely;

1. That the trial magistrate erred in law and fact by convicting him despite the fact that the prosecution did not discharge its burden

2. That the trial magistrate erred in law and fact by convicting him yet the evidence did not support the charge

3. That the learned magistrate erred in law and fact when she imposed a death penalty which was unfounded as section 297(2)

Contradicts section 389 penal code

4. That the trial court erred in law and fact in convicting the appellant when crucial witnesses were not called

5. That the trial court erred in law and fact by dismissing his defence

6. That the trial court erred in law and fact by failing to discharge its mandate of evaluating the evidence before drawing adverse inferences against him

5. **Alexander Mutiso Peter,** herein the 2nd appellant, also filed his memorandum of appeal on the same day in criminal appeal No. 31 of 2019 and raised similar grounds of appeal as those of the 1st appellant. I see no reason to repeat them here. **Dennis Mutinda Matheka** and **Alexander Mutiso Peter** shall henceforth be referred to as the 1st and 2nd appellants respectively.

6. The 1st appellant filed together with his submissions further grounds of appeal that:

1. That trial magistrate erred in law and fact by failing to find that the prosecution did not prove to the required standard that the prevailing conditions were conducive for positive identification

2. That the trial court overlooked the first report made by the complainant at the police station which did not identify him or give descriptions of the attackers

3. That the testimonies tendered on the 1st appellant's mode of arrest were riddled with doubts and was not enough to sustain a conviction

4. That the trial court erred in accepting the parade conducted against the said appellant yet the witness had been shown the 2nd appellant's photo

5. That the trial court erred in law and fact in failing to find that the prosecution's witnesses evidence was unbelievable and illogical.

6. That the trial court erred in law and fact in failing to appreciate that the prosecution's evidence was not only insufficient but also fabricated, speculative, conjecture, discredited, inconsistent in material particular and lacked probative value.

7. That the trial court erred in law by failing to rule that the burden and standard of proof by the prosecution was not discharged and thus the guilty verdict was unsafe and could not be supported having regard the evidence thus led to miscarriage of justice.

7. During the hearing of the appeal, the appellants relied on their written submissions and urged the court to allow the appeal, quash convictions and set aside the sentences.

1st Appellant's submissions

8. In his writes submissions filed on 18th March 2020, the 1st appellant submitted that the prosecution did not follow the approach given in decided cases on identification. He relied on ***Bogere Moses & Another V Uganda*** Criminal Appeal No. 1 of 1997, for the argument that the court ought to satisfy itself that the conditions under which identification took place were conducive.

9. He also argued that the mandatory provisions of section 208 (3) of the Criminal Procedure Code were not complied with in that the trial court never informed him of his right to cross-examine his co-accused. The 1st appellant contended that the trial court did not inform him of his right to cross-examine the witnesses and since he was not informed that he had the right to cross-examine his co-accused, this failure vitiated the trial given that cross-examination is one of the key ingredients of a fair trial.

10. The 1st appellant relied on ***Ezekiel Nyaga & 3 Others v Republic*** CRA No. 9 of 1985, for the submission that the provision is an acknowledgement of the disadvantage at which an unrepresented accused stands and is intended to level the playing field and its efficacy must lie in the court's ability to appreciate its fair trial implications and its concomitant duty to play more active and **didactic** role.

11. He again relied on ***Godhana v Republic*** [1991] KLR 471 where the Court of Appeal stated that since the appellant had not been given an opportunity to cross-examine his co-accused and the prosecution witnesses; this vitiated the trial and was a fatal misconduct.

12. The 1st appellant further relied on ***Edward s/o Msenga v Republic*** CRA No. 123 of 1956 for the submission that failure to give an accused an opportunity to cross-examine a co-accused was no less prejudicial and was indeed a denial of fundamental rights.

13. The 1st appellant submitted that the prevailing conditions were not conducive for a positive identification. He argued that whenever an accused pleads not guilty, everything is in issue and the prosecution has to prove the whole of their case, including the identity of the accused, nature of the act and the extent of any necessary knowledge or intent. He relied on ***R v Sims*** [1946] KB 531 (**per Lord Goddard CJ,** P 539**).**

14. According to the 1st appellant, the crime having been committed at 7.30pm, conditions for a proper and positive identification did not exist. He relied on ***Waithaka Chege v Republic*** [1979] KLR 271 for the submission that evidence of visual identification should always be approached with great care and caution where conditions were poor. (See also ***Gikonyo Karume & Another v Republic*** [1900] KLR 23 and ***Wamunga v Republic*** [1989 KLR 424.)

15. He also argued that the complainants must have been in a state of panic to positively identify him since the mere presence of a weapon attracts more attention from the attacker. On this argument, the 1st appellant relied on ***Augustine Ritho v Republic*** CRA No. 99 of 1986, contending that the complainants must have been more worried about their security and self-preservation as opposed to observing him with a view to identifying him.

16. The 1st appellant again submitted that the complainants did not give descriptions of their attackers at the first opportunity. He relied on ***Akumu v Republic*** [1954] EACA 21 for the proposition that evidence of first report after attack proves a good test of which truth and accuracy of subsequent statements may be guide and provides a safeguard against later establishment or a deliberately made up case.

17. He further relied on ***John Njagi Kadogo & 2 Others v Republic*** [2006] eKLR for the submission that in the absence of a first report to the police by the complainants giving a description of the appellant, the subsequent identification in an identification parade could not be said to be fool proof.

18. The 1st appellant relied on many other decisions and urged the court to find that the prosecution did not prove its case beyond reasonable doubt, allow his appeal, quash the conviction and set aside the sentence.

2nd Appellant's submissions

19. In his written submissions, the 2nd appellant also argued that he was not properly identified; that the conditions did not favour a proper identification and that the person who purported to have identified him could not have done so in the circumstances. He relied on ***Waithaka Chege v Republic*** [1997] KLR 217 for the submission that evidence of visual identification should always be approached with great care and caution, and ***Gikonyo Karume & Another v Republic*** [1990] KLR 22 for the submission that care should be exercised where the conditions for a favourable identification are poor.

20. He also relied on ***Abdalla Bin Wendo & Another v Republic*** [1955] 20 EACA166 and ***Mailanyi v Republic*** [1986] KLR 198 for the submission that before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the location of the source of light in relation to the accused so as to be able to identify him subsequently. (See also **Paul Etole & Another v Republic** [2001] eKLR)**.**

21. According to the 2nd appellant, the evidence of PW1 and PW2 did not show how he was identified and the source of light; that PW12 stated that PW1and PW2 did not give disruptions of the assailants when they recorded their statements and therefore the conclusion to be drawn from such evidence is that PW1 and PW2 could not identify their attackers.

22. The 2nd appellant relied on ***John Njagi Kadogo & 2 Others v Republic*** [2006] eKLR for the submission that in the absence of a first report to the police by witnesses giving a description of the attackers, the subsequent identification in an identification parade cannot be said to be full proof.

23. The 2nd appellant further relied on ***Kamau Njoroge v Republic*** (1982- 88) KLR 1134, for the submission that dock identification is worthless unless this had been preceded by a properly conducted identification parade. A witness should be asked to give a description of the accused and thereafter the prosecution should arrange a fair identification parade.

24. According to the 2nd appellant, when PW1 was cross examined she stated that it took 1 minute to identify someone which he argued was not possible. He relied on the Canadian case of ***Republic v Hane Maayeu*** **2008 ONCA 580,** for the submission that observation by a witness that she honestly believed that she had identified the right person was rebuked by the court when it observed that what happened in that case was consistent with what is known about mistaken identification evidence in particular that honest but mistaken witnesses make convicting witnesses.

25. It is the 2nd appellant's case that the prosecution did not prove that he was one of the attackers; that no description of attackers was given and that he was not properly identified. He argued that presence of a weapon would ordinarily attract the attention of the victim to the weapon and not to the attacker.

26. This appellant argued that his mode of arrest was unclear and that the trial court had stated in its judgment that events leading to his arrest were unclear. He contended that PW1 and PW2 did not lead to his arrest and even claimed that they did not know how he was arrested. He also argued that no witness claimed to know him except PW3. He therefore contended that the evidence was insufficient to connect him with the offences.

Respondent's submissions

27. Mr. Meroka, counsel for the prosecution filed written submissions on 22nd July 2020 on behalf of the respondent in opposition to this appeal. On identification, he submitted that conditions were favourable to enable the complainants positively identify the appellants; that the appellants shone a touch light when forcing the complainants into the vehicle and that the appellants and complainants interacted for some time. It was also argued that there was bright moonlight illuminating the place where the complainants were finally dumped.

28. The prosecution counsel further argued that the appellants were at close range and proximity and engaged the complainants in conversations; stripped PW1 naked as they teased her with rape; that the complainants were able to identify the appellants through special features and body size as short guys and finally, PW3 was able to identify 1st appellant as the person who sold to him the phone that was later recovered. These, he argued, culminated in the appellants being positively identified at the identification parades.

29. It was argued that there were security lights from a nearby gate with sufficient light to enable a positive identification; that the appellants walked in front of the vehicle with its headlights on thus enabling identification.

30. Next, the prosecution counsel submitted that the appellants used force to take control of motor vehicle and robbed the occupants. It was further submitted that the complainants were clear that one of the attackers was armed with a pistol and, therefore, the prosecution proved the ingredients of the offence thus proved the case beyond reasonable doubt. He urged the court to dismiss the appeal.

Determination

31. I have considered this appeal submission by both sides and the authorities relied on. I have also perused the trial court's record

and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind, that it did not see witnesses testify and give due allowance to that. (See ***Okeno v Republic*** [1972] EA 32).

32. In ***Kiilu& Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. 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; 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."

33. In ***Kamau Njoroge v Republic*** [1987] eKLR, the Court of Appeal also stated:

"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."

34. The Supreme Court of India underscored this duty in ***Garpat v State of Haryana*** (2010) 12 SCC 59 stating that:

"***The first appellate court and the High court while dealing with an appeal is entitled and obliged as well to scan through and if need be re-appreciate the entire evidence and arrive at a conclusion one way or the other."***

35. **PW1 SA** a student at [Particulars Withheld] university Kitengela campus testified that on 7th February, 2017 at 6 pm, she went to fuel her motor vehicle registration No. KBQ xxxB a Toyota Premio at Shell Petrol Station, Athi River. On her way back to Kitengela, she gave a lift to her colleague Timothy Abong'o (PW2). They went to Kitengela where she bought some items and then made her way home. As she was dropping PW2, they were accosted by three people, the 1st appellant stood in front of the vehicle pointing a pistol at her while the 2nd appellant went to the driver's side and started hitting her with a gun butt asking her to open the door. She was pushed to the back seat. The attackers also got hold of PW2 who was trying to escape and forced him into the back seat.

36. The 2nd appellant got into the driver's seat while the 1st appellant sat with PW1 and PW2 at the back. The 2nd appellant reversed the vehicle and drove back towards where they were coming from. The other members of the gang entered the vehicle and she was forced to look down when they sat near the interior light. As they were about to approach the tarmac road, the robbers stopped and got the two out of the vehicle to a nearby bush. They forced her to sit down as PW2 was taken to a different sport. She was made to undress and the 1st appellant tied her hands and legs with her cloths and shoe laces. The 2nd appellant was also holding PW2. The 1st appellant threatened to rape her and beat her up but the 2nd appellant dissuaded him from doing that. They then left them and drove away after taking her phone.

37. She tried and untied herself, went to where PW2 was and assisted to untie him by cutting the laces using a razor blade that was in PW2's pocket. She then put on her torn cloths and they walked to [Particulars Withheld] gate where they asked a motor cyclist to take them to the police station where they reported the matter and recorded their statements.

38. . They went to scene with police officers. They also called her brother who was the owner of the vehicle and informed him of the robbery. She went to Kitengela Medical Hospital for treatment. She was later given a P3 form which was filled at Kitengela County Hospital on 5th May, 2017. Her phone was later recovered and she went to the police station and identified it.

39. She testified that she was later called by the investigating officer and informed that a suspect had been arrested and she was asked to go and identify him. An identification parade was conducted and she identified the 1st appellant. She was again call that other suspects had been arrested and she was required to identify them. On 12th March, 2017 she went to the police station where an identification parade was conducted and she again identified the 2nd appellant.

40. In cross-examination PW1 told the court that she had seen the attackers well and that she gave their descriptions to the police when reporting the incident. However, the witness statement read out in court did not have descriptions. She stated that she saw it recorded in the OB; that there were lights from nearby homes and that the incident took place at 7.30 pm.

41. **PW2 Timothy Abong'o** testified that on that day he was at Athi River when PW1 gave him a lift. They went to Kitengela where PW1 did some business and then they left for home. When they reached where he was to alight, they were approached by some people. The 2nd appellant went and stood in front of the vehicle and pointed a pistol at them two others were attacking them from behind. He attempted to open the door and flee but he was pushed back by the 1st appellant who ordered him to jump to the back seat and lie between the front and back seat. He saw the 2nd appellant in front of the vehicle and identified him by means of the head lights.

42. He told the court that he did not see the 1st appellant clearly though he sat near him till later on when the vehicle stopped. When they were ordered to get out, the 1st appellant was waiting for him outside, grabbed him by the collar of the shirt and that was when he saw him properly. He also saw the 2nd appellant who was the driver by means of the interior light.

43. He was pulled away by the 1st appellant who tied him using shoe laces as he lay facing down. He was robbed of a cell phone Tecno 3ys valued at Kshs. 6,500/= which he had purchased on 18th September, 2015 at Safaricom shop along Moi Avenue Nairobi. The phone was taken by the 1st appellant as well as Kshs. 500/- from his pocket. He was forced him to drink some concoction and was also beaten.

44. Later PW1 moved to where he was and assisted to untie him by cutting the shoe laces. They went to where motorcycles were and took one to the police station where they reported the incident; recorded statements and PW1 went to the scene with the police. They were then taken to Kitengela Medical Hospital for treatment. He was given a P3 form which was later filled. His phone and money were not recovered.

45. On 26th February, 2017 he was informed that a suspect had been arrested and asked to go and identify him. He went and identified the 1st appellant. Again on 10th March, 2017 he was informed that another suspect had been arrested. He went and identified the 2nd appellant at an identification parade. Cross-examined by 1st appellant, he stated that he used the light at the gate to see him and that at first he used the headlamp to identify 2nd appellant. Cross examined by 2nd appellant he told the court that he was able to see the gun and that he never saw the person's unique mark or his teeth. He also stated that he gave the police a description but he did not know whether it was recorded in the OB. He also stated that he attended the parade but that he never saw another fat person in the parade and that he was not interested in the height.

