REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 154 OF 2013

Appeal from the original conviction and sentence by the Chief Magistrate at Garissa (Miss Hannah Ndung'u) in Criminal Case No. 1366 of 2011

ALI SAID WAYU…..……1ST APPELLANT

MOHAMED HUSSEIN MOHAMED…….……2ND APPELLANT

YUSSUF IMAN FUMAU…..……..……3RD APPELLANT

VERSUS

REPUBLIC……..…..…..……RESPONDENT

JUDGEMENT

Background

Ali Said Wayu (1st Appellant), Mohamed Hussein Mohamed (2nd Appellant) and Yussuf Iman Fumau (3rd Appellant) were charged in the Chief Magistrate's Court at Garissa with the following offences:

1. Robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of this charge are that on 12th July 2011 at Madogo Trading Centre within Tana River County jointly with others not before the court while armed with crude weapons namely pangas, rungus and stones, robbed Kuya Okutoi Gabriel of two mobile phones make Nokia X201 and Nokia 2700, Ceska pistol, identity card, certificate of appointment, Barclays Bank Plate and cash Kshs 50,000 all valued at Kshs 120,000 and at or immediately before or immediately after the time of such robbery wounded the said Kuya Okutoi Gabriel.
2. Robbery with violence contrary to section 296 (2) of the Penal Code. The particulars are that on 12th July 2011 at Madogo Trading Centre in Tana River County jointly with others not before the court while armed with dangerous weapons namely pangas and stones robbed one Seavan Akelo of an AK 47 rifle S/No 793861 and 8 rounds of 7.62 mm ammunitions valued at Kshs 45,240 and at or immediately before or immediately after the time of such robbery used actual violence on the said Seavan Akelo.
3. Arson contrary to section 332 (b) of the Penal Code. The particulars are that on 12th July 2011 at Madogo Trading Centre within Tana River County jointly with others not before court willfully and unlawfully set fire to motor vehicle make Land Rover registration No. GK A058 V valued at Kshs 3,000,000 the property of the Kenya Police.
4. Taking part in a riot contrary to section 80 of the Penal Code. The particulars are that on 12th July 2011 at Madogo Trading Centre within Tana River County jointly with others not before court

took part in a riot.

Brief facts

On 11th July 2011 there were protests at Madogo area of Tana River County over a dispute involving matatus between youths from Madogo and the neighbouring Garissa. As a result of these protests the Madogo youths blocked the Nairobi-Garissa road making it impossible to access or leave Garissa by a motor vehicle. Vehicles intending to access Garissa had been stopped at Hola junction.

Senior Superintendent of Police Gabriel Kuya Okutoi, PW2, OCPD Bura Tana where Madogo Trading Centre falls administratively travelled to the scene to find out what the problem was and to resolve the issues. He was in company of other police officers and was driven by Police Constable Seavan Akelo, PW1, in motor vehicle GK A058V.

PW2 and his counterparts from Garissa were not able to resolve the issues causing the protests on 11th July 2011 but they managed to unblock the road. They decided to attend a crisis meeting in Garissa the following day on 12th July 2011 to discuss and resolve the issues. On 12th July 2011 the youths from Madogo blocked the road again. In the process of trying to find out a solution the youths turned violent and started stoning the police officers. The police officers from Garissa escaped from the scene leaving PW2 and his driver PW1. In an attempt to flee from the riotous and violent youths the vehicle driven by PW1 got stuck in a heap of sand. PW1 attempted to free it but was attacked with stones and other weapons. He sustained injuries and was rescued by a woman from the area. In the meantime, PW2 also got seriously injured and lost consciousness. It is in this state of serious injuries that the firearms carried by the two officers were taken away. PW1 lost an AK 47 rifle serial number 793861 while PW2 lost a Ceska pistol serial number F3232. PW2 also lost 2 mobile phones, personal documents and cash Kshs 50,000.

The appellants were later arrested and the two firearms recovered. The above charges were preferred against them.

