REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL 36 OF 2012

JUMAPILI M. NDIRANGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Mombasa Chief Magistrate's Court Criminal Case No. 2875 of 2010, Hon. R Kirui, SPM on 21st January, 2012)

BETWEEN

REPUBLIC.....PROSECUTOR

AND

JUMAPILI M. NDIRANGU.....ACCUSED

JUDGEMENT

1. The appellant herein **Jumapili M. Ndirangu** were charged before the Chief Magistrate's Court Mombasa in Criminal Case No. 2875 of 2010 with the offence of robbery with violence contrary to section 296(2) of the ***Penal Code.*** The particulars of the offence were that on the 6th day of September, 2010, at Shelly Beach Area Likoni Location in Likoni District within Mombasa District, the appellant jointly with others not before the Court robbed **Ramadhani Msila Kimani** of a motorcycle registration number KMCH 211R valued at Kshs 85,000/= and at the time of the said robbery killed the said **Ramadhan Masila Kimani**. The appellant pleaded not guilty to the said charge.

2. In support of its case the prosecution called 7 witnesses.

3. According to PW1, **Abdalla Said Otien0**, he was given the said motorcycle, which was being used for ferrying passenger, otherwise known as *boda boda*, by one **Kennedy Kasasi**, PW5, who was managing the same on behalf of the owner. PW1 then gave the said motorcycle to his fellow rider nicknamed **Babu**, the deceased who was to use it till the following morning. When the deceased failed to return the same the following morning as a greed, PW1 went to look for him at his residence but failed to find him after which he reported the mater to Likoni Police. He was later informed that the deceased was found at Coast General Hospital Mortuary where PW1 and his colleagues saw his body. According to him the doctor who performed a post mortem on the body informed them that the deceased had been strangled.

4. On 7th September, 2010 at 8.00am two people, the appellant and one **Juma**, called upon PW2, **Hamisi Ndaikwa Kambi**, in Samburu with a motor cycle reg no. KMCH 211R which they said they were selling at Kshs 25,000/= and when PW2 asked for the documents of the same, he was told that they had forgotten them in Mombasa but would avail the same. PW2 then agreed to pay them Kshs 10,000/= which was received by the appellant while **Juma** was left behind to collect the balance as the appellant went back to Mombasa. At 2.00pm PW2 gave **Juma** another Kshs 10,000/= on the promise that the documents would be availed upon the collection of the balance. However the appellant and the said **Juma** never returned and the following Saturday PW2 was called by the police that the said motor cycle was being sought. Upon confirming that he had the motor cycle the police went and confirmed that it was the motor cycle they were looking for after which he was taken to a motor vehicle where he found the appellant inside. PW2 was thereafter taken to Likoni Police Station and was informed that a certain young man had been killed and robbed of the motor cycle. PW2 was however released the same day.

5. According to PW2, he met the appellant for the first time on the day of the transaction and the appellant gave him his names. They

however did not write any agreement and there was no witness to the transactions. According to PW2, there were other motor cycles that the appellant had sold to other people in the same town.

6. PW3, **Margaret Wangeci**, the mother of the deceased was at work when she was called by PW1 and informed that her son called **Ramadhan Masila Kimani** also known as **Babu** had disappeared. Upon failing to find the deceased at Central, Makupa and Likoni Police Stations, she eventually was told to go to Coast General Hospital where she found the deceased's body in the mortuary having been killed. She identified the body and was informed that he had been strangled and that the body had been brought by police officers from Mariakani. She later identified the body and witnessed the post mortem.

7. On 2nd February, 2010, PW4, **Nebert Kavere Mugwanga**, bought a motorcycle reg no. KMCH 211R at Kshs 85,000.00 and gave it to PW5, to manage on his behalf as a *boda boda.* According to him, PW5 looked for a rider for the said motor cycle and used to give him the proceeds. He however did not know who the rider was.

8. On 7th September, 2010, PW4 received a report that the said motorcycle was missing with the rider and he told PW5 to report the matter to the police at Likoni Police Station. Upon following up on the matter, he was informed that at the said police station that the person who had disappeared with the motorcycle had died and that the motorcycle was recovered at Samburu Area and brought to Likoni where he went and identified it as his. He was however not aware of the agreement with the people who handled the motorcycle or the identity of the person who was arrested.

9. PW5, **Kennedy Kasasi**, was, in February 2010 approached by PW4 who gave him PW4's motor cycle reg. no KMCH 211R so as to look for a rider to operate as a boda boda. Accordingly he found a rider, PW1, who later informed him that he gave the motor cycle to the deceased who never returned it. PW5 then told PW1 to report the matter to police at Likoni and after investigations, the deceased was found dead in the mortuary and the motorcycle was also recovered. According to PW5, he knew the deceased. He was however not present when the motorcycle was given to the deceased and he did not know the appellant.