46. **PW3 Jackson Njogu** a resident of Mukuru Kayaba and a repairer of phones testified that in early February, he was in his shop when the 1st appellant took phones to him for servicing and resetting if the phone had been blocked. These were Tecno C9 and Sumsung J12. After servicing them, the 1st appellant asked him if he could buy them. He purchased the Tecno at Kshs. 5,000 and Samsung at Kshs. 2,000. He had previously purchased an Infix phone at Kshs. 3000 from him. On the first day he had gone with the 2nd appellant when he sold the infix phone to him.

47. PW3 sold the phones Sumsang and infix at Nairobi CBD next to Imenti House. He sold the Tecno phone to Stephen Omollo (PW4) for Kshs. 7,500. Omollo paid Kshs. 7000 and was to pay the balance of Kshs. 500/- later. Omollo went with the phone. Sometime in March 2017, Omollo went with CID officers to his hop looking for the phone. They arrested him and Omollo because the phone was stolen property. They were taken to Kitengela Police Station where they recorded their statements and later released. He denied that he knew the origin of the phone. He testified that the 1st appellant was common in Mukuru Kayaba and that he used to see him there.

48. **PW4 Stephen Otieno Omollo** also resident of Mukuru Kayaba selling second hand clothes, testified that he purchased a phone from PW3 at Kshs. 7,500/-. He paid Kshs. 7000/= and was to pay the balance later. He tested the phone using his sim card and later bought another line. On 3rd March, 2017, PW3 called and asked him to go to his shop saying that he had delayed paying the balance of Kshs. 500/-. PW3 took the phone and promised to release it to him upon paying the balance.

49. On 4th March, 2017 at 2 pm the area Chief called and asked him to go to his office. When he went there, he found two CID officers who asked him about the whereabouts of the phone. He took them to PW3's place and both of them were arrested taken to Kitengela Police Station where they learnt that the phone had been robbed from someone. He recorded his statement and released

on bond to be a witnesses.

50. **PW5 Richard Kibor** a clinical officer attached to Kitengela Sub County Hospital, testified that on 22nd May, 2017 he attended to PW2 who had a history of assault in a robbery incident. He had scars on the back of the hand right wrist joint and a scar on the right knee which had healed. The injuries were about 10 weeks old. The probable weapon used was a blunt object. He signed the P3 form on the same day which he produced as an exhibit.

51. **PW6 Ann Nasieko Leyian** also a clinical officer at Kitengela Sub County Hospital, testified that on 10th May, 2017 she attended to PW1 who also had a history of assault following a robbery incident. She had injuries on the forehead, bruises on other parts of the body. She classified the degree of injury as harm. The injuries were 3 months old. She signed the P3 form which was produced as an exhibit. According to the notes her cloths were torn.

52. **PW7 No. 232777 CI Mohamed Osman** of DCI Kitengela testified, that on 12th March, 2017 he was requested to conduct an identification parade. He assembled 9 members of the parade and two witnesses PW1 and PW2 were to participate in the parade concerning the 2nd appellant. He informed the 2nd appellant of the parade and asked him whether he was ready to participate in the parade to which he acceded.

53. The 2nd appellant declined to have a relative or an advocate witness the parade and signed to that effect. The witness asked the 2nd appellant to choose where to stand in the parade. Members of the parade were of similar height age and physical appearance with the 2nd appellant. He first called PW1 and told her that the person may or may not be among those assembled and asked her to touch the person if she was able to identify him. She identified the 2nd appellant who was standing between No. 6 and No.7 by touching him on the shoulder. He took PW1 away to the report office and called PW2 after he had asked the 2nd appellant if he wished to change his position but elected to maintain the same spot. PW2 identified the 2nd appellant by touching him. The 2nd appellant made no comment. He asked the 2nd appellant if he was satisfied with the way the parade was conducted and he said that he was and signed the form produced as PEX 10. In cross examination, the witness told the court that he never had a conversation with the witness about identification features.

54. **PW8 No. 236160 IP Edgar Nyala** of DCI Kitengela testified that on 26th February, 2017 he was requested by the investigating officer to conduct an identification parade. He prepared members of the parade who were of similar physical appearance and complexion with the 1st appellant. He informed the 1st appellant the purpose of the parade and he agreed to participate in the parade and signed by thump printing on the form. He also identified the person who would be present during the parade a friend from Mukuru Kayaba.

55. The 1st appellant chose to stand between No. 4 and 5. After the parade was ready, he called PW1 and informed her that her attacker may or may not be in the parade. She identified the 1st appellant by touching him. He asked 1st appellant if he was satisfied with the conduct of the parade and he said he was. He again put his thumb print on the form. He then called PW2 and repeated the procedure as he had done with the PW1. PW2 identified the 2nd appellant by also touching him. The 2nd appellant said that he was satisfied with the way the parade was conducted and signed the form.

56. **PW9 No. 235179 APC Moses Mwendwa** of Land Mawe in South B division Nairobi, testified that on 25th February, 2017 at about 8.30 pm, he was called by members of the public over a person they had arrested at Mukuru Kayaba slum. They went and re arrested the 1st appellant from members of the public and took him to Hazina AP camp post; interrogated him and called the DCIO Kitengela who came and collected the 1st appellant as he had a case pending in that station after a person who had been arrested over phone stolen during a robbery mentioned him. In cross examination by the 1st appellant, the witness told the court that the police had alerted them that the person should be arrested when seen.

57. **PW10 JOO** brother to PW1 and owner of motor vehicle KBQ xxxB, testified that he had given the vehicle to Pw1 for use to take his children to school. He produced the logbook of the vehicle as an exhibit. He told the court that in February, 2017 he was informed by Kitengela police that the vehicle had been stolen. He talked to PW1 who confirmed that the vehicle had been taken from her at gun point.

58. **PW11 Daniel Hamisi** who works with Safaricom at the law enforcement section, testified that on 20th February, 2017 he generated data on request by DCI Kitengela vide their letter dated 16th February, 2017 of particular phone with IMEI number over a case they were investigating. He generated data showing the number the handset had used between 5th February 2017 and 19th

February, 2017. He established that only two numbers were used. 5th February, 2017, 0720xxxxxx. PW1 was the registered owner ID number [….]. She had used the phone between 7th February, 2017 and 10th February, 2017 at 3.51 pm. There was no communication on 10th February, 2017. It was used by number 0725xxxxxx owned Stephen Otieno identity card No. [….] until 19th February, 2017 and that from 10th February, 2017 the phone registered to be at Kapiti Crescent South B, Mukuru, Kayaba, Mathare North Area 4 but was mostly used at Mukuru Kayaba.

59. He told the court that each phone had a unique IMEI; that he generated the report by computer and produced it as PEX 16. He also signed a certificate under Section 65(8) as read with Section 106B of the Evidence Act and produced it as PEX 17. He produced the letter from police PEX 15.

60. **PW12 No. 99958 PC Reyatone Mwalo** of DCI Kitengela and the investigating officer, testified that on 8th February, 2017, he was instructed to investigate the case. He called PW1 and PW2 and recorded their statements. On 25th February, 2017 together with CIP Nyala, CP Kitonyi, Macharia and Chanja, they proceeded to Hazina AP Camp after they were notified that the 1st appellant had been arrested by members of the public and was being held there. They rearrested him and took him to Kitengela police station.

61. He also testified that on 10th March, 2017 he left the station in the company of CPL Gitonya, PC Mbogo and PC Chanya and the 1st appellant to Pipeline Nairobi to look for the 2nd appellant but they did not succeed in arresting him. They came back and got information that he had been seen at Kitengela and went to look for him. At about 7 pm they found him in a bar within Kitengela and arrested him with the assistance of the 1st appellant who identified him. They also confirmed his name from his identity card and took him to the station. PW1 and PW2 identified the 1st appellant on 26th February, 2017 at an identification parade conducted by PW7.

62. The witness further testified that he conducted a search with NTSA and got a copy of records for the motor vehicle KBQxxxB which showed that it belonged to PW10. He recovered PW1's phone which he produced as PEX 7. PW1 had the receipt for the phone, **IMEI 352879080015523** and produced the receipt as PEX 8. The phone was recovered from PW4 who led them to PW3. The appellants were then charged with the offence.

63. In cross examination, the witness admitted that the complainants did not give descriptions of the attackers. However, in re-examination, he told the court that the complainants gave descriptions of the attackers in their statements. He also told the court that PW3 gave information that led to the identification of the appellants and their eventual arrest.

64. When put on their defence the 1st appellant gave unsworn testimony while the 2nd appellant gave a sworn testimony. The 1st appellant testified that he used to run a hotel business at Mukuru Kayaba in Nairobi but closed in August, 2016 due to business differences with PW 3 and his sister. He moved to a different location and started selling scrap metal. He testified that on 25th February, 2017 he closed his business and was going home at 7.30 pm when he met a police officer Moses Mwendwa of Hazina AP Camp, an undercover agent who was well known to him.

65. The officer informed him that he had his report and asked him (1st appellant) to accompany him to the Chief's camp. He asked the 1st appellant what problem he had with his family and the 1st appellant told him. At the chief's camp, the officer instructed him to sit on the floor along the corridor. While sitting there, some people entered the office and when they came out, they informed him that they were CID officers from Kitengela and asked if he was Dennis Matheka Mutinda and he responded in the affirmative. They handcuffed him, put him in a vehicle without telling him why and took him to Kitengela police station.

66. Later he was asked how he knew PW3 and other people. He was interrogated on whether he had friends in Kitengela which he denied. He was put in the boot of the car and taken to a railway line where he saw the [Particulars Withheld] gate at about 4 a.m. He was beaten and injured. He was taken back to the station and later charged.

67. The 2nd appellant testified that he used to do business at Kitengala and Gikomba market selling shoes until 2006. He was later employed by Bamburi Portland cement as a casual worker for 6 months then stopped. He later joined groups of land brokers. He would meet customers in bars for discussion.