In his defence the 1st Appellant Ali Said Wayu who appeared in the lower court as the 3rd accused told the court that he was arrested on 12th July 2011 by the Assistant Chief Mohamed Loka (PW6) without being told the reason for that arrest because he had a grudge with him over a lover. He denied knowledge of the charges he was facing.

The 2nd Appellant Mohamed Hussein Mohamed who was 1st accused person in the lower court testified in his defence that he had travelled on 9th to repair a motor vehicle and returned from Masalani on 13th July 2013, went home and slept. He said he was arrested later that day with allegations that he had been in a fight at Madogo. He denied the allegations claiming that Hussein Dado, PW5, had a grudge with him over a piece of land. He produced a receipt to show that he had travelled from Masalani (Ex. D1).

The 3rd Appellant who was the 2nd accused in the lower court denied the allegations and claimed that he was in court on 12th July 2011 when judgement in File No. 2872 of 2011 against him was read and he was placed on probation. He said he was arrested upon leaving the courtroom and forced to sign certain papers regarding this case.

The trial magistrate took evidence of seven prosecution witnesses and the defence of the appellants. She found all the 4 charges proved and convicted each of the appellants. She sentenced each appellant to death in count 1 and declined to sentence the appellants on counts 2, 3 and 4 stating that the sentences of these counts would be held in abeyance.

The appellants are aggrieved by the convictions and sentence and have come to this court on appeal. The 3rd Appellant is represented by Olando Udoto & Okello Advocates. During the hearing of the appeal, Ms Njalale, advocate, argued the appeal on behalf of Mr. Olando. The 1st and 2nd Appellants are not

represented. Mr. Collins Orwa, learned state counsel, represented the respondent.

Petitions of appeal

We have carefully read the petitions of appeal in respect of each appellant. We have understood the 1st Appellant as raising the grounds of appeal as summarized here below:

1st Appellant's appeal

i. That the charges were rendered fatally defective by consolidating all them in one charge sheet.
ii. That the trial was unfair.
iii. That the trial court failed to consider that the assistant chief incriminated the 1st Appellant with a police baton due to an existing grudge.
iv. That no witness connected the 1st Appellant with the offences.
v. That the trial magistrate failed to consider that the police baton was not one of the items lost during the riots.
vi. That the mode of arrest was poorly done.
vii. That the description of the 1st Appellant was given during the first report.
viii. That no investigations were carried out.

1st Appellant's submissions

The 1st Appellant has submitted that the charges were defective in that the charge sheet had four counts and it was not clear which evidence supported which charge; that the trial court convicted the 1st Appellant on all the counts but sentenced him on one count only; that the evidence did not support the charges; it was not stated whether the weapons were offensive or dangerous; that the serial number of the pistol and number of the identity card were not given; that the names of the complainant is given as Kuya Okoth Gabriel and again as Kuya Otoyi Gabriel and whether personal violence was used.

1st Appellant further submitted that the serial number of the rifle used by PW1 was not given in his evidence and that the number of rounds of ammunition differ as 30 and 8; that without identifying the recovered exhibits as belonging to the complainants the court is not able to believe their evidence; that the intention of the protestors was not to rob or steal; that the date of arrest and appearance in court is indicated as diverse which is not possible; that the trial was unfair in that the record does not indicate to whom the charges were read and in which language; that the 1st Appellant was not given a copy of the police Occurrence Book until at the end of the trial and this infringed on his rights.

The 1st Appellant further submitted that he was not identified as one of the youth who took part in the protests or who robbed the complainants. He submitted that the baton alleged recovered from him was not among the exhibits allegedly stolen form the complainants and none of the police officers claimed to have lost a baton; that there was no identification parade conducted and that the arresting officers did not testify. The 1st Appellant asked this court to allow his appeal, quash the conviction, set the sentence aside and set him free.