10. The investigations officer, PC Benson Njogu testified that on 7th September, 2010 at about 8.55pm he was at Likoni Police Station when PW1 reported that the deceased had gone to Mariakani with a motor cycle reg. no. KMCH 211R carrying two passengers but had not returned. Upon conducting investigations, he on 8th September, 2010 received a report that the deceased's body had been found at Coast General Mortuary. He then proceeded there and found police officers from Taru Police Station in Samburu with the deceased's relatives who identified the deceased's body. He then accompanied them to where the body was found a few metres from Mariakani towards Taru. On 10th September, 2010, they received a report that somebody had been arrested at Shelly Beach and people wanted to lynch him. Upon proceeding there the found the appellant whom they rescued and the same day at 7.00 am the appellant agreed to take them where he had sold the motor cycle at Taru. Thereafter, PW2 to whom the motor cycle had been sold rang them and informed them that he had the motorcycle at his home and upon proceeding there PW2 surrendered it and confirmed that he had paid part of the purchase price. From there the appellant led them to where he had sold other motor cycles all of which they took to Likoni Police Station together with the appellant.

11. According to PW6 on 13th September, 2010 at Coast General Hospital Mortuary he witnessed the post mortem on the body of the deceased carried out by PW7, **Dr Nyali Mbuko**, according to whose evidence by that time the body had started rotting. In his evidence there was a bruise on the head and the brain was already rotten. In his opinion the cause of death was trauma on the head.

12. At the close of the prosecution's evidence, the appellant was placed on his defence and gave sworn testimony but called no witness. According to him he was residing at Shelly Beach but knew nothing about 6th September, 2010. He however recalled that on 10th September, 2010, he was harvesting "*mnazi*", a traditional beer from coconut trees at had started selling it when at 10pm members of *Sungusungu* vigilante group went to him and asked him why he was selling beer up to night. When he tried to talk to them, they refused to listen, poured down the beer and arrested him saying they were taking him to the police. On the way, they met a police vehicle on patrol which stopped and the police officers asked him what the problem was and he explained to them. He was then taken away by the police. It was his evidence that he was surprised when he was confronted with the charge levelled against him in Court which he knew nothing about. .

13. In cross-examination he stated that on 6th September, 2010 he was at Shelly Beach and that he did not know Samburu Area as he had never gone there.

14. In her judgement, the Learned Trial Magistrate (as she then was) found that PW2 to whom the appellant sold the motorcycle appeared truthful and had no reason to lie against the appellant whom he did not know before. She however found that the deal between the appellant and PW2 took place during the day and that the motor cycle was sold to PW2 soon after the deceased disappeared. The Court therefore found PW2 to be truthful and found that the appellant had indeed sold the motor cycle to PW2. However, the appellant did not explain how he got the motor cycle and never talked about it.

15. It was therefore the Court's judgement that the circumstantial evidence that the appellant had the motorcycle soon after the robbery and the killing of the deceased without any explanation as to how the appellant came by the motor cycle is incapable of any other explanation than that he robbed and killed the deceased. The Court was therefore convinced beyond reasonable doubt that the appellant committed the offence as charged and convicted him accordingly.

16. In his submissions, the appellant took issue with the fact that PW2 identified him in a police vehicle as opposed to a properly arranged identification parade. In that respect the appellant relied on **Oluoch vs. Republic [1985] KLR 549**, and **Karumba and 2 Others vs. R [2001] KLR 602**, where the Court deprecated reliance in dock identification. The appellant also relied on **Peter Sangura Mabae vs. Republic Cr. Appeal No. 32 of 2004** where it was held that:

"it would have been very easy for Aseneka, PW1, to say he had seen the appellant during robbery as Evans and Martin took the appellant straight to Adeneka's house after his arrest."

17. The appellant further took issue with the failure by the Court pursuant to section 150 of the ***Criminal Procedure Code*** to call the people who PW6 stated wanted to lynch the appellant and the person who called the police to explain the reasons for his arrest. In this respect the appellant relied on **John Kenga vs. Republic Cr App. No. 118 of 1984** where it was held that:

> **"we acquit the appellant in this case due to the fact that some of the mentioned witnesses were not summoned during the trial to clear the doubt of his arrest especially those who arrested him."**

18. Similarly the appellant relied on **James Kuloba Walishe vs. Republic [2008] eKLR** where it was held that:

> **"we have noted that the prosecution did not call the person who arrested the appellant in order for us to understand why the appellant was arrested. All the prosecution witnesses confirmed that they did not arrest or participate in the arrest of the appellant…the arresting of the appellant and the circumstances that led to his arrest are difficult to discern from the evidence tendered by the prosecution…we therefore do not understand how the appellant could be connected and or linked to the robbery…"**

19. The appellant submitted that from the evidence of PW6, it was not the appellant who led the police to the recovery of the motor cycle but PW2. The appellant therefore took issue with the finding by the Court that it was the appellant who led the police to the recovery of the motor cycle. The appellant relied on **Charles Lamamba vs. R Cr. App. No. 8 of 1984** where the Court held that:

> **"the doctrine of possession of recently stolen property could not apply until possession by the appellant was satisfactorily proved."**

20. On the same point the appellant relied on **Arum vs. Republic [2006] 2 EA** and submitted that the evidence of PW2 and PW6 on the recovery of the motor cycle was conflicting.

21. The appellant therefore submitted that the case was not proved beyond reasonable doubt.

22. As regards the sentence, the appellant relied on the decision of the Court of Appeal in **Paul Ouma Otieno Alias Collera and Another vs R Cr App. No. 616 of 2010** in which the Court relied on Criminal Appeal No. 56 of 2013 – **William Okungu Kittiny vs. R**, and urged the Court to consider the same and allow the appeal.

23. In opposing the appeal, it was submitted by **Miss Ogega** that the Trial Court was entitled to reach the finding it did as the prosecution presented witnesses who were consistent in their testimonies. It was submitted that the incident was not sudden, took place in board daylight and PW2 had ample time to see the people he was dealing with hence the appellant's identification was free from error. Based on **Robert Kariuki Wachiuri & Another vs R [2016] eKLR**, it was submitted that not all dock identification is worthless and that what is required id for the Court to test with greatest care such evidence and may base conviction thereon if satisfied that the evidence must be true and if prior thereto it warns itself of the possible danger of mistaken identification.

24. As regards the failure to call crucial witnesses, it was submitted that the reason for the arrest of the appellant by the civilians was not material to the case and that the prosecution has the discretion to decide which witnesses to call. To the Respondent the evidence before the trial court was overwhelming to sustain the appellant's conviction as the appellant did not show any prejudice occasioned to him in the failure to call the said persons.

25. As regards the contradiction in the evidence of PW2 and PW6, it was submitted that the same was minor as it was only in respect of who called who but not with respect to the recovery of the motor cycle. In this respect the Respondent relied on **Philip Nzaka Watu vs. R [2016] eKLR**.

Determinations

26. I have considered the material placed before the Court. This is a first appellate court, this court is obliged to analyse and evaluated afresh all the evidence adduced before the lower court and to 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."**

27. Similarly 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.

28. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

29. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, thus:

"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:

'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"

30. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC** (as he then was) said:

"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."

31. In this case the summary of the prosecution case is that PW4 bought a motor cycle Reg No. KMCH 211 R and desirous to do taxi business with it, gave the said motor cycle to PW5 to manage it for it for him. Based on the foregoing, PW5 gave the said motor cycle to PW1 to ride the same for the purposes of *boda boda* business. On 6th September, 2010, PW1 in turn handed over the said motor cycle to the deceased to use the same until the following morning. However upon failing to have the same returned as agreed, PW1, according to PW5, reported that the deceased had gone missing with the motor cycle. PW5 then told PW1 to report the same to Likoni Police Station and this report was made. In the meantime PW5 also reported the fact of the missing motor cycle to PW4 who was also of the same opinion that the matter be reported to Likoni Police Station. PW1 also passed the information to the deceased mother, PW3. According to PW6, the report that was made was that the deceased had gone to Mariakani with the said motor cycle while carrying two customers but had not returned. The following day on 8th September, 2010, PW6 received a report that the deceased's body had been found at the mortuary. Two days later on 10th September, 2010 in the morning he received a phone call that someone had been arrested by the public who wanted to lynch him and he rushed there and rescued the appellant who agreed to take them to a place where *mnazi* is sold where he had received the money. PW2 then called the police and informed them that he had the motor cycle at his home and they proceeded there and recovered the motor cycle. The appellant then led them to where he had sold other motor cycles.

32. PW2's evidence on the other hand was that on 7th September, 2010, the appellant in company of another person called Juma approached him and informed him that they were selling the said motor cycle. A deal was then struck at Kshs 25,000.00 out which Kshs 10,000.00 was received by the appellant with Juma receiving Kshs 10,000.00 while the balance was to be paid upon the sellers availing the documents for the motor cycle. However, PW2 never heard from the said sellers till he received a call from the police from Samburu who informed him that the motor cycle was being looked for and upon confirming to them that he had the motor cycle, the police went and confirmed that it was the one after which they took PW2 to their vehicle where he saw the appellant. This however was the first time the PW2 was seeing the appellant.

33. From the record, it is clear that the only evidence linking the appellant to the robbery was the evidence of PW2 and PW6. However none of the two witnesses witnessed the robbery nor heard the appellant talk about it. According to PW2, the motor cycle was sold to him by the appellant. However the evidence of PW2 was that of identification as opposed to recognition as PW2 did not know the appellant prior to that date. According to him, it was the police who called him and informed him that the motor cycle was being looked for and upon confirming to them that he had the motor cycle, the police went and confirmed that it was the one after which they took PW2 to their vehicle where he saw the appellant. PW6 on the other hand testified that PW2 to whom the motor cycle had been sold rang them and informed them that he had the motorcycle at his home and upon proceeding there PW2 surrendered it and confirmed that he had paid part of the purchase price. PW2 did not testify that before he saw the appellant he had given the appellant's name or description to the police. In **Maitanyi vs. Republic (1986) KLR at page 198** the Court of Appeal held:

"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made…if a witness receives a very strong impression of feature of an assailant; the witness will usually be able to give some description."

34. The court proceeded to hold further that:

"In this case J admitted that she did not give the description of the 1st appellant before he was arrested and before she identified him when he was brought into the police station. We are of the considered view that J's evidence on identification ought to have been tested by her first recording her initial statement indicating whether she could identify her attackers and giving their descriptions."

35. Therefore if PW2 did not disclose to the police that he was in possession of the motor cycle prior to the police inquiring about it, who is it that disclosed to the police the fact that the appellant was the one who had robbed the deceased? In my view this is the crucial link that is missing from the prosecution's case. There was no evidence that those who wanted to lynch the appellant wanted to do so because they suspected him of having participated in the deceased's death or robbery. According to the appellant he was arrested by *sungusungu* vigilante on the claim that he was selling beer outside hours. That the appellant was arrested by the members of the public is accepted by both the prosecution and the defence. It is the reason for his arrest that has not been disclosed by the prosecution while the defence has given his own version which was never challenged in cross-examination.

36. Whereas the prosecution has urged the court not to take into account the inconsistencies in the evidence of PW2 and PW6, the law is that whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See ***Law of Evidence*** **(10th Ed) Vol. 1 at 46.** In **Philip Nzaka Watu vs. Republic [2016] eKLR,** the Court of Appeal held that:

"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt."

37. As was noted in **Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:**

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

38. In this case, the case against the appellant is purely circumstantial. In **Neema Mwandoro Ndurya vs. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that:

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

39. However, caution is called for when relying on circumstantial evidence. While recognizing the dangers in relying on circumstantial evidence without exercising this caution the Court in **Teper v. R [1952] AC at p. 489** had this to say:

"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."

40. In **Sawe –vs- Rep [2003] KLR 364** the Court of Appeal held:

"In order to justify conviction on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

41. In **R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135,** in the Court of Appeal for Eastern Africa had this to say:

"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

42. In **Abanga Alias Onyango vs. Rep CR. A No.32 of 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the

circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

43. In **Mwangi vs. Republic [1983] KLR 327 Madan, Potter JJA** and **Chesoni Ag. J. A**. held:-

"In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused."

44. The circumstantial evidence here is that the appellant is alleged to have sold the subject motor cycle to PW2 soon after the robbery. However, the appellant was not found in possession of the said motor cycle. Instead the motor cycle was found in possession of PW2 whose evidence was that the disclosure of the robbery to him came from the police. The police themselves stated that it was in fact PW2 who disclosed the fact that the motor cycle was sold to him by the appellant. To make matters worse the police took PW2 to the motor vehicle where the appellant was. It was not disclosed why this was necessary if PW2 was sure of the identity of the appellant taking into account that PW2 had not seen the appellant prior to the transaction between them.

45. In my view there was clearly a break in the chain of events linking the appellant to the robbery. It may well be that the appellant was arrested due to the fact that he had sold other motor cycles in the area prior to this incident. However that would only be suspicion that he was the one who actually robbed and killed the deceased.

46. It is therefore my finding the in this case, that it cannot be said with certainty that the inculpatory facts were so incompatible with the innocence of the appellant, and were incapable of explanation upon any other reasonable hypothesis than that of his guilt. In my view, the prosecution failed to discharge its burden of proving facts which justify the drawing of this inference a burden that always remains with the prosecution and never shifts to the accused. It may well be that had the prosecution called the people who arrested the appellant they would have shed some light on the reasons why the appellant was arrested. The rule with regard to non-summoning of a crucial witness was quoted in **Bukenya & Others –vs- Uganda (1972) E.A 549** thus:-

"The law as it presently stands is that prosecution is obliged to call all witnesses who are necessary to establish the truth in a case, even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact where, however the evidence adduced barely establishes the prosecution case and the prosecution withholds a witness, the court, in an appropriate case is entitled to infer that had this witness been called