



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO 112 OF 2019

JOSEPH NJOROGE NDICHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. C. Oluoch Chief Magistrate dated 1st July, 2019 in Mavoko Chief Magistrate's Court Criminal Case Number 629 of 2016)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

MICHANAL IMBAI alias "ANESCO"1ST ACCUSED

JOSEPH NJOROGE NDICHU.....2ND ACCUSED

VINCENT ODHIAMBO ALIAS "VINI"3RD ACCUSED

JUDGEMENT

1. Michanal Imbai alias Anesco, Joseph Njoroge Ndichu (the appellant herein) and **Vincent Odhambo Alias Vini** (hereinafter referred to as "the accused") were charged before the Chief Magistrate, Mavoko in CM's Court Criminal Case No. 629 of 2016 charged with four counts of robbery with violence contrary to section 296(2) of the *Penal Code*. Particulars in count I were that on the night of 14th and 15th April 2016 at Syokimau Estate in Athi River Sub County, Machakos County, jointly with others not before court, while armed with offensive weapons namely pistols robbed **Henry Raballa** of cash Kshs. 8, 000, certificate of appointment, one Co-operative Bank ATM card, NHIF card, two mobile phones; Blackberry valued at Kshs. 70, 000 and Nokia valued at Kshs. 2, 000, cash Kshs. 9, 000, laptop model Lenovo valued at Kshs. 70, 000 all valued at Kshs. 159, 000 and at the time of such robbery used actual violence against **Henry Raballa**.

2. Particulars in count II were that on the night of 14th and 15th April 2016 at Syokimau Estate in Athi River Sub County, Machakos County, jointly with others not before court, while armed with offensive weapons namely pistols robbed **Ruth Njeri Muiruri** of three mobile phones namely Nokia Lumia 1320, Samsung Duos, ITEL 1409, cash Kshs. 450 and a handbag valued at Kshs, 15, 000 and at the time of such robbery threatened to use actual violence against **Ruth Njeri Muiruri**.

3. Particulars in count III were that on the night of 14th and 15th April 2016 at Syokimau Estate in Athi River Sub County, Machakos County, jointly with others not before court, while armed with offensive weapons namely pistols robbed **Jackline Amira** of three mobile phones namely Sony Experia, HTC M8 and a wrist watch make Titan worth Kshs. 35, 000, cash Kshs. 9, 000 and one handbag and at the time of such robbery threatened to use actual violence against **Jackline Amira**.

4. Particulars in count IV were that on the night of 14th and 15th April 2016 at Syokimau Estate in Athi River Sub County, Machakos County, jointly with others not before court, while armed with offensive weapons namely pistols robbed **Muchai Morris Ndegwa** of a mobile phone namely ITEL 1407 valued at Kshs. 6, 000 and at the time of such robbery threatened to use actual violence against **Muchai Morris Ndegwa**.
5. They faced an alternative charge of handling stolen goods contrary to section 322 (1) (2) of the **Penal Code**. The particulars were that on the night of 14th and 15th April 2016 at Syokimau Estate in Athi River Sub-county within Machakos County otherwise than in the course of stealing, dishonestly retained one mobile phone make Nokia IMEI 355104/07/070614/9, 355104/07/070615/6 knowing or having reason to believe to be stolen property.
6. In count V they were charged with being in possession of a firearm without a firearm certificate contrary to section 4(1) as read with section 4(2) (a) and 4(3)(a) of the **Firearm Act**. The particulars were that on the night of 6th and 7th August 2016 at Kabiria in Kawangware within Nairobi County, they were found in possession of a firearm make Ceska Serial Number 14B62786 without a firearm certificate.
7. In count VI they were charged with being in possession of ammunition without a firearm certificate contrary to section 4(1) as read with section 4(2)(a) and 4(3)(a) of the **Firearm Act**. Particulars were that on the night of 6th and 7th August 2016 at Kabiria in Kawangware within Nairobi County, they were found in possession of eleven rounds of ammunition without a firearm certificate.
8. After the hearing, the 1st and 2nd accused persons were convicted in the four counts of robbery with violence while the 3rd accused was acquitted thereof. The 1st accused was also convicted in counts five and six while the other accused persons were acquitted therefrom.
9. In support of its case, the prosecution called a total of 8 witnesses.
10. According to PW1, **Jackline Amira Osiema**, on 14th April, 2016 at around 8pm she was in their house in Syokimau when she received a call from her husband, **Henry Raballa**, PW2 herein, who asked her to open the gate for him and she did so. As she was in the process of closing the gate she was kicked by a young man and fell down. While down she saw four of the attackers surrounding PW2's vehicle while one of the attackers remained guarding her where she was lying face down and another one went round the house. At one point she lifted her eyes and saw another person manning the gate. At one point she was ordered to stand up and realised that the person guarding her had a gun. According to her the compound was small and electric lights were on and the attackers had not covered their eyes so she could see them. After removing PW2 from the vehicle, the said attackers searched him.
11. When a neighbour, one **Lucas** heard the commotion and came out to find out what was happening he was similarly apprehended. After PW1 was ordered to stand up she was taken to the house by the person who was guarding her while PW2 and the said Lucas were taken to the back of the house. Inside the house PW1 was taken to the bedroom where her children and those of her brother were. Although PW1 was ordered to lie down she kept on lifting her head to check on the children and saw the attackers ransacking the house in the process of which they took two phones, a watch and Kshs 9,000/- from her wallet. According to her one of the attackers remained at the gate, one was along the corridor while two were guarding them in the bedroom and two others ransacked the house. It was her evidence that the electric lights were brightly on the bedroom and she could see everything since the attackers were talking to them as they asked for the properties. It was her evidence that the attackers took less than 10 minutes in the room after which they left with the said neighbour, **Lucas**, to his adjoining house where they were for about 3 minutes before leaving.
12. It was PW1's evidence that two of the attackers were armed with pistols and one of them was in the room. After the attackers left, PW2 called the police using the house help's phone and the following day they reported the incident. It was her evidence that though she was kicked in the stomach, since she did not sustain serious injuries she did not go for treatment. She was able to identify one of the attackers who according to her was the ring leader by appearance and that according to her was the 1st accused. On 12th August, 2016 at Muthaiga Police Station, she identified the 1st accused and the appellant herein at an identification parade by touching them. It was her evidence that it was the appellant who was shifting the stolen items in the bag. She had however not seen them before the date of the attack.
13. In cross-examination, PW1 conceded that she was not asked and did not give the description of the attackers in her statement. It was her evidence that after she was kicked at the gate, she fell down on her back and turned to lie on her stomach upon being ordered to do so. She stated that PW2's windows were down as he had rolled them down to greet her. She stated that five of the attackers forced them into the house where there were electric lights in all the rooms.
14. On his part, PW2 testified that on 14th April, 2016 at about 8.30pm he reached his gate at Syokimau from and called his wife, PW1 to open the gate for him. After the gate was opened he drove in and then heard a loud bang at the gate. When he checked behind he saw PW1 lying down and saw about six men, two of whom were armed with pistols. Five of them approached him and whisked me out of the car. After ransacking his coat and car, they took away his black berry phone valued at Kshs. 70,000/-, Nokia phone worth Kshs. 2,000, wallet containing an Id card, Co-Op. Bank ATM Card, certificate of appointment, NHIF Card and medical card. It was his testimony that from the gate he was about 5-7m when he heard the bang and that the compound was well lit by electricity lights. Though he was inside the car, window was rolled down and he saw PW1 lying down and six men. The one who was with PW1 at the gate while lying down was armed while out of the five who approached him one was armed. Two of them ransacked him while Two others were ransacking the car.
15. It was his evidence that one of the attackers pointed a gun at him and that they all engaged him asking whether he had a gun. they asked if I had a gun, a phone and money. It was his evidence that one who had a gun (the 1st accused) was acting like a commander and that the altercation between him and the attackers took about five minutes before the 1st accused commanded the other one to bring PW1 and ordered them to take them to the house. As they started going into the house, one of the neighbours, **Lucas**, came out from his house and the 1st accused and one of the two armed went for him. The "commander" and another one went for him, brought him and they were commanded to go to the house. The 1st accused directed the other gun wielding person to go to the gate, while two men were each with PW2 and Lucas while one remained with PW1.

16. In the house, the 1st accused ordered PW2 to go to the bedroom followed by his children while his house help went to her bedroom. In the bedroom, they were ordered to lie down with the 1st accused pointing a gun at them and threatening to shoot. However, PW2 who was facing upwards was engaged by the 1st accused who was demanding for money and took Kshs. 8,000/- from his wallet while the 3rd accused took his Lenovo laptop. The appellant took PW1's travelling bag in which they placed a watch, HTC Phone, Sony X-Peria phone among other things. During this time, PW2 was now sitting down and could see everything they were doing as the electric lights in the bedroom were on. It was his evidence that the incident in the bedroom lasted for about 15 minutes. During the altercation, the 1st accused removed a cartridge and threatened to shoot him while kicking him in the eye twice. After that the 1st accused ordered his team to leave together with the said **Lucas**. After they left, PW2 using her house help's phone reported the matter to the police and after 20 minutes police officers from Mlolongo Police Station arrived. On 15th April, 2016, PW2 went for treatment at Mater Hospital and proceeded thereafter to Mlolongo Police Station where he recorded his statement.

17. According to PW2, on 12th August, 2016, he was called to attend identification parade at Muthaiga Police Station where he identified all the three accused persons as some of the attackers and also identified the Nokia phone stolen from him. He also identified that gun that the 1st accused had. He however disclosed that he did not know the attackers before the date of the attack but marked their faces at the scene through electricity lights all over since they had not covered their faces.

18. In cross-examination he however admitted that he did not give the description of the attackers in his statement to the police. And that he was in a state of shock at the time. Through the electricity lights, he was however able to see the 5 attackers approaching his car as the windows were down. He also stated that the person who remained with PW1 at the gate was not before the court.

19. According to PW3, **P.C. Naftali Makoli**, on 3rd July, 2016 he was assigned the duty of arresting the suspects. They were two teams led by **Cpl. Neli** and **Cpl. Evans**. They proceeded to CID Headquarters to join and reinforce another team following up suspects for a case of robbery with violence. Their investigations led them to Dandora area where they laid an ambush until about 9.00p.m. Based on the leads they had been given, they arrested the appellant and the 3rd accused. in Dandora. The two were in communication with the main suspect, the 1st accused whom they were waiting for to join them in Dandora at a house of a female friend. They were however intercepted them before they entered the house and were ordered to put their phone on loud speaker. The two then directed the 1st accused to where they were and upon his arrival, the 1st accused was arrested while he was walking along the road while the other two suspects were in the police vehicle after he was described by the said two suspects. Upon sighting the two suspects in the police vehicle, the 1st accused exclaimed: "*Silver team tumekwisha*" (Silver team we are finished). After interrogating them, the three led them to Kawangware to look for guns and the 1st accused directed them to a house in Kabiria, Kawangware which he disclosed belonged to his mother. On approaching the house the 1st accused started screaming "*Mama, Mama niokoe*" and the mother came with the sister. After explaining their mission, the 1st accused informed them that there was a gun in a bag at the side of the bed and in one of the guns they found a silver gun and at the outer part at the side, was removed a Nokia Phone. In his evidence, PW3 stated that he realized that Silver team meant the Silver gun that was recovered. The gun had a magazine loaded with 4 rounds of ammunition and there was also an empty magazine. He identified all the recovered items in court.

20. After that they proceeded to Muthaiga Police Station where they booked the suspects.

21. In answer to the questions put to him by the appellant, PW3 declined to reveal the source of the information that led to the arrest. He stated that they did not find anything in possession of the appellant at the time of arrest. He stated that it was not the appellant who took them to Kawangware and the appellant was not the owner of the house where the gun was found.

22. The identification parade was conducted by PW4, IP **Alphonse Kimemia**, attached to Kariobangi Police Station who by then was the officer in charge crime Muthaiga Police Station. According to him on 10th August, 2016, the investigating officer **Corporal Daniel Aika** from CID Headquarters approached him and asked him to conduct an identification parade on three suspects who were being held at Muthaiga Police Station for an offence of robbery with violence and he was given the names of the suspects. He went to the cells and called them and informed them of his intention to conduct an identification parade. He told them there were witnesses who were to try and identify them and informed them that they had a right to call an advocate or friend to be present during the parade. The suspects asked for time to think over it. The following day, 11th August, 2016 at 2.00p.m. he left them again and notified the investigating officer to arrange for the witnesses to come. On 12th August, 2016 he went to the cells at 2.00p.m. and they asked for time to see if their friends would come. After 2.00p.m., they told PW4 they were ready because their friends had taken long to come. At 3.00p.m. PW4 told the investigating officer to prepare the identification parade witnesses who were at CID headquarters and he stated the parade at 4.00p.m.

23. It was his evidence that the parade was conducted at an enclosed place away from unauthorized people within Muthaiga police station. He took eight male people of nearly similar complexion and height as the suspects and recorded their names and addresses. He informed told the suspects they were free to take any position in the parade. He started with the 1st accused who told him that he had no friend. He had two witnesses, **Jackline Amira** and **Henry Raballa**. The 1st accused stood between number 5 and 6 and was identified by **Jackline Amira**. In the second parade, he stood between number 6 and 7. He was identified by **Henry Okoth Raballa**. Both identified the 1st accused by touching the shoulders. When asked if he had any comments, the 1st accused stated he had none and signed to confirm he was satisfied with the parade and he had no complaints with the way it was conducted. There were eight members of the parade which started at 4.00p.m. and ended at 4.21p.m. it took 20 minutes. He also signed the form which he identified.

24. In the second parade was the 3rd accused. The said parade started at 4.30 p.m. and ended at 4.45p.m. after the 3rd accused consented to taking part in the parade and signed to confirm he did not need a friend or lawyer to witness the parade. Members of the parade were nine witnesses and to identify them were **Jackline Amira** and **Henry Raballa**. The suspect stood between number 4 and 5. **Jackline** could not identify him but he was identified by **Henry Raballa** by touching when he was between number 2 and 3. The suspect signed the form to confirm he was satisfied with the parade and he had no complaints.

25. Third parade was for the appellant, **Joseph Njoroge Ndichu** who also consented to appear in the parade and confirmed that he did not

require a friend or lawyer to be present. PW4 looked for eight members and stood between number 5 and 6 where he was identified by **Jackline Amira**. He was also identified by **Henry Raballa** while standing between number 5 and 6. He was identified by **Jackline Amira** by touching the shoulders. He signed to confirm he was satisfied with the manner in which the parade was conducted. According to PW4, the parade was done at an enclosed area and there was no possibility that they met and the witnesses could not see the suspects before the parade. PW4 produced the parade forms as exhibits.

26. PW5, **Johnstone Musyoki Mwangela**, was the firearm's examiner who exhibited the ballistic on behalf of CIP Charles.

27. PW6, **Ruth Njeri Muiruri**, testified that she was staying in Syokimau with her family and brother **Morris Ndegwa**. On 14th April, 2016 at about 8.00p.m., she was from P.C.E.A. Syokimau when she called her brother **Ndegwa** to open the gate. She was driving KBM 825J Toyota IST. However, before she could park, she heard her said brother screaming and saw him running being followed by somebody. Two boys entered the compound and went directly to her side of the vehicle and hit the widow using their hands and ordered her to open. The one who had chased my brother returned and hit the window using a gun after following her brother to the house. PW6 Opened the door and alighted and knelt down and the one with a gun ordered her to give them all she had. The other two ransacked the vehicle for valuables and opened the boot after she told them her items were in the car. They took a Nokia, Lumia 1320 Kshs. 40,000/-and hand bag valued at Kshs. 15,000. After that they exited the compound with the two unarmed ones leaving first. However, gun wielding man remained behind ordering PW6 not to shout lest she be shot. According to PW6 both the security lights in the compound and the vehicle lights were also on and the incident took between 15-20 minutes while she lay down on the floor. When she stood up, they had left. During the time when her brother was running, he dropped his phone which the suspect running after him picked. When he got into the house he locked it. It was her evidence that the one with a gun had a red jumper and was of medium height. The other two were of his age. One was slightly tall and bigger in physique. Neighbours as well as the police went to the scene and she was advised me to report to Mlolongo Police Station in the morning which she did and recorded her statement. Later she was informed that some suspects had been arrested but since she was out of the country she did not go to the police station and never took part in any identification parade.

28. According to PW6, it was the 1st accused who had a gun and she could identify him by his height. She was however unable to identify the other two accused persons and she did not know them before the incident.

29. PW7, **Morris Muchai Ndegwa**, corroborated the evidence of PW6. He was however unable to identify any of the suspects in court and was not asked to identify any of the suspects.

30. PW8, **Sergeant Daniel Ntabo Aika**, was the investing officer in the case. According to him, there were rampant robberies from May to June 2016 in Ruai, Rongai, Dandora, Syokimau and Kitengela and his boss felt it wise for them to go for the file from Mlolongo. He testified that there was a planned robbery on 30th June, 2016 within Kasarani and the officers therein acted fast leading to a shoot-out between the robbers and police. They were informed of those who had and were tasked with investigating the matter. He applied to Safaricom to get owners of some numbers and discovered that the IMEI being used had some connections. They got information that the suspects moved to Kabiria in Kawangware then Nkubu in Meru. Accordingly, he moved to Nkubu and upon arrival at Nkubu, the suspect moved to Nairobi on 1/7/16. They received information that they were planning another robbery in Nairobi from informers and with assistance of officers from special crime unit an ambush was laid at Dandora the night of 3/7/16 between 8.00p.m. and 9.00. The 3rd accused arrived came in first and he was arrested. The appellant was next and was similarly arrested and the 1st accused was arrested last. According to him, the suspects were going to meet at a club outside a residential house. Upon their interrogation in the vehicle, the 1st accused confessed that "*silver squad imeisha*" and they established that the robbers had a group using a silver coated firearm, hence the name. The 1st accused then led the special crime officers to Kabiria where upon a search, a firearm was recovered. He produced the exhibits.

31. In cross-examination by the appellant, PW8 stated that he tracked the appellant through a phone though it was not the appellant's. It was his testimony that the appellant assisted the 1st accused to escape from Kabiria and that the appellant was a new recruit though he used to attend all the meetings of the gang. The appellant also assisted the 1st accused to go to your friend, a member of the gang in Meru.

32. Upon being placed on their defence, the appellant testified that he was staying in Dandora with his parents while training as a mechanic and was selling spares in town by his uncle. On 6th August, 2016, he woke up in the morning and went to his place of work where he stayed with his uncle until 6.00 p.m. and returned to Dandora reaching there at about 8.00p.m. At Total area in Dandora where his uncle's wife was selling cereals, his uncle told him to take his car to a car wash about 100m away. On reaching the car wash, he left the car and went to where there was a Toyota Rav4 and leaned on it as he browsed his phone. People came out of the car and asked me why he was leaning on a police vehicle and his plea of innocence fell on a deaf ear. They sought for his identification and when he told them that he did not have any as he had dropped out of school in June 2016 they drove around with him. In the vehicle he found three suspects and on 7/8/16 at around 3.00p.m. they were taken to Muthaiga Police Station.

33. At about 6.00p.m., the OCS ordered all inmates out of the cell and called out names from a register. He saw those who had arrested him and other people he could not identify. He was taken to the crime office for finger print. On 8/8/16, he was released from the cell with other suspects and brought to court. On the way, the investigating officer demanded a bribe of Kshs. 100,000/- to secure his release but since he was unable to raise it, he was arraigned alongside the people he did not know. Police asked for 14 days and he was taken back to the police station while one person had been released. On 12/8/16, he was called by **IP Alphonse** and PW1 identified him. In the second parade, he saw PW2 whom he had seen on 7/8/16 during the roll call. On 22/8/16 he was brought back to court for plea.

34. In cross-examination he stated that he took part at an identification parade and though he had seen only seen PW2 before the parade, he did not know PW1 before the parade.

35. In her judgement, the learned trial magistrate found based on Section 214 (2) of the **Criminal Procedure Code** that contradictions on time or date of commission of an offence is not material. She also relied on the case of **Imanyara vs. Republic [1985] eKLR** and concluded that the discrepancy on date of arrest in the evidence of PW3 and PW8 is inconsequential and cannot affect the credibility of the entire prosecution case. More so because the accused confirmed that they were arrested the night of 6th and 7th August 2016, as indicated in the

charge sheet.

36. As regards the dock identification of the appellant by PW1, the learned trial magistrate relied on **Gabriel Kamau Njoroge v Republic (1982-1988) 1 KAR 1134** and discounted the same. As regards the evidence of identification in the parade, the learned trial magistrate pointed that the accused persons signed the parade forms without any indication that they had any reservations in the manner in which PW4 carried it out. PW4 said he started engaging the suspects on 10th August 2016 with a view of explaining their rights and seeking their consent to take part in the parade. He said he accorded them sufficient time and facilities to call their friends and family members, a fact the accused persons did not challenge on cross-examination. If indeed PW2 had seen them before the parade, as they alleged, nothing would have stopped them from raising the issue at the time of signing the forms. Further, they only claimed that PW2 and not PW1 had seen them. PW1 still identified two of them when there was no allegation that she had seen them. Regarding members of the parade, the learned trial magistrate compared the members of the first parade concerning the 1st accused, second parade for the 3rd accused and 3rd parade for the 2nd accused and found that there were in total thirteen members in the three parades, each comprising nine people including the suspects. Members number 2, 5, 7 and 8 for the 1st accused's parade did not take part in the 2nd accused's parade. Member number 5, 6, 7 and 8 in the 1st accused's parade did not take part in the 3rd accused's parade. It is therefore not correct to say that parade members were the same for all the accused persons. She therefore found no fault with the parade on the ground of use of same members, in the circumstances.

37. While finding that it was undisputed identification happened close to four months after the incident when naturally, memories fade with time, the learned trial magistrate held the view that each case must be considered on its own peculiar facts and in this case, there was no indication that PW1 and PW2 had any difficulties in identifying the 1st and 2nd accused persons at the parade though she had some doubts about the 3rd accused whose identification was by a single witness with no other cogent corroborating circumstances. She found that PW1 said robbery incident in the bedroom took about ten minutes. PW2 estimated it to be about fifteen minutes and said he engaged them in conversations as they asked for property. The witnesses said the attackers had not covered their faces and bright electricity lights were on. They distinguished the role played by each suspect. That is the 1st accused armed, standing at the door and appearing to be commanding the others. They said the 2nd accused was stuffing stolen items to a bag during the robbery. On that basis, they said they formed a good impression of their physical appearances and could remember them during the parade. She relied on the holding in **Robert Muriithi & 2 others vs. Republic [2006] eKLR**.

38. Based on the foregoing, the learned trial magistrate found based on the evidence that conducting the parade four months after the incident does not therefore render it worthless.

39. As regards the failure to give detailed descriptions of the suspects in statements, she relied on **Nathan Kamau Mugwe vs. Republic [2009] eKLR** and **John Mwangi Kamau vs. Republic [2014] eKLR**.

40. Based on the foregoing and her observations regarding the identification parade was above board, the learned trial magistrate had no reason to fault identification of the 1st and 2nd accused persons and was satisfied they acted in concert with others not before court to execute the robberies that took place on 14th and 15th April 2016 in which PW1, PW2, PW6 and PW7 were victims.

41. The learned trial magistrate therefore found that the prosecution proved Count I, II, III and IV against the 1st and 2nd accused beyond reasonable doubt and convicted them for robbery with violence contrary to section 296(2) of the ***Penal Code*** while acquitting the 3rd accused in the four counts under section 215 of the ***Criminal Procedure Code***. She also convicted the 1st accused for being in possession of a firearm without a firearm certificate contrary to section 4(1) as read with 4 (2) (a) and 4 (3) (a) of the ***Firearms Act*** in Count V and acquitted the 2nd and 3rd accused of this count under section 215 of the ***Criminal Procedure Code***. She also convicted the 1st accused in Count VI for possession of ammunition without a firearm certificate under section 4(1) as read with 4(2) (a) and 4(3) (a) of the ***Firearms Act***.

42. After considering the mitigation, the victim impact statements and presentence reports and that the 1st and 2nd accused were youthful and held the view that they are suitable for a rehabilitative sentence but in form of a jail term as a deterrent measure and accord justice to the victims, the learned trial magistrate sentences the 1st and 2nd accused to 20 years in jail, in count II to 20 years in jail, in count III to 20 years in jail and in count IV to 20 years in jail. All sentences were to run concurrently.

43. In this appeal it is submitted by the appellant that section 208(3) of the ***Penal Code*** relating to the right to cross-examine a co-accused was not complied with hence that was fatal since the court has a positive duty where the accused is not represented to invite him to cross-examine the all the witnesses. In support of this submission the appellant relied on section 302 of the ***Criminal Procedure Code*** as well as the case of **Ezekiel Nyaga & 3 Others vs. Republic Court of Appeal Criminal Appeal No. 9 of 1985**.

44. The appellant submitted that the circumstances obtaining during the robbery were such that the witnesses who purportedly identified him could not have done so positively particularly as the first report to the police did not describe the attackers. In this regard the appellant relied on **David Mwangi Wanjohi & 2 Others vs. Republic [1989] eKLR**. The appellant pointed out that the environment was not conducive for observation of the features of the assailants; that the identifying witnesses had not seen the assailants before; that the evidence did not disclose the duration that the witnesses had the attackers under observation; that none of the identifying witnesses led to the arrest of the assailants; that the identification parade was discredited; and that the assailants were not described in the statements.

45. It was submitted that since the witnesses had not given the description of the assailants in their first reports they should not have identified them in the parade. In support of this submission, the appellant relied on **John Njagi Kadogo and 2 Others vs. Republic Appeal No. 64 of 2004**, **James Tinaga Omwenga vs. Republic [2014] eKLR** and **Stephen Matu Kariuki & 2 Others vs. Republic [1996] eKLR**. According to the appellant, on many occasions, the Court of Appeal has held that dock identification is almost worthless without an earlier identification parade and cited the case of **Owen Kimotho Kiarie vs. Republic Criminal Appeal No. 93 of 1983**.

46. It was further submitted that the appellant's alibi defence was never considered and that there was no direct cogent and convincingly compelling evidence to warrant convicting the appellant.

47. In opposing the appeal, the Respondent, through **Mr Ngetich**, the Prosecution Counsel, submitted that from the evidence on record, the prosecution proved all the essential ingredients for the offence of robbery with violence.

48. While appreciating that **Section 208 of the Criminal Procedure Code** is couched in mandatory terms that in circumstances where an accused person is unrepresented by an advocate the court shall at the close of examination of each witness for the prosecution ask the accused whether he wishes to put any questions to that witness and shall record his answer, it was submitted that contrary to the Appellant's submissions, the requirement in section 208(3) of the CPC is for an accused person to cross-examine the prosecution witnesses. From the record, it is evident that he cross examined all the prosecution witnesses. None of his co-accused persons testified against him hence negating the need to cross examine them. Accordingly, it was submitted that the complaint by the appellant is misplaced.

49. Regarding the identification, the Respondent relied on the decisions of the Court of Appeal in **Karanja & Another vs. Republic (2004) 2 KLR 140, 147** and **Kiilu & another vs. Republic, (2005) 1 KLR 174**, and based on the testimony of PW1, PW2, PW6 and PW7, who told the court that they were able to positively identify the Appellant since there were security lights on and Pw1 and PW2 who further stated that they were taken inside the house and their bedroom which were well lit, it was submitted that when the appellant was arrested the complainants were given an opportunity to identify him during an identification parade hence this ground of appeal lacks merit and should be dismissed.

50. As regards the allegation of the failure to consider the defence of alibi, reliance was placed on **Charles Anjare Mwamusi vs. R CRA No. 226 of 2002** and **Victor Mwendwa Mulinge vs. Republic**, and based on the foregoing it was submitted that it is trite law that the correct approach is for the trial court to exhaustively examine the entire prosecution evidence in totality and weigh it against that of the appellant and make a finding supported by reasons that the prosecution case displaced the defense raised by the appellant. In this case it was submitted that when the appellant was placed on his defense, he gave a sworn statement which defence concerned what transpired on the date of his arrest and when he was being held at the police station. He never talked about where he was on the night of 14th and 15th April 2016. Accordingly, it was submitted that there was no alibi adduced by the appellant at the trial court and the learned trial magistrate after considering the evidence adduced by both parties found that the Appellant could not exonerate himself from the offence. Therefore, the trial magistrate went ahead and dismissed it and convicted him as the prosecution had proved their case beyond reasonable doubt.

51. In view of the above, it was submitted that this ground of appeal is devoid on any merit and should be dismissed.

Determinations

52. This being a first appeal, the court is expected to analyse and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

53. Similarly, in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows: -

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

54. In **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

1. 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.

2. 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.

55. In this case, the complainant's case in summary was that on 14th April, 2016 at around 8pm PW2 a police officer was on his way from work to his house in Syokimau. Upon approaching the gate, he called his wife, PW1, to open for him the gate. After the gate was opened he

drove in. As PW1 was closing the gate, she was kicked by a person and she fell down. She then saw six people among whom two wielded guns and she was ordered to lie down. She complied and while the other attackers approached where PW2 was one of them remained guarding her. PW2 heard the bang occasioned by the said commotion and when he checked on his rear mirror, he saw PW1 lying down and saw some five people approaching his vehicle. The said persons including a gun wielding attacker ordered him out of the car. In the meantime, a neighbour who heard the commotion came out but was similarly apprehended by the attackers who led the trio into PW2's house where they were ordered to lie down as the attackers ransacked the house and took items belonging to PW1 and PW2.

56. According to PW1, although she was ordered to lie down she kept on lifting her head to check on the children and saw the attackers ransacking the house in the process of which they took two phones, a watch and Kshs 9,000/- from her wallet. It was her evidence that the electric lights were brightly on the bedroom and she could see everything since the attackers were talking to them as they asked for the properties. It was her evidence that it was the appellant who was shifting the stolen items in the bag. According to her the incident in the bedroom took about 10 minutes during which time During this time

57. In his evidence PW2 also confirmed that it was the appellant herein who took PW1's travelling bag in which the attackers placed a watch, HTC Phone, Sony X-Peria phone among other things. During this time, PW2 stated he was now sitting down and could see everything the attackers were doing as the electric lights in the bedroom were on. It was his evidence that the incident in the bedroom lasted for about 15 minutes. Both PW1 and PW2 were emphatic that the bedroom was well lit and he attackers did not try to camouflage their appearances. In the said incident, both PW1 and PW2 sustained injuries.

58. After the attack the attackers left with the said neighbour towards his house and PW2 called the police and relayed the information. The police arrived and advised them to report the following day which they did after PW2 sought treatment.

59. In the meantime, the police, based on their own investigations received information about those who were suspected to have been involved in a spate of robberies in the area and based thereon they laid an ambush in Dandora area in which they apprehended the appellant and the 3rd accused. Relying on communication between the said accused persons and the 1st accused, they also nabbed the 1st accused who divulged to them information that led to the recovery of a firearm and rounds of ammunition as well as PW2's phone which was stolen in the attack.

60. On 12th August, 2016 at Muthaiga Police Station, both PW1 and PW2 identified the 1st accused and the appellant at an identification parade.

61. On the same day of the attack on PW1 and PW2, a similar attack was made on PW6 and PW7. However, PW6 and PW7 were unable to identify the appellant as one of the attackers.

62. In his defence, the appellant stated that he was arrested on 6th August, 2016, at a car wash where he had gone to have a car belonging to his uncle cleaned when he was found leaning on a police vehicle. From there he was taken to Mutahiga Police Station in the company of three other people whom he found in the police vehicle. According to him he police demanded a bribe of Kshs. 100,000/- to secure his release and it was only upon his failure to raise the same that the charge against him was laid. According to him, on 12th August, 2016, he was called by **IP Alphonse**, PW4, and PW1 identified him. In the second parade, he saw PW2 whom he had seen on 7th August, 2016 during the roll call.

63. In this appeal, the appellant contends that section 208(3) of the **Penal Code** relating to the right to cross-examine a co-accused was not complied with hence that was fatal since the court has a positive duty where the accused is not represented to invite him to cross-examine all the witnesses. In support of this submission the appellant relied on section 302 of the **Criminal Procedure Code** as well as the case of **Ezekiel Nyaga & 3 Others vs. Republic Court of Appeal Criminal Appeal No. 9 of 1985**.

64. Section 208 of the **Criminal Procedure Code** provides as hereunder:

(1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).

(2) The accused person or his advocate may put questions to each witness produced against him.

(3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.

65. Two issues arise here. First, an accused person is entitled to put questions to each witness produced against him. In my view this entitlement does not apply only to those witnesses called by the prosecution but applies to all witnesses including the co-accused and their witnesses whose evidence are against an accused person.

66. The right to cross-examination is a fundamental one, as was appreciated in the decision of the Court of Appeal for Eastern Africa in **Edward S/O Msenga vs. Reginam, (1942) EACA 553** where the Court held that:-

“The failure to give the appellant an opportunity to cross-examine the second accused was the denial of a fundamental right which was fatal to the conviction on the first count.”

67. The second issue that arises from the aforesaid section is the obligation placed on the Court where an accused person is unrepresented to ask the accused person whether he wishes to put any questions to that witness and to record his answer. In **S vs. Msimango and Another**

“The right to cross-examine is trite in our criminal justice system that curtailing it inappropriately or interfering with it, may render a trial unfair, vitiating the entire proceedings. There is also an obligation on a judicial officer in criminal trials of unrepresented accused persons, not only to explain to such accused persons their procedural rights, but specifically, the right to cross-examination. For example, in *S v Mdali* 2009 (1) SACR 259 (C), the court held that the failure on the part of the magistrate to adequately explain to an unrepresented accused the right to cross-examination; how it should be conducted; the purpose and scope thereof; and the consequences of a failure to cross-examine, breached the accused’s fundamental rights to a fair trial. Indeed, the importance of the right to cross-examine in any disputed hearing, particularly in an adversarial trial system, such as ours, can hardly be over-emphasised.”

68. The Court of Appeal in Kisumu in Criminal Appeal No. 326 of 2010 - H.O.W vs. Republic; [2014] eKLR stated as follows:

“The first such matters and which is the main one is on point of procedure which in law, we feel fundamentally prejudiced the entire case and the appellant. This is that the complainant, J.S. who was a minor was taken through *voire dire* examination and this was proper in law for whatever evidence was given on age, she was not above twelve (12) years in age. The learned trial Magistrate found as a result of *voire dire* examination that she did not know the normal duty of telling the truth and its normal consequences. She was ordered to give unsworn statement and she did so. That evidence seriously implicated the appellant, but at the end of it, for some reasons unrecorded, it was not subjected to cross-examination by the appellant who was present in court. There was no indication or any record to show that the appellant was afforded an opportunity to cross-examine this witness and no reasons were recorded as to why that procedure was not done. Unfortunately the appellant was unrepresented and clearly could not apprehend his right to cross-examine the witness. He clearly relied on the trial court which had a duty to invite him, at the end of the witnesses’ evidence in chief to cross-examine the witness, which invitation did not come forth in respect of this witness. We can find no reason for this serious omission except that we think perhaps the court erroneously felt that as an accused person who gives unsworn evidence is not to be cross-examined so would any witness who gives unsworn evidence not be cross-examined. Of course that was a misapprehension of the law. An accused person who chooses to give unsworn statement in his defence does so as a result of the provisions of the Criminal Procedure Code which protect him from being cross-examined if he chooses to give unsworn statement in his defence. It must be appreciated that the accused person cannot in law be charged with the offence of perjury in respect of a statement he gives in defence of himself in a criminal case brought against him. That protection is not available to a witness in a criminal case. Section 208 of the Criminal Procedure Code is clear on this aspect.”

69. The above authority cited the case of Nicholas Mutula Wambua vs. Republic Criminal Appeal No. 373 of 2006 (Mombasa) where the court stated:

“The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined...It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined...That thinking is expressed in Section 208 of the CPC which governs hearing of Criminal proceedings in the Magistrate’s courts. It provides that during the hearing, the accused persons or his advocate may put questions to each witness produced against him. Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The trial courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission.”

70. In this case, the 1st accused, Michanal Imbai and the 3rd accused, gave evidence on oath. After their testimonies, they, together with the 3rd accused’s witness, were cross-examined by the Learned State Counsel and there is no evidence that either of the co-accused cross-examined them or that they were asked whether they wished to cross-examine them. This was clearly a serious omission on the part of the trial magistrate. However, in the case of Edward S/O Msenga vs. Reginam, (1942) EACA 553 it is clear that a co-accused gave evidence on oath and implicated Msenga on count one of the charge. Before arriving at its decision the Court examined the nature of the evidence which the co-accused had given against Msenga and found that it was impossible to say that the refusal by the Learned Trial Magistrate to allow the appellant to cross-examine the second accused did not prejudice the appellant in his defence and did not result in a miscarriage of justice since the evidence given by the second accused undoubtedly tended to incriminate the appellant, particularly his evidence that the appellant did not hand over the money to him for, if the appellant did not hand over the money, the only reasonable inference which could be drawn was that the appellant had stolen the money himself. The Court found that if doubt were thrown on the truth of the second accused’s testimony, a reasonable doubt might well have been raised as to the guilt of the appellant. It was, therefore, clearly in the interests of justice that the appellant should have been given an opportunity of testing by cross-examination the truth of the evidence given against him by the 2nd accused. Although the Court found that the prosecutor cross-examined the second accused on most of the points on which the appellant said he wished to cross-examine, it was unable to agree with the conclusion of the learned appellate Judge that ‘had the appellant been allowed to cross-examine, there is no reason whatsoever to believe that the 2nd accused would have answered differently.’ In its view, it could not be assumed that the second accused would not have answered differently if he had been cross-examined by the appellant since the appellant might well have material which was unknown to the prosecutor and which would have enabled him to cross-examine more effectively than the prosecutor. Accordingly, it was the Court’s view that the failure to give the appellant the opportunity to cross-examine the 2nd accused was a denial of a fundamental right which was fatal to the conviction on the first count.

71. In this case I have considered the evidence adduced by the appellant’s co-accused as well as DW4. However, none of their testimonies implicated the appellant herein. Neither the co-accused nor the defence witness gave evidence which was against the appellant herein. Accordingly, it cannot be said that the failure on the part of the trial court to afford the appellant an opportunity to cross-examine them

prejudiced the appellant. Section 382 of the *Criminal Procedure Code*, provides that:

No finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

72. In this case it is my view and I so hold that the omission to strictly comply with section 208 of the Code did not occasion a failure of justice. Accordingly, nothing turns on that ground and it is for dismissal.

73. The appellant further submitted that the circumstances obtaining during the robbery were such that the witnesses who purportedly identified him could not have done so positively. In the case of R –vs- Turnbull and others (1976) 3 All ER 549, an English case, Lord Widgery C.J. had this to say:-

“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?”

74. Some of the factors that a court of law should bear in mind when determining whether circumstances prevailing at the time and place of the incident favoured positive identification or otherwise of the assailant were set out by the court in the Maitanyi versus Republic [1986] KLR 198. A court of law ought to be conscious of the fact that many witnesses do not properly identify another person even in day light and it is therefore prudent for such a court to ascertain the nature of the light available, the type of light, its size and its position in relation to the suspect when dealing with the issue of identification.

75. In this case it was clear from the evidence that the identification of the appellant was in the bedroom. The evidence was that the lighting system was adequate in a small room. The whole incident took place in a span of between 10 to 15 minutes during which period the attackers did not disguise themselves and they were in conversation with PW1 and PW2. According to PW2, he was facing upwards and though PW1 was facing down, she could occasionally raise her eyes to check on her children. Both PW1 and PW2 gave concurrent evidence as to the role which was played by the appellant in the whole episode. Even if the evidence of identification parade were to be discounted, while the court has indeed, in several decisions in the past, generally downgraded the probative value of dock identification as was the case, for example, in Ajode versus Republic [2004] 2KLR 81, an important qualification to that generality was made in the case of Muiruri & 2 Others versus Republic [2002] KLR 274 where the Court stated:

“We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo v. Rep (1953) 20 EACA 166, Roria v. Republic [1967] EA 583, and Charles Maitanyi v. Republic (1986) 2 KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”

76. It was submitted that if the evidence of identification parade is discounted then the dock identification becomes worthless. However, in Robert Kariuki Wachiuri & Another vs. Republic [2016] eKLR the Court of Appeal expressed itself as hereunder:

“The High Court was keenly aware that it was assuming a higher burden of re-evaluating the evidence on identification after discounting the evidence on identification parades. In the end, the court had no doubt that the witnesses on identification were truthful in the circumstances of the case and upheld their evidence. In our view, it was not a worthless exercise.”

77. I have on my part revaluated the evidence of PW1 and PW2 and just like the learned trial magistrate I find that the prevailing conditions were conducive to proper identification by them of the appellant and their evidence as regards the role played by the appellant left no doubt as to their concentration on the appellant. While the case was not that of a single identifying witness, in Tom Piemo Ombura & Another vs. R Nairobi Court of Appeal Criminal Appeal No. 98 of 1992 [2000] eKLR the Court of Appeal held that:

“The law is well settled in as far as the identification or recognition of an assailant by a single witness is concerned. In Abdalla Bin Wendo V R [1953] 20 EACA 166 this Court said that (subject to certain exceptions) a fact is capable of proof by the testimony of a single witness but this did not, however, lessen the need for testing with the greatest care the evidence of such a witness in respect of the identification especially when it is known that the conditions favouring the identification are difficult. In such circumstances, other evidence, circumstantial or direct pointing to the guilt of the appellant is needed.”

78. In this case the appellant was arrested based on a tip off by an informer and his arrest led to the arrest of the 1st accused in whose

possession was found the phone which was taken from PW1. In my view this piece of evidence taken together with the identification by PW1 and PW2 of the appellant was sufficient to clear any doubt as regards the mistaken identity.

79. It was submitted that since the witnesses had not given the description of the assailants in their first reports they should not have identified them in the parade. However, in Nathan Kamau Mugwe vs. Republic [2009] eKLR, the Court of Appeal expressed itself as follows:

In MUIRURI & 2 OTHERS V. REPUBLIC [2002] 1 KLR 274, the Court consisting of Kwach, J.A as he then was, Bosire & Ole Keiwua, JJ.A stated at pg. 277 between paragraphs 25 and 40:-

“We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo v. Rep (1953) 20 EACA 166, Roria v. Republic [1967] EA 583, and Charles Maitanyi v. Republic (1986) 2 KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”

That position was again followed in the recent decision of the Court in the case of GRACE WAMBUI NJOROGE alias WANANCY & 3 OTHERS VS. REPUBLIC, Criminal Appeal No. 201 of 2006 (unreported). Having considered and compared the decisions in GABRIEL’s Case, supra, and that in MUIRURI’s Case, supra, we have come to the conclusion that the more correct position at law is the one propounded in MUIRURI’s case and not that stated earlier in GABRIEL’s case. We accept the position as stated in MUIRURI’s case rather than that in GABRIEL’s case. We must point out that Mr. Obuo must have been unaware of the latter two decisions for he did not cite any of them to us. James swore he saw the appellant from the time they met and negotiated the fare and was with him from the place of hiring upto the place where he was attacked and tied up. The appellant was sitting next to him on the front passenger seat. The trial Magistrate and the first appellate court were satisfied that James had ample time to see the appellant during the period the two were alone in the vehicle and also at the beginning of the journey. James had no difficulty in identifying him at a properly conducted identification parade. True, the evidence of James was that of a single witness and the courts below did not warn themselves on the dangers of relying on it, but if the two courts had the correct principles in mind, they would have realized that the dock identification of the appellant by Mwendo must have lent some weight to the identification by James. We think the identification of the appellant was, in all the circumstances of the case, sound and even if the two courts below had excluded the evidence of Mwendo with regard to the parade, they would have inevitably come to the conclusion that the appellant had been properly and correctly identified as the person who had hired James at Cheers Makuti Bar and subsequently robbed him in the company of another person. As to the complaint in ground six that the witnesses had not given to the police a description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL’s case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness “SHOULD” be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him. In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected. On the failure to produce the car taken away from James, nothing can turn on that. The photographs of the car taken by the police were produced and there was no complaint by anyone that the photographs were not a true representation of the car. Other items such as money were stolen and were never recovered. We find no substance in the complaint with regard to the car. In our view, the charge against the appellant was proved beyond any doubt that is reasonable and that being the view we take of the matter, we must order, as we hereby do, that his appeal against the conviction be dismissed. The sentence imposed was the only one available in law and there can be no basis for interference by us. The appeal fails in its entirety and these shall be the orders of the Court.”

80. Therefore, the evidence of identification ought not to be rejected merely because the witness never described the attackers.

81. It was further submitted that the appellant’s alibi defence was never considered and that there was no direct cogent and convincingly compelling evidence to warrant convicting the appellant. This ground necessitates a determination of what amounts to an alibi defence. In the case of Patrick Muriuki Kinyua & Another vs. Republic Nyeri Criminal Appeal No. 11 of 2013 (UR) the Court held that:

“an alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged.”

82. In this case the appellant was charged with an offence which was committed on the night of 14th and 15th April 2016 at Syokimau Estate in Athi River Sub County, Machakos County. In his defence he never testified as to his whereabouts on that night. Accordingly, it cannot be said that he raised a defence of alibi.

83. Having considered the material placed before the learned trial magistrate I have no reason for faulting her decision as regards the conviction of the appellant on counts I and III. Accordingly, I confirm the conviction therefor.

84. As regards Counts II and IV, which were in respect of the attack on PW6 and PW7, the learned trial magistrate found that PW6 said she did not take part in the parade as she was out of the country. On cross-examination, she confirmed she did not give a description of the suspect in her statement. Out of three suspects that accosted her, PW6 singled out one armed with a gun and wearing a red jumper. She claimed that this was the 1st accused. PW7 also said he was attacked at the gate by somebody wearing a red jumper. According to PW2, the person with a red jumper had remained outside when they were in the bedroom with three suspects. Upon her reconciliation of the evidence of PW6 and PW7 with that of PW1 and PW2, the Learned Trial Magistrate found that this may have been mistaken identity. On the evidence, PW6 and PW7's attack happened when PW1 and PW2 were in a bedroom alongside a neighbour, under the guard of three suspects. They alleged the 1st accused stood at the door holding a pistol. She therefore formed the view that if the evidence of PW1 and PW2 on identification of the accused persons was believable, then it could not be possibly true that the 1st accused was the same person who pointed a gun at PW6 and PW7. The learned trial magistrate therefore found that PW6's dock identification of the 1st accused was unreliable.

85. However, at the conclusion of the judgement, the learned trial magistrate's view was that having observed that the identification parade was above board, she had no reason to fault identification of the 1st and 2nd accused persons. She was therefore satisfied they acted in concert with others not before court to execute the robberies that took place on 14th and 15th April 2016 in which PW1, PW2, PW6 and PW7 were victims. She proceeded to find that the prosecution has proved Count I, II, III and IV against the 1st and 2nd accused beyond reasonable doubt and she convicted them for robbery with violence contrary to section 296(2) of the *Penal Code*.

86. With due respect it is not clear why the court having doubted the evidence of PW6 and PW7 as regards the participation of the 1st accused, who was with the appellant during the attack of PW1 and PW2 at that very moment, in their attack, proceeded to convict the appellant on the counts relating to the attack on PW6 and PW7. It is clear that there was no evidence placing the appellant at the scene since he was not identified by PW6 and PW7. Accordingly, there was no basis for convicting him therefor. Consequently, I allow his appeal against both conviction and sentence in respect of the said sentences, set the conviction aside and quash his sentence therein.

87. Regarding his sentence on Counts I and III, the law as set out by the Court of Appeal in **Thomas Mwambu Wenyi vs. Republic [2017] eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira vs. State of Maharashtra** at paragraphs 70-71 is that:-

“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

88. Having allowed the conviction of the appellant on counts II and IV, I hereby set aside the sentence of the appellant in Counts I and III and substitute therefor a sentence of 15 years each which sentences will run concurrently from 7th August, 2016.

89. It is so ordered.

90. This Judgement is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic.

Judgement read, signed and delivered in open court at Machakos this 12th day of August, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Ngetich for the Respondent via Skype

Appellant via Skype

CA Geoffrey