68. On 20th December, 2018 there was a party at Akinyi's a bar owned by a police officer where they were drinking beer. According to the 2nd appellant, the police officer received a call that his wife (Akinyi) was drinking beer he had bought her. The

officer went and chased them from the bar. They moved to Kings Bar, took their drinks and left. The 2nd appellant testified that he left for Mombasa on 3rd March, 2017. He later went to Kings Bar, passed by Tongei bar, paid his bill and stood outside waiting for a friend, Evans Chege. The wife of investigating officer saw him, went and pulled him inside the bar but he told her that he could only go in if her husband was around. Just as she pulled him, Mwalo came and the 2nd appellant asked her to leave him alone.

69. The appellant further testified that Mwalo was annoyed and thought he had an affair with his wife. He wanted to shoot the 2nd appellant but members of the public intervened. Mwalo later called for the vehicle and he was taken to the police station. Other officers came and beat him up because he was joking with a police officer's wife. Later at about 8 p.m., CI Osman and another officer came and told him that he would be charged with attempted rape and indecent assault; that Gatori asked how much money he had so that he could assist him and demanded Kshs. 200,000/- which he did not have. He was later put in the cell and told that he would be charged with robbery with violence.

70. He told the court that when he went for the identification parade EN came and he saw his photo on her phone; that the first person who identified him was holding the phone but PW9 locked him out; that five parades of 16 people were carried out including the one whose report was produced in court; that he was identified in the parade by use of his photographs in the phone but that he rejected the parade. He denied that the signature on the form was his, stating that his correct signature is on his identity.

71. After considering the above evidence, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt, convicted the appellants and sentenced them prompting this appeal.

72. I have considered the appeal and the evidence that was before the trial court. The issues that arise for determination in this appeal are; whether the prosecution proved its case beyond reasonable doubt and whether the appellants were properly identified as the attackers.

73. The appellants were charged with the offence of robbery with violence. Section 296(2) provides that;

"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"

74. The prosecution was therefore required to prove the ingredients under section 296(2) namely; that the attackers were more than one, or, were armed with dangerous weapons, or, used violence before, at or immediately before, or immediately after the commission of the offence.

75. The evidence of PW1 and PW2 was that they were driving in a motor vehicle when they were attacked by more than two men who were armed with a pistol. They were forced to the back seats of the car and beaten during the attack. The attackers were joined by more men; drove their victims to some open space where they again beat them up, undressed and robbed them of their phones and money. They were later abandoned in the area. They got assistance from motor cycle riders and taken to the police station where they reported the robbery incident.

76. From this evidence, there is no doubt that the attackers were more than one, were armed with a pistol and used violence on the complainants as they robbed them. The evidence of both PW5 and 6, clinical officers, also confirmed that the complainants had been assaulted during the attack. The prosecution evidence therefore proved the ingredients of the offence of robbery with violence. I am satisfied as the trial court was that the prosecution proved this ingredient of the offence as required by law.

77. That left the issue of whether the appellants were the persons who committed the offence and robbed the complainants. The appellants argued that they were not properly identified as the attackers and that PW1 and PW2 did not give descriptions of the attackers to the police when they reported the matter. They also submitted that conditions under which the offence was committed were not conducive for a proper and positive identification. They argued that without giving descriptions of the attackers, the subsequent identification in the identification parades should not have been accepted.

78. It was submitted on behalf of the respondent that conditions were favourable for positive identification. According to the prosecution counsel, the appellants shone touch lights when forcing their victims into the vehicle; the appellants and the

complainants interacted for a while at close proximity; there were lights from nearby gates; the appellants walked in front of the vehicle with its headlights on and that there was bright moonlight illuminating the place, thus enabled the complainants see their attackers.

79. It was also argued that the appellants and the complainants were at close range and engaged one another in conversations; that PW1 was stripped naked as she was threatened with rape and therefore there was time and opportunity for the complainants to identify the appellants. It was also argued that PW3 was able to identify the 1st appellant as the person who sold to him the stolen phone that was later recovered. All this, it was argued, culminated in the appellants being positively identified at the identification parades.

80. I have considered the arguments by both sides on this issue. I have also perused the trial court's record and the impugned judgment. On the issue of whether the appellants were the attackers, the trial court considered the evidence of the witnesses on the role of the appellants and how they were identified as well as the appellants' defence, and stated at page 6 of the judgment;

"I have considered the circumstances of the crimes-the dark hour and the available light at the time. I have considered the victims account of exactly how they were handed (sic) and the role the two accused played. I have found nothing to make me doubt that the witnesses said the truth. I am satisfied that the accused were properly identified into having convicted (sic) the two robberies.

There is no other explanation except that it is the accused who accosted and robbed these complainants at gun point."

81. The trial court concluded that he appellants were properly identified and convicted them as charged on the two counts.

82. I have myself reviewed the evidence of both the prosecution and the appellants' defence. There is no denial that the offence was committed in the evening between 7 and 730 pm. The complainants testified that the headlights of the vehicle were on and that one of the attackers stood in front of the vehicle and pointed a pistol at them forcing them to stop. One of the robbers took control of the vehicle and turned towards where the complainants were coming from. The other forced PW2 into the back seat while the door light was one. The complainants also testified that there were lights at the nearby gates illuminating the area.

83. The complainants further testified that the appellants took them to an open space where they spent some time with them; undressed and teased them; robbed them and tied them using shoe laces and cloths. They then left them and drove away. According to the complainants, there was bright moonlight. They told the court that a combination of all these factors enabled them to identify the appellants. When identification parades were conducted on different dates and time, both PW1 and PW2 picked out the appellants from the parades.

84. The appellants have argued that the conditions were not conducive for a positive identification. They have also argued that the complainants never gave descriptions of the attackers to the police at the time of reporting the robbery. During cross examination, PW1 testified that she gave descriptions to the police. Her statement was read out in court but there were no descriptions. The witness however told the court that she had seen the descriptions recorded in the OB at the time the incident was reported.

85. In ***Republic v Eria Sebwato*** [1960] EA 174, the court held that where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction.

86. Similarly, in Kamau ***Njoroge v Republic*** (supra), the Court of Appeal held that;

"Dock identification is worthless unless preceded by a properly conducted identification parade. The complainant should also be asked to give description of the suspect, and police should arrange for a fair identification parade. On many occasions this court has held that such identification is almost worthless without an earlier identification parade."

87. On dock identification or the practice of inviting a witness to identify an accused in the dock, the Court of Appeal again stated in ***John Stelen Ole Mwenda v Republic*** [1989] eKLR, that:

"The most serious complaint of the appellant was that the prosecution witnesses who claimed to have identified him were made to see him in the cells before they purported to identify him. To this was added the fact there was no identifying witnesses. In Republic v Cartwright (1914) 10 Cr Appeal R 219, it was held that the practice of inviting a witness to identify a defendant for the first time when the defendant is in the dock is undesirable and should be avoided if possible. Here the appellant complained that the prosecution witnesses were made to see him in the cells before they continued their testimony in the course of the trial. Such witnesses had not previously identified the appellant at an identification parade and no evidence was led that the holding of such a parade was impracticable or unnecessary or that there were any exceptional circumstances. So despite the fact that a large number of witnesses testified, in all the circumstances, the quality of the identification evidence was in our respective view poor."

88. In the present appeal, the appellants argued that there was no description of the attackers given to the police at the time of reporting the robbery. To this the complainants testified that they gave descriptions to the police and that this was recorded in the OB. PW12, the investigating officer, testified that he was assigned the case on 8th February 2017. He then perused the OB and noted the details of the complainants. He called them and recorded their statements. On 25th February 2017, he, with other officers, went to Hazina AP Camp and rearrested the 1st appellant who had been arrested by members of the public and handed over to AP officers at the camp. They later arrested the 2nd appellant within Kitengela with the assistance of the 1st appellant.

89. Identification parades were conducted for the two appellants on 26th February 2017 and 11th March 2017 respectively and they were positively identified by the complainants. The witness told the court in cross examination that the complainants did not give descriptions of the attackers; that there were no photos of the 2nd appellant and that he did not interfere with the identification parade because he was not the one who conducted the parades.

90. Unlike in cases described as dock identification, identification parades were conducted in respect to the appellants' case where both were positively identified by the complainants. PW12, the investigating officer, however admitted in cross examination that the complainants did not give descriptions of their attackers. This contradicted the complainants' testimonies that they gave descriptions of their attackers.

91. I have perused the identification forms in respect of the appellants produced as PEX 9 and 10 by PW7 and 8. They were singed by appellants. The 1st appellant affixed his thumb print while the 2nd appellant singed initials "AM" to signify that they were satisfied with the way the parades had been conducted. I have also reviewed the evidence of PW7 and 8 who conducted those respective parades. I have no doubt that the parades were properly conducted. The issue however is how the complainants were able to identify the appellants without descriptions or special features of the attackers. On this, I will deal with the 2nd appellant first.

92. Regarding the 2nd appellant, the prosecution evidence was shaky on his role in the commission of the offence. Apart from the complainants' evidence that they identified him, the conditions for his identification were not conducive. The complainants did not give descriptions of the attackers to the police when they had the first opportunity to report the robbery. PW12, the investigating officer, confirmed that no descriptions were given about the attackers. I am not satisfied that the prevailing conditions at the time the robbery was committed could enable a positive identification of the attackers, including the 2nd appellant.

93. There was also no clear evidence on how the police traced and arrested the 2nd appellant. According to PW12, the 1st appellant assisted them in tracing the 2nd appellant who was arrested at a bar within Kitengela. When the PW12 was cross examined by the 2nd appellant, he told the trial court they went with the 1st appellant who was in the boot of their car, left the car several metres away from the bar where they arrested the 2nd appellant and took him to the vehicle and the 1st appellant identified him. There was no evidence that it was the 1st appellant who pointed out the 2nd appellant in the bar before he was arrested. How the 2nd appellant was traced and arrested therefore remains unclear.

94. PW3 testified that when the 1st appellant first went to sell to him an Infix phone, he was with the 2nd appellant. However, that was before the robbery the subject of this appeal. That Infix phone was also not robbed from the complainants. Moreover, PW3 was not called to identify the 2nd appellant in the identification parade after his arrest. The fact that the arrest of the 2nd appellant was not clear was also a matter of concern to the trial court when it stated at page 5 of the judgment that ***"the events leading to arrest of the 2nd appellant is a bit unclear."*** With this uncertainty, the trial court fell into error when it convicted the 2nd appellant on the basis of unclear and doubtful evidence.

95. It is a long standing legal principle that it is the duty of the prosecution to prove its case against an accused person beyond

reasonable doubt. Any doubt in the prosecution case should go to the accused. Taking all this into account, I am satisfied that the prosecution did not prove its case against the 2nd appellant beyond reasonable doubt. His conviction was therefore unsafe.

96. Having considered the 2nd appellant's appeal, submissions and the authorities relied on; I find merit in his appeal. Consequently, his appeal is allowed, conviction quashed and sentence set aside. The 2nd appellant, **Alexander Mutiso Peter,** is hereby set at liberty unless otherwise lawfully held.

97. Turning to the 1st appellant, his fate would have been the same as the 2nd appellant had his conviction been solely on the basis of identification. However, there was credible evidence that the 1st appellant sold phone robbed from the PW1 to PW3 who in turn sold the phone to PW4. The phone was traced through call data obtained from the mobile network provider, Safaricom. The stolen phone had been used on PW4's line and that was how it was traced by the mobile phone provider. PW3 was traced and arrested. He had sold the phone to PW4 who used it. PW4 was also arrested. PW3 explained to the officers that it was the 1st appellant, a person well known to him that had sold the phone to him. He in turn sold it to PW4. They were taken to Kitengela police station where they recorded their statements. This is led to the arrest of the 1st appellant.

98. Even though the 1st appellant complained that the complainants never gave descriptions of the attackers and that his identification in the subsequent identification parades should not have been the basis of his conviction, there was other credible evidence of the stolen phone which he sold to PW3 that connected him with the offence.

99. The 1st appellant and PW3 were well known to each other. According to PW3, it was the 1st appellant who sold to him the stolen phone which he also sold to PW4 and was traced to them. The evidence of PW3 was clear that the phone originated from the 1st appellant. The 1st appellant argued that there was business rivalry between him and PW3 and his sister which PW3 and PW12, the investigating officer, denied saying it was not true.

100. The fact of the recovery of the stolen phone which was connected with the 1st appellant, introduced the doctrine of recent possession. In ***Issac Nganga Kahiga alias Peter Nganga Kahiga v Republic*** [2005] eKLR, the Court of Appeal held:

"It is trite law that before a court 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 proof, first that the property was found with the suspect, and secondly that, the property is positively the property of the complainant, thirdly 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 properties can move from one person to another."

101. It must be made clear that the stolen phone was not found in the 1st appellant's possession. It was traced to PW4 then to PW3 who purchased it from the 1st appellant. The chain of possession was therefore traced to the 1st appellant. PW3 and the 1st appellant were known to each well and it was not the first time the 1st appellant was taking phones to PW3 for repairs or "flushing". The 1st appellant had previously sold to PW3 other phones which PW3 sold within Nairobi Central Business District.

102. The 1st appellant argued that he was not informed of his right to cross examine his co-accused. In his view, this failure vitiated his trial. I have gone through the trial court's record and the 2nd appellant's defence. The 2nd appellant did not make any reference to the 1st appellant at all. I do not think therefore failure to cross examine the 2nd appellant caused the 1st appellant any prejudice.

103. With this uncontroverted evidence, the 1st appellant was well connected with the offence. The phone had recently been robbed from the complainants at gun point. It was properly identified through the unique IMEI number. For that reason, I am satisfied that the 1st appellant was properly connected to the offence and his conviction was sound. His appeal fails. The conviction upheld.

104. On sentence, the 1st appellant was sentenced to death in count 1 while count 2 was held in abeyance. However, according to the Supreme Court decision in the ***Muruatetu case***, death sentence is no longer mandatory in these cases. The death sentence is therefore set aside. In place therefor, the 1st appellant **Dennis Matheka Mutinda alias stupid,** is sentenced to **twenty (20) years** imprisonment in each count.

105. The law requires that where an accused is sentenced to a term of years, the period spent in remand be considered when sentencing. According to the charge sheet, the 1st appellant was arrested on 25th February 2017 and was sentenced on 14th September

2018. The sentences of twenty (20) years for each count shall therefore run concurrently from 25th February 2017.

Orders accordingly

Dated, signed and delivered at Kajiado this 16th day of October 2020.

E.C. MWITA

JUDGE