2nd Appellant's appeal

The 2nd appellant has stated in his petition of appeal that:

i. The charges are fatally defective.
ii. The trial was unfair.
iii. There was no identification parade carried out to ascertain his identity as one of the robbers.
iv. Description of the robbers was not given during first report to the police.
v. The mode of arrest was poorly done.
vi. The investigations were poorly carried out.

vii. Evidence was contradictory and inconsistent.
viii. The 2nd Appellant was not positively identified.
ix. The ballistic report was not produced as exhibit.
x. The doctor was not called as a witness to produce the P3 Form.

2nd Appellant's submissions

The 2nd Appellant's submissions are similar to those of the 1st Appellant on the issue of the defective charge and contradictions in evidence in regard to the ammunition and failure to cite the serial numbers of the Ceska pistol and the AK 47 rifle. Similarly the 2nd Appellant submitted on his identification as not having been positive. He submitted that there was no witness who testified to having arrested him; that the charge sheet has many contradictions on the date the offence was allegedly committed and when the appellants were taken to court; that there was no ballistic report to prove the rifle was a firearm and ammunition. For these reasons the 2nd Appellant asked this court to allow his appeal, quash the conviction, set aside the sentence and set him free.

3rd Appellant's appeal

The 3rd Appellant through his legal counsel advanced ten grounds of appeal but abandoned ground number eight at the time of hearing of this appeal. By his amended appeal dated 8th July 2014 he raises the following issues:

i. The learned court erred in law and fact by failing to appreciate the dangers of relying on the evidence of a single identifying witness before making the decision to convict.
ii. The prosecution failed to call the officer who conducted the identification parade thereby raising doubts as to whether or not the identification parade was conducted.
iii. The prosecution witnesses failed to give a description of the suspects to the police during the first report as to whether they were able to identify the suspects.
iv. The identification parade form was not produced in court.
v. The prosecution evidence was contradictory.
vi. The trial court failed to consider the 3rd Appellant's alibi defence.
vii. The trial court failed to comply with section 169 of the Criminal Procedure Code.
viii. The trial court shifted the burden of proof to the 3rd Appellant.
ix. The prosecution failed to produce medical evidence to support the allegations of injury to PW1 and PW2.

3rd Appellant's submissions

Ms Njalale made oral submissions during the trial. On grounds 1, 2, 3 and 4 learned counsel submitted that the trial court did not treat the evidence of the single identifying witness with caution as required by law; that conditions were not favourable for positive identification because PW1 had been attacked by youths from opposite sides and was cut on various parts of his body; that in those conditions PW1 could not identify the 3rd Appellant as one of the youths who attacked him. Learned counsel submitted that PW1 did not give the description of the youth who attacked him in his statement which was self-recorded; that PW1 may have seen a bearded youth and mistook him for the 3rd Appellant; that the evidence is not clear as to whether an identification parade was conducted and if it was, the officer who conducted it did not testify to confirm if the parade was conducted according to Police Standing Orders. In support of the submissions on these grounds of appeal, learned counsel relied on **Ogeto vs. Republic Criminal Appeal No. 1 of 2004 (2004) 2 KLR; Vincent Omondi Ombeto 7 Another vs. Republic (2005) eKLR** and **Wamunga vs. Republic Criminal Appeal No. 20 of 1989**.

On ground number 5 learned counsel submitted that PW1, PW2 and PW4 contradicted each other on the recovery of the firearms with PW1 stating that the AK 47 rifle was picked by the 3rd Appellant who was 2nd accused in the lower court and who had a beard while PW4 said he heard that the rifle was returned

by 1st accused in the lower court; that PW4 further said that the Ceska pistol was recovered from one Kunyo who was not an accused in the lower court; that PW5 said 1st accused handed to him the rifle; that the prosecution failed to clarify the contradictions; that the shifting of the burden of proof to the accused where recent possession doctrine is applicable can only be done after the prosecution proves beyond reasonable doubts that the stolen item was found in the possession of the accused; the applicable principles in recent possession as set out in **Arum vs. Republic Kisumu Criminal Appeal No. 85 of 2005 (2006) eKLR** were not met and the doubts must go to the benefit of the 3rd Appellant. Further to the above cited cases, learned counsel relied on the **Wamunga case** above and **Mburu & Another vs. Republic Criminal Appeal No. 329 of 2006.**

Learned counsel submitted under grounds 6 and 7 that the trial court did not consider the 3rd Appellant's defence of alibi. Learned counsel cited the cases of **Haro Guffil Jillo vs. Republic Criminal Appeal No. 240 of 2011 (2014) eKLR** and **Joseph Mwaura vs .Republic Criminal Appeal No. 273 of 2007 (2009) eKLR.**

Learned counsel submitted that the trial court shifted the burden of proof to the 3rd Appellant by stating words to the effect that it was an issue between the accused persons how the rifle moved from the 2nd accused (3rd Appellant) to 1st accused (2nd Appellant); that the P3 Forms in respect to PW1 and PW2 were not produced and as a result all these failures by the prosecution, the charges were not proved beyond reasonable doubt. Learned counsel asked the court to allow the appeal, quash the conviction and set the sentence aside and set the 3rd Appellant free.

Respondent's Submissions

Learned state counsel Mr. Collins Orwa for the respondent opposed the three appeals. He submitted that under section 143 of the Evidence Act no particular number of witnesses can be summoned to testify and the prosecution summoned the witnesses it felt were relevant to proof the facts; that proof of any of the ingredients of robbery with violence is sufficient to found a conviction on; that there are no contradictions in evidence and if any exist they do not go the root of this case; that the lower court record is clear why some exhibits were not produced in court; that all the three appellants were positively identified by the witnesses; that they participated in the protests and were seen for two days by PW1 and PW2 and that they did not give a reasonable account as to why they had the weapons.

Learned state counsel submitted that there was no identification parade conducted so there was no need to call a witness on that issue; that the three appellants were identified by witnesses as having been at the riots and this evidence has not been controverted; that evidence on the identification of the 3rd Appellant is not that of a single witness; that the evidence is clear on who among the three appellants was found with which weapon and the doctrine of recent possession was properly applied; that the trial magistrate considered the defence of the 3rd Appellant and found that it did not rebut that of the prosecution. Learned state counsel submitted that the trial magistrate did not shift the burden of proof and that the ingredients of section 296 (2) Penal Code have been proved. Learned state counsel asked the court to dismiss the appeals for want of merit.

Determination

We are alive to the duty placed on us to critically re-evaluate, re-examine and re-analyze all the evidence on record with a view to arriving at our own independent findings. We caution ourselves that we did not benefit from observing the witnesses as they testified and therefore we are limited in that respect. We have read all the petitions of appeal and submissions of each appellant carefully. We have noted common issues to all the appellants. We have consolidated the issues arising from all the appeals as follows:

a. Defective charges.
b. Identification of each of the appellants.
c. Contradicting and inconsistent evidence.
d. Omission to summon some key witnesses.

e. Mode of arrest.
f. Poor or lack of investigations.
g. Failure to consider alibi defences.
h. Failure to comply with section 169 of the Criminal Procedure Code.
i. Shifting of the burden of proof.
j. Unfair trial.
k. Insufficient evidence to proof case beyond reasonable doubts.

We intend to consider each of these issues at it relates to each appellant.

On defective charges, we have scrutinized all the charges the appellants are facing. The offence of robbery with violence is created under section 296 (2) of the Penal Code. This section provides thus:

"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."

The offence of arson is created by section 332 of the Penal Code. Section 332 (b) of the Penal Code which is the relevant section in this case provides that: **"Any person who willfully and unlawfully sets fire to (b) any vessel, whether completed or not is guilty of a felony and is liable to imprisonment for life."**

Taking part in a riot is a misdemeanour under section 80 of the Penal Code and the section simply provides that **"Any person who takes part in a riot is guilty of a misdemeanour."**

In our view all the charges are properly drawn and comply with the provisions of sections 134 and 137 (a) of the Criminal Procedure Code. The charges specify the statement of the specific offence(s) and give such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. The charges also give reference to the section of the law creating the offence and all essential elements are stated. The particulars of each offence are given. We have found nothing wrong in charging the appellants with several offences in one charge sheet. Each offence is distinct from the other. We shall address the issue of sentencing later in the course of this judgement to address the issue raised that the trial magistrate sentenced in one charge and left the rest despite convicting the appellants in all the counts.

On the issue of identification of the appellants, we note that among the witnesses who testified for the prosecution it is only PW1 and PW2 who were at the scene. PW1 testified without mentioning any appellant until towards the end of his testimony where he told the court that he identified 2nd and 3rd appellants (1st and 2nd accused persons). PW2 said he identified the 3rd Appellant because of his long beards. He however said that at the time of the hearing of the case the 3rd Appellant had reduced his beards. He said it is the 3rd Appellant who took his rifle. He said he saw the 2nd Appellant at the scene of the protests on 12th July 2011. Strangely when PW1 was cross examined by the 3rd Appellant he did not tell him he was the one who took the rifle. He kept on stating that the 2nd accused person (3rd Appellant) took the rifle as though he was another person other than the person cross examining him.

We have noted the evidence of PW1 in chief. He testified that he had been hit with a stone on his forehead and fell down; that on standing up he was hit with another stone on his back; that at one stage he decided to run but met another group of youths from Garissa direction. He continued in evidence:

"They attacked me and cut me severally on the hands, head. After I was cut on the right hand the AK 47 I was holding serial number 793861 fell down. They ordered me to kneel down. I refused. I was bleeding profusely. One lady came and started pleading with them to spare my life. One of the youths grabbed my gun which had fallen down….."

PW2 testified as follows in respect to identification of the persons who attacked him:

"I was hit with many crude weapons. I was finally hit with a stone and I do not know what happened thereafter. During the incident I lost a Ceska pistol with 15 rounds of ammunition…….. The accused persons before the court were amongst the people I talked to before I met Mr. Okello. They are the same people who might have taken the items I have spoken of."

On cross examination PW2 said that he was talking to the multitude of people who were at the riots and that accused 2 (3rd Appellant) was among the people.

We have examined this evidence carefully in light of various decided authorities including **R. vs. Turnbull & Others, (1973)3 ALL ER 549** on the issue of identification. We are of the view that under the circumstances described by the two witnesses it was not possible to identify who took the firearms. We have also noted the contradicting evidence of PW1 that he attended an identification parade. Learned state counsel for the respondent submitted that the police did not conduct any identification parade. This settles this matter that no identification parade was conducted. We noted learned counsel for the 3rd Appellant spent considerable energy submitting on the issue of identification parade and failure to summon the officer who conducted the parade as a witness and failure to produce the report in evidence. We now know that we need not take more time on this issue.

It is our further observation that PW1 and PW2 did not describe the attackers to the police during their first report. PW1 did not mention any description of the attackers in his self-recorded statement, see **Vincent Omondi case** above on the issue of giving description of the attackers in the first report to the police.

We have considered other evidence that tend to connect the appellants with the offences. On 12th July 2011 around 5.00pm Harun Kunyo Lalafa, PW4, received information that an AK 47 rifle had been taken towards Maramtu. The 2nd Appellant was implicated and PW4 with others visited his home. They did not find him. PW4 later learned that the 2nd Appellant has returned the rifle. PW4 further testified that he received information from an informer that the Ceska pistol had been with one Kunyo and that the said Kunyo was not arrested due to an amnesty that those who returned the stolen items would not be arrested.

Further to this evidence, Hussein Dado, PW5, on 12th July 2011 elders and the assistant chief looked for the 2nd Appellant in connection with the rifle but failed to trace him; that in the evening of that day the 2nd Appellant approached the village with the firearm but because of presence of many people he did not return the gun; that PW5 and one Baakar followed the 2nd Appellant to the bush where the 2nd Appellant handed over the weapon to PW5 who handed the rifle to the assistant chief.

We have noted that the 2nd Appellant claimed in his defence that there was a grudge with PW5 over a piece of land. PW5 denied during cross examination that any grudge existed. The 2nd Appellant gave an alibi defence that he was away. We are alive to the legal principal that in advancing an alibi defence an accused person does not assume the burden of proof. The prosecution had to rebut the evidence by the 2nd Appellant. We have noted that this defence was given at the time of the hearing and the prosecution had not been given notice. We shall therefore consider this defence against the evidence by the prosecution. We find that we have no doubt in our minds that the 2nd Appellant returned the rifle to PW5. This was on 12th July 2011 the evening of the same day the rifle went missing.

Applying the **Arum case**, we are satisfied that the principles in this case are applicable here as shown in this quotation below:

"In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; 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" (emphasis added).

We are satisfied by the evidence of PW4 and PW5 that the rifle was found in possession of the 2nd Appellant (1st Accused). This was the same day the rifle was picked from where it had fallen after PW1 was injured. This in our view leaves no doubt in our mind that the 2nd Appellant is the one who took the rifle and instead of handing it to the police or area Chief he took it with him and hid it. The doctrine of recent possession is properly applicable.

On the issue of contradicting evidence, we have noted that the appellants appeared in court charged in different files. There was Criminal Cases No. 1360 of 2011; 1366 of 2011 and 1562 of 2011. Criminal Case No 1360 of 2011 came up first but was consolidated with the other files on 26th October 2011. This in our view could explain the charge sheet indicates the date to court as 26th October 2011.

We have considered the issue of contradictions and find that PW1 contradicted himself on whether the identification parade was conducted. At one time he said it was then again it was not conducted. PC Bedford Muriuki, PW7, contradicted the evidence of PW4 by stating that the Ceska pistol was recovered from the 3rd Appellant (2nd accused) when PW4 said that the pistol was recovered from one Kunyo who was not arrested. These contradictions create doubts as to the involvement of the appellants in the commission of the offences but do not in our view negatively affect the evidence that the 2nd Appellant was found in possession of the AK 47 rifle.

We wish to consider the issues in respect to omission to summon key witnesses, failure to produce identification parade form, mode of arrest and poor investigations together. To our understanding the key witnesses referred to here are the doctor(s) who treated PW1 and PW2 and the officer who conducted the identification parade. We have been told that the parade was not conducted and obviously there was no witness to call on this issue together with the issue of producing the parade form as exhibit. However, it is true the investigations, if any, were poorly conducted. We are aware that the some of the exhibits were burned up during the fire at the Garissa Police Station but that aside, there is no evidence that investigations were carried out. If they were carried out at all, this was shabbily done. For instance while the 1st Appellant (3rd accused person) was arrested by PW6 and handed over to the police, there is no evidence to show how the 2nd and 3rd Appellants were arrested. Evidence of PW5 shows that the 2nd Appellant surrendered the rifle to him but there is no evidence to show who and how he was arrested. PW7 said the 2nd Appellant was arrested by the chief. Neither PW4 nor PW6 mentioned arresting the 2nd Appellant. It true therefore that the mode of arrest was not stated. We however find that the appellants must have been arrested and handed over to the police for them to be charged with this offence and brought to court.

We wish to consider failure to comply with section 169 CPC, failure to consider alibi defence and shifting burden of proof together. Section 169 CPC is in respect of the contents of a judgement. We have carefully read the judgement of the lower court and we find that it complied with this section. We also make a finding that the trial magistrate considered the defences of the appellants but did not analyze them or the legal principles on the defence of alibi. On shifting of the burden of proof, we have noted that the trial magistrate stated as follows:

“Accused 2 had taken the rifle from the complainant (PW1) but during recovery it was accused 1 who returned it. How it changed hands only the two can tell but the upshot is that these charges have been proved beyond reasonable doubt against each of the three accused persons …….”

We agree with the appellants that this statement seems to suggest that it is the appellants to prove how the rifle changed hands. We fault the trial magistrate for making that finding. The correct position is that it is the prosecution who bears the burden to prove a fact. Even where the burden of proof shifts to an accused person for instance in cases like alibi defence the prosecution must prove that the accused was not at the place where he claims to have been.

On our part we have considered all the evidence and the defences of the appellants. The 2nd appellant said he travelled to repair a vehicle on 9th. He does not state it was 9th of which month. He stated that he

returned from Masalani to Garissa on 13th. He produced a receipt to show he travelled on 13th. Again he did not state it was 13th of which month. Even if we are to assume it is true that the 2nd Appellant was not in Madogo from 9th to 13th July 2011 there is evidence of PW4 and PW5, especially PW5 who stated that the 2nd appellant handed him the rifle on 12th July 2011 in the evening. We are not able to believe his defence.

The 3rd Appellant said he was at Garissa Law Courts on 12th July 2011 but he said he was arrested on leaving the court room. We have taken judicial notice that Garissa Law Courts and Madogo are about 5 kilometres apart and one can easily walk to each destination in a short time.

The 1st Appellant said he was working in Garissa Town on 12th July 2011 but was told by his boss to go home to Mororo due to the riots there. He said he travelled to Mororo and was later arrested by the assistant chief. Again this court takes judicial notice that Mororo is just across the bridge from Garissa Town.

We found nothing to show that the appellants were not accorded a fair trial. The record of the court shows each was charged in a different file and each appeared in court to take separate plea on different dates. The record shows that on 26th October the files were consolidated and the consolidated charge read over to the appellants. The language of the court is Kiswahili and this is the language the appellants have been using throughout the trial in both lower and this court. We however agree with the 1st Appellant that he sought to be served with a copy of the Occurrence Book from Garissa Police Station on several occasions without success. The trial court did not seem to give that application attention. Had it done so, it would have made a follow up to ensure the order was implemented.

We have not found any evidence regarding the police baton allegedly recovered from the 1st Appellant. While we do not doubt the evidence of Pauline Wanzi Mutua, PW3, that the 1st Appellant hit her with a police baton on 12th July 2011, there is not police officer who testified to having lost it. PW1 and PW2 did not mention this item as being one of the items stolen from them.

As stated in this judgement, we have given all the evidence careful consideration. While we find that the trial magistrate applied the legal principles on recent possession and proof of any of the ingredients of robbery with violence properly, we fault her for finding there was sufficient evidence to prove that all the appellants were properly identified at the scene of the robbery. The evidence touching on their identification is shaky and unsafe to rely on in conviction. Although it was submitted by 1st and 2nd Appellants that the intention of the rioters was not to commit robbery, it is our finding that there are several charges including taking part in a riot and arson.

We find that the evidence as analyzed does not prove beyond reasonable doubt that the 1st and 3rd Appellants were identified at the scene of the robbery. In view, it is our finding that it would be unsafe to convict them with any of the four charges they are facing. We fault the trial magistrate for making blanket findings that the charges were proved against all the appellants. The conviction against the 1st and 3rd appellants in each count is hereby quashed and the death sentence set aside.

In respect of the 2nd Appellant, we have invoked the doctrine of recent possession as expounded in the **Arum case** and are convinced that he is guilty not only of the 2nd charge of robbery with violence but also of taking part in a riot. For him to possess the rifle the same day it was robbed of PW1 he must have been at the riots. It is our finding that the 2nd appellant was at the scene of the robbery where the 2nd Complainant lost the AK 47 rifle and must therefore have participated in the riots that resulted in the robbery. We find no evidence connecting the 2nd Appellant with the robbery in the first count and arson. Consequently, the 2nd appellant's appeal is hereby dismissed of counts 2 and 4. We however allow the 2nd appellant's appeal in respect of counts 1 and 3. We proceed to quash the conviction in respect of counts 1 and 3 respectively.

Dated and signed this 11th day of September 2014.

F.N.MUCHEMI **S.N.MUTUKU**

JUDGE **JUDGE**

Delivered this 18th day of September 2014

By Justice Stella Mutuku