Ndwiga & 2 others v Republic (Criminal Appeal 78 of 2014)
[2017] KECA 443 (KLR) (7 June 2017) (Judgment)

John Bosco Ndwiga & 2 others v Republic [2017] eKLR

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 78 OF 2014

PN WAKI, RN NAMBUYE & PO KIAGE, JJA

JUNE 7, 2017

BETWEEN

JOHN BOSCO NDWIGA ..... 1ST APPELLANT

CHARLES MAINA GITONGA ..... 2ND APPELLANT

IRENE WAWIRA MUTHONI ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The three appellants in this appeal raise different issues of law and fact in their separate memorandums of appeal drawn up by counsel, containing in all some 25 grounds. Common to all the grounds, however, are four issues of law, the most fundamental of which was that the appellants were subjected to an unfair trial before the Chief Magistrate's Court and the High Court as they were not represented by learned counsel. The other three common issues of law relate to the application of the doctrine of recent possession; reliance on circumstantial evidence and re-evaluation of the evidence on record. We shall examine those and other issues shortly.

2. The appellants are represented before us by different learned counsel: the 1st appellant, John Bosco Njue (Bosco) was represented by Mr. M. Gachumba instructed by M/s Onyoni Opini & Gachumba Advocates; the 2nd appellant, Charles Maina Gitonga (Maina) by Mr. Charles Kanjama, instructed by M/s Muma & Kanjama Advocates; while the 3rd Appellant, Irene Wawira Muthoni (Irene) was represented by Mr. S. K. Njuguna. Mr Kanjama filed written submissions which he orally highlighted at some length, while M/s Gachumba and Njuguna made oral submissions. They all filed and referred to lists of authorities to assist the Court.

3. The concurrent findings of fact made by the two courts below were fairly straight forward:

> At about 8.30 pm on 11th October, 2010, Josphat Mugo Muriuki (the deceased) and Lewis Gaithuma Njeri (PW1) (Lewis), both of whom were motor cycle taxi operators (more popularly known as, 'boda boda operators') were waiting for customers at their usual operating base near POA Filling Station at Ngurubani town in Kirinyaga South District. The Petrol station was fully lit and the operating base was also lit by electricity mains fixed by the County Council at the bus stage. Then came a lady customer who approached them and negotiated with the deceased. She boarded the deceased's motorbike Registration No. KMCA 815A, a green coloured Hongra, and the two rode out towards Merica Petrol station.

4. That was the last time Lewis saw the deceased alive. The following morning he received information that a person had been found dead at Maisha Kamili village and when he went there he confirmed it was his workmate, the deceased. The motor cycle was nowhere to be found and only the side mirror and the deceased's cap were found at the scene.

5. About one and a half hours later, at 10 pm, Irene in the company of Bosco and Maina, arrived at the house of Peter Maina Mwangi (PW6) (Peter) in Makutano town requesting for a place to spend the night. Peter was a friend of Maina who explained that they were using a motor cycle en route to Nairobi and it was late. They kept the green motor cycle Reg. No. KMCA 815A in the house and went to sleep.

6. The following morning, Maina tried to sell a Nokia mobile phone to Peter but Peter declined because he had no money. He referred him to a kiosk owner in town to try his luck. Maina and Bosco then left the house to look for a buyer for the phone as Peter left for his hawking business, leaving Irene in the house. Peter returned at lunch hour and found Irene alone who told him the other two, Maina and Bosco, had gone to Nairobi on the motor cycle. When they did not return by 7.30 pm, Peter suggested and Irene agreed, that they go out to dinner as they awaited the two men. The two finally arrived and said they had booked a lodging room at Classic Bar. They all had drinks in different bars before ending up at Universal Bar in Makutano at about 9 pm. Shortly after, Peter excused himself and left for his house to prepare for the following day's work.

7. As the events at Makutano town were taking place, the police from Wanguru Police Station under the command of Cpl Richard Odhiambo (PW12) (Cpl Odhiambo) had arrived at Maisha Kamili where the deceased lay. His hands and leg were tied at the back with a rubber band. His neck was also tied up and the body had physical injuries on the upper lip, both hands and the neck had bruises. Scenes of crime personnel were summoned who took and compiled photographs of the scene and the body was thereafter collected for post mortem. The broken side-mirror and the deceased's cap were also collected and investigations on the crime commenced in earnest.

8. On information received, police officers from Makutano police post headed for Universal Bar in Makutano town on the evening of 12th October, 2010 and found Bosco, Maina and Irene seated at a table. They arrested them for questioning. As soon as they were taken away, the barmaid (waiter) who had been serving them, Esther Nduku Damaris (PW7) (Damaris), started cleaning the table and found a driving licence for a motor cycle in the name of the deceased which had no photograph. She also found an identity card in the name of Bosco and a key for a lodging room at Classic Bar. She gave the documents to her manager Cyrus Njagi (PW2) (Cyrus) who later handed them over to the police. At the police post, Constable Joakim Owiti (PW8) recovered from Bosco a motor vehicle driving licence in his name (Bosco) which had no photograph.

9. The three persons were handed over to the Investigating officer, Cpl Odhiambo who had them rearrested. An identification parade was arranged for Lewis who picked out Irene as the lady customer who rode away with the deceased. Dr Stephen Wang'ombe Nderitu (PW10) (Dr. Nderitu) carried out the postmortem and confirmed the cause of death as strangulation. Peter was also arrested at first on suspicion of complicity but after explaining his innocent contacts with the three suspects he was released and later testified as a prosecution witness. The investigating officer concluded that the purpose of removing the photographs from the two driving licences was for Bosco to easily substitute one for the other if he was stopped by the police as he rode away to Nairobi. Bosco, Maina and Irene were subsequently charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

10. In his defence, Bosco said he was a fish trader and had spent the whole day on 12th October, 2010 selling fish at Viai and Karaba after which he went to drink some beer and watch football at Universal bar. That is when the police came and arrested him together with other two people he was seated with. He said one of the arresting officers (one Apima) had a grudge against him because he owed him sh.4000 for protection fee when he (Bosco) was a chang'aa seller.

11. Maina also denied the offence stating that he had been called on telephone by his employer, Blue Shield Insurance Company, at 9 pm on 11th October, 2010 and informed that he had been transferred to Nyeri. The following day he travelled to Nyeri returning to Makutano at 6 pm only to find out from his wife that his housemaid had disappeared with his Sh.20,000. He then went to Universal bar to drink beer and watch football when another man who introduced himself as Bosco joined him at the table. They shared drinks and bet on which team would win. As they did so, Peter and Irene entered the bar and sat where they were. He did not know Peter or the lady. But Peter took him outside and started telling him that he (Peter) was having an affair with the housemaid who had disappeared and could assist him in tracing her. He needed only ten minutes to do so. Peter left and Maina returned to the bar. Within ten minutes police officers came in, arrested them and subjected him to questioning on a motor cycle he knew nothing about. The investigating officer also asked him for a bribe which he did not have and so he was charged with the offence.

12. Finally, Irene said she was Peter's friend and worked at a restaurant in Embu. She was working on 11th October, 2010 but Peter called her the following day and told her he was sick. She travelled by bus to Makutano and found him in bed. She took him to hospital and they had lunch before returning home. In the evening they went out for supper and thereafter to Universal bar after Peter insisted he would not sleep without a beer despite his sickness. They found and sat with two other men in the bar. Shortly thereafter, Peter excused himself to go to the urinal after which he would buy some chips for Irene elsewhere and return. As soon as he left, police officers came in and arrested her and the two men. She was interrogated about an offence she knew nothing about.

13. From those facts, the two courts had no difficulty in making the concurrent finding that the deceased was violently robbed of his motor cycle and did not willingly give it away. Both courts were also in agreement that there was no direct evidence on who the perpetrators of that crime were. They relied on circumstantial evidence to zero in on the three appellants. The trial court (B. M. Ochoi, SRM) connected several factual chain links from the evidence: that Irene was identified by Lewis; that she was the last person to be seen with the appellant alive; that there was no explanation from Irene as to what happened to the deceased; that soon after the robbery, the three appellants were seen in possession of the stolen motorcycle and Nokia phone; that the deceased's driving licence was found in possession of the appellants; that the prosecution witnesses were credible and honest; and that the three appellants gave dishonest defences which amounted to outright lies. The court found no coexisting circumstances

to weaken that chain of events pointing unerringly to the three appellants as the perpetrators of the crime.

14. On its part, the High Court (Ong'undi & Githua, JJ.) found no reason to disbelieve the account of events as narrated by Lewis and Peter because they were believed as credible witnesses by the trial court which had the advantage of seeing and hearing them. It accepted the chain link of events as found by the trial court and laid emphasis on the finding of the deceased's recently stolen items in possession of the appellants in circumstances that they could not explain away. Finally the court rejected the defences put forward by the appellants in the same manner as the trial court did. It is that decision which provoked this second and final appeal.

15. The first challenge made to those findings is constitutional. It was not raised before any of the lower courts but it goes to jurisdiction and may thus be raised at any time. We must therefore consider it in limine because jurisdiction is everything. If the acts or omissions of the two lower courts are invalidated, then the other grounds of appeal would be of no moment. The appellants may be acquitted or a retrial ordered depending on the facts and circumstances of the case, and the interests of justice.

16. The argument, as we understand it, is this: Article 50 of the Constitution guarantees the right to a fair trial while Article 2 (4) invalidates any law, act or omission that is contrary to the Constitution. Part of the fair trial rights under Article 50 (2) (h) is the right "to have an advocate assigned to the accused by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly" (emphasis added). That provision came into effect on 27th August, 2010 when the Constitution was promulgated and the offence herein was committed on 11th October, 2010. Clearly therefore, the issue squarely falls for consideration under the new Constitution.

17. All Counsel cited and relied on the decision of this Court in David Njoroge Macharia v Republic [2011] eKLR where the offence of robbery with violence was committed long before the new Constitution but the same issue was raised under Section 77 of the retired Constitution and other international instruments governing fair trial rights. The appeal was, however, decided on 18th March, 2011, well after the promulgation and the Court made several pronouncements based on the new Constitution, albeit in obiter dicta.

18. The issue in the Macharia case (supra), as it is before us, was whether "the right to free legal counsel in serious criminal offences is a fundamental right that must be availed to an accused person at state expense".

    There was an express provision in the retired Constitution (Section 14) which ruled out any right to state funded legal representation and therefore the Court answered the issue in the negative. But the Court, in comparative fashion, extensively examined the law in other jurisdictions of the world, the current Constitution and several international instruments ratified by Kenya which now form part of our law by virtue of Article 2 (6), before concluding as follows:-

> " Under the new Constitution, state funded legal representation is a right in certain instances. Article 50 (1) (sic) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution. However, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where 'substantial injustice would otherwise result',

persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."

19. We suspect counsel in this matter latched on that conclusion to make their case. Both Mr. Gachumba and Mr. Kanjama were emphatic that Article 50 (2) (h) was couched in mandatory terms and therefore the State was obligated to comply, in default of which the sanction of invalidation under Article 2 (4) would kick in. According to counsel, the offence charged was so serious in complexity and consequence that substantial injustice would result in the absence of legal representation. More importantly, in counsel's view, the right to be informed of the right to have legal representation was non-derogable but was never accorded to the appellants at any stage. There was thus total absence of fair trial.

20. In fairness to Mr. Kanjama, he also cited two other decisions of this Court (differently constituted) both of which were decided after the Macharia case and which reiterated the centrality of legal representation in fair trials, more so in capital offences. The first was Moses Gitonga Kimani v Republic [2015] eKLR which, like the Macharia case, was decided under the retired Constitution which expressly excluded free legal representation. The other was Karisa Chengo & 2 Others v Republic [2015] eKLR where the offence was committed after the promulgation and the issue now under consideration was squarely before the court.

21. Responding to the issue, learned Assistant Director of Public Prosecutions, Mr. Kaigai, submitted that there was a misinterpretation of Article 50 (2) (h) by the appellants' counsel. It was not mandatory, he submitted, and the State was not under any obligation to provide free counsel when the trial commenced in October 2010. If it was, it would mean that all capital trials held after the promulgation without free legal counsel would be nullified. In his view, the provision was not immediately applicable and Parliament which had the mandate to enact the enabling legislation to operationalize Article 50 took time but eventually did so in 2016 when the Legal Aid Act No. 6 of 2016 was passed. It is that Act which clarifies, among other provisions, that those who can afford legal representation are not eligible to free counsel and therefore the right is not absolute. He further submitted that the consequence of non-compliance with the constitutional provision was not an acquittal of the appellants but a retrial since the constitutional rights of the victims should not be trampled on either. Mr. Kaigai found no support for the assertion that there was any substantial injustice caused to the appellants because, in his view, they fully participated in the trial and cross examined witnesses.

22. We have considered the issue which, unlike the Macharia case (supra), is no longer a novel one. There can be no argument as reviewed by this Court extensively in the Macharia case that fair trial is an imperative that all civilized nations of the world should accord its citizenry. This country has had its fair share of a mixture of foot-dragging and perhaps genuine practical difficulties in attaining that ideal, but it is some consolation that there is now, six years after the promulgation of the Constitution, an Act of Parliament, The legal Aid Act No 6 of 2016:

> " to give effect to Articles 19 (2), 48, 50 (2) (g) and (h) of the Constitution; to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes ."

23. In the absence of such legislation, the courts in the decisions cited before us could only make declaratory pronouncements since each case has its own peculiar facts and considerations. In the Macharia case (supra), the Court stated thus:-

> " We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the

provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."

24. In the Moses Kimani case (supra) the Court in its obiter dicta observed that the constitutional provision was progressive and lamented Parliament's snail's pace in enacting Legislation. It stated in part:

> " Under the current Constitution an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise arise in the absence of such legal representation. As noted in the David Njoroge Macharia case the Constitution does not set out what constitutes substantial injustice. Chapter 18 (transitional & consequential provisions) of the current Constitution places an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation."

25. Finally, in the Karisa Chengo case (supra) the Court was of the view that it was not in every capital offence trial that an inference of substantial injustice may be drawn, and each case should be scrutinized on its own merit. We may quote the relevant part:

> " The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases 'where substantial injustice might otherwise result' and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another. Only then would the state obligation to provide legal representation arise."

26. We respectfully concur with the sentiments expressed in those cases. The progress to the attainment of the full benefits of fair trial has been slow and painful to those in this country who have had to bear the brunt. In an appropriate case where substantial injustice is demonstrated or is glaringly apparent, the courts would not hesitate to make orders invalidating unfair trials and acquitting the persons accused. That is why each case should be brought forward for examination of its facts and circumstances. In this case, it was not demonstrated nor is it apparent that the appellants were willing but unable to obtain legal representation. It was not enough that they were facing a serious offence attracting the death penalty on conviction. Nor was the state under any obligation to provide free legal counsel when the trial commenced in October 2010. The Constitution itself, and therefore the people of Kenya, in transitional provisions had given Parliament a leeway of four years to enact legislation for the realization of fair trial rights. Both the trial and the first appeal were finalized while that grace period was still operational. We agree with Mr. Kaigai that the appellants fully and meaningfully participated

in the trial and the first appeal. Their claim that they neither knew nor understood the nature of the proceedings before the two courts rings hollow. We do not, in all the circumstances, find merit in the first ground of appeal and we reject it.

27. We must now examine the other issues of law which is all we can do by dint of Section 361 (1) of the Criminal Procedure Code (CPC). The findings of fact made by the two courts below deserve total respect and would only be interfered with to the limited extent that they were based on no evidence at all, or on a misapprehension of the evidence, in which case they would be bad in law. See Chemagong v Republic (1984) KLR 213 and J.A.O v Republic [2011] eKLR.

28. As stated earlier, there are three other common issues of law relating to the veracity of the circumstantial evidence relied on to convict the appellants; re-evaluation of the evidence by the first appellate court; and the application of the doctrine of recent possession. These issues are closely tied up and we propose to consider them together. Mr. Gachumba for Bosco took issue with the evidence relating to the recovery of the deceased's driving licence pointing out that there was no cogent evidence on where it was found, who had it and on which date. All there was, in his view, was contradictory evidence from four different witnesses (PWs 2, 3, 6 and 8) which the High Court did not re-evaluate. He submitted that the person who recovered the driving licence was not called to testify and that the person to whom the stolen phone was sold was not called either. All that was contrary to Section 150 of the CPC, he submitted. Counsel further submitted that Bosco was not identified at any stage as the person who had the stolen motorbike or any of the items stolen from the deceased; that Peter was an untruthful witness; that in the absence of a direct connection of Bosco with the death of the deceased or stealing of any item, no circumstantial evidence could connect him to the offence; and that it was doubtful that the offence charged was committed since there was no evidence of any weapon used or recovered from the scene. In aid of those submissions he cited the cases of Vincent Kasyula Kingoo vs Republic, Nairobi Criminal Appeal No.98 of 2014; Erick Otieno Arum vs Republic [2006] eKLR(High Court); Daniel Muthomi M'arimi vs Republic [2013] eKLR; and Erick Odhiambo Okumu vs Republic [2015] eKLR.

29. Mr. Kanjama, in his written and oral submissions, forcefully argued that the High Court did not re-evaluate the exculpatory evidence against Maina and merely regurgitate what the trial court stated. Such was the evidence that cleared or tended to clear Maina from guilt. It was also evidence of factors that weakened or destroyed the circumstantial evidence. According to counsel, no prosecution witness saw Maina with the deceased or at the scene of the crime. No one saw him steal anything. The only reliance was on the evidence of Peter (PW6) who alleged Maina was among the people who came to his house with the motorbike and that Maina had a Nokia phone, without any further proof that Maina had stolen those items. The other reliance was on Esther (PW7) who recovered a driving licence from under the table without any video or photographic evidence that it was Maina who dropped it there. Anyone, in counsel's view, could have dropped it. At his arrest nothing was recovered from him except a hotel room key. The doctrine of recent possession was therefore wrongly applied. Other exculpatory evidence was given by Maina himself in form of an alibi but was ignored. According to counsel, Maina knew Peter as well as Peter's affair with his housemaid and that is why Peter was offering him help to trace her.

30. In further submissions, Mr. Kanjama asserted that Maina was innocently in the company of Bosco and Irene. We may quote learned counsel verbatim on this submission:

> "The only wrong that the 2nd Appellant committed was to associate with the 1st and 3rd Appellants who were at that time in possession of the Motorbike. He found the 1st appellant with the Motorbike at a place called Makutano and did not become suspicious as the two would at times hire a bike and use in the town whenever they were together. Like any other

normal person, the 2nd Appellant thought that it was business as usual and rode the bike to the bar so that they would talk as earlier planned. It would be improper to convict the 2nd appellant on this (sic) grounds which do not directly link him to the commission of the offence".

31. In conclusion, counsel submitted that the case was not proved beyond reasonable doubt; that Maina was convicted on mere suspicion; that reliance was made on the evidence of an accomplice, Peter, without corroboration; that the identity of the informer who connected the appellants with the offence was never disclosed; that there were material contradictions in the evidence of the prosecution witnesses; and that the elements of robbery with violence were not proved. For all those submissions counsel relied on and cited several authorities, among them: David Njoroge Macharia v Republic (2011) eKLR; Isaac Ng'ang'a & Another v Republic (2006) eKLR; Martin Mungathia v Republic (2015) eKLR; Neema Mwandoro Ndurya v Republic (2008) eKLR; Joan Chebii Sawe v Republic (2003) eKLR; Lowethit Loritim v Republic (2014) Eklr; Karisa Chengo & 2 Others v republic; Moses Gitonga Kimani v Republic (2015); Ali Salim Awadhi alias Majid v Republic (2015); Patrick Mwangi Weru v Republic (2013); Daniel Muthoni M'arimi v Republic (2013); Erick Otieno Arum v Republic (2006); Moses Mwangi Kanyeki & Another v Republic (2015) and John Nduati Ngure v Republic (2016).

32. For Irene, Mr. Njuguna largely adopted the submissions of other counsel but added that there was no proper identification of Irene by Lewis who mixed up the colours of the attire she allegedly wore. There was also no cogent evidence describing the scene and the High Court did not interrogate the intensity of the lighting at the petrol station or how far it was. Counsel further submitted that there was no basis laid for the identification parade because no description of the suspect was given by Lewis to the police before the identification parade was arranged. He cited the cases of Maitanyi v Republic [1986] KLR 198 and Martin Shikuku Makokha v Republic [2007] eKLR (High Court).

33. In response, Mr. Kaigai submitted that the inculpatory facts established by prosecution were not explicable on any reasonable hypothesis other than the guilt of the appellants. From the clear identification evidence of Lewis which was confirmed in a properly organized identification parade, through the evidence of Peter who hosted the three appellants and identified the stolen items, to the evidence of recent possession of items belonging to and stolen from the deceased, the chain was complete. In his view, Peter was a mere suspect who was not involved in the crime and cannot therefore be termed an accomplice. His evidence required no corroboration and even if it did, subsequent events corroborated it. It was not a multiplicity of witnesses that is necessary to establish a fact, he asserted, citing Section 143 of the Evidence Act. Finally, he submitted that the Evidence Act allows for non compulsion of privileged witnesses to testify and there was nothing wrong in failing to disclose the identity or call to the witness box, the police informers mentioned in the trial.

34. We have anxiously considered the issues raised in the appeal and are grateful to learned counsel for their industry in research and incisive submissions.

There was no eye witness to the killing of the deceased or the stealing of his property in the process. However, it is clear from the evidence on record that violence as envisaged in Section 296 (2) of the Penal Code was involved and that among the properties stolen were the deceased's motorbike, cell-phone and driving licence. It would thus be idle to argue that the elements of the offence were not proved simply because of the absence of or recovery of any weapon. The two courts below were right to hold that the case lay for consideration on the basis of circumstantial evidence. Such evidence, as has been said many times before, is not inferior evidence. Many a time it is the best evidence because those

who commit crimes do not intend to make them obvious to eyewitnesses. More than a century ago in the English case R v. Taylor Weaver and Donovan [1928] 21 Cr. App. R. 20) the court stated;

> " Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

35. The courts in Kenya have also laid out clear principles on the threshold for a safe conviction on such evidence. We take it from Mwita v. Republic [2004] 2 KLR 60 at p. 66, where this Court stated thus:

> " It is trite that (sic) in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt". See Simoni Musoke v. R [1958] EA 715 where the following extract from Teper v. R [1952] AC 480, was quoted:-
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> > 'It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."'

36. The strongest inculpatory facts in this case came from Lewis (PW1), Peter (PW6) and Esther (PW7). The evidence of Lewis was challenged on the basis that he was not consistent on the colours of dress worn by the pillion passenger he saw; that there was no proof of clear lighting; and that the identification parade which confirmed the identity was not preceded by a report to the police. The evidence of Peter was challenged mainly because it was uncorroborated accomplice evidence and was untruthful, while the evidence of Esther was challenged as non-existent or of no probative value. The High Court in respect of those witnesses is berated for failure to re-evaluate the evidence.

37. Firstly, on re-evaluation of evidence, we find no justification for this complaint. It is evident from the record that the High Court was aware of its duty as the first appellate court and did in fact re-examine and re-evaluate the evidence before accepting the findings of the trial court. There is no set format for re-evaluation of evidence. This Court has previously followed the dicta by the Uganda Supreme Court in the case of Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634, stating thus:

> " The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this Court said in two cases. In Sembuya v Aiports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:
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> > 'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinize and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'
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> In Odongo and Another v Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), ODOKI JSC (as he then was) said: "While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."

38. Secondly, the credibility of the three witnesses was assessed and accepted by the trial court which had the advantage of seeing and hearing them. The High Court did not interfere with that finding. Lewis testified, and was believed, that the electricity lighting at the operating base, supplemented by other County Council electricity lights nearby, was bright and he was able to see the lady customer who approached the deceased in his presence and shortly thereafter rode away with him. He was able to recall and point out the same lady one week later in an identification parade which was not challenged as being noncompliant with the police Force Standing Orders under Cap. 46. When he saw her first, she wore "a black trouser with maroon flowers". At the parade she wore a "dark grey jeans trouser with maroon flowers". The two lower courts found no material contradiction in that description. Nor do we, considering the different circumstances surrounding the description. In any event it was a factual matter.

39. We are aware of the timely caution made by the predecessor of this Court in Roria v Republic (1967) EA 583, thus:

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

In our view, the evidence of Lewis on identification was not under difficult circumstances and was fortified by subsequent events. It was safely relied on.

40. Peter's evidence, as correctly submitted by counsel, would have required corroboration if it was accomplice evidence. But in our view it was not. He was indeed arrested on suspicion of his complicity in the offence but was released after explaining his innocent hosting of the three appellants at the request of his friend, Maina. He was not charged with any offence. Who is an accomplice? This Court in the case of Antony Kinyanjui Kimani v Rep [2011] eKLR said the following:-

> " What legally constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of Watete v Uganda [2000] 2 EA 559, the Supreme Court held that 'in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial'. The same definition was restated by the same court in the case of Nasolo v Uganda [2003] 1 EA 181 where the court further stated:
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> > "On the authorities, there appears to be no one accepted formal definition of 'accomplice'. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case".

41. It was further held in Kamau v Republic (1965) EA 581 that:-

> " (iv) while a person who aids and abets the commission of a crime or assists the guilty person to escape punishment is always an accomplice, a person who

merely acquiesces in what is happening or who fails to report a crime is not normally an accomplice..”

It is our view that the evidence of Peter was properly accepted and evaluated.

42. On the issue of recent possession of stolen items, it is clear that the motorbike and the Nokia phone were not recovered. But the description given of them by Lewis and Peter leave no doubt that they were the same items stolen on the same day from the deceased. The three appellants had the motorbike when they arrived at Peter’s house. Maina, according to Peter, had the phone. So too the deceased’s driving licence which was found under the table occupied by the three appellants at the time of their arrest. It is not true, as submitted by Mr. Gachumba, that the witness who recovered the item was not called to testify. Esther was PW7 and swore that she started working in the bar at 6 pm and no other customers had occupied the table. She is the one who served the appellants with drinks when they arrived until their arrest at about 9 pm. In our view, that chain of evidence was compliant with the principles set out in the case of Erick Otieno Arum v. Republic [2006] eKLR thus:

> “ ..before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly; that property is positively the property of the complainant; thirdly; that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant”.

It was incumbent on the appellants to rebut the presumption that they were either the thieves or handlers of the stolen items they were found in possession of but they did not. Possession under Section 4 of the Penal Code may, of course, be actual physical possession or constructive possession.

43. In the end, we form the view that the inculpatory facts proved in this case were incompatible with the innocence of the appellants. We further find that the co-existing circumstances put forward in this appeal as weakening or destroying that inference have no basis. The appellants had no duty to prove the alibis they put forward in their general denials of the offence. But the alibis were displaced by credible prosecution evidence. Indeed, one of the appellants, Maina, who had denied on oath that he knew Peter or any of the other two appellants, ended up admitting before us that he knew Peter before and was associating with Bosco and Irene before, albeit innocently. There was a basis for the finding by the two lower courts that their defences were outright lies.

44. This appeal has no merit and is for dismissal. We so order.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF JUNE, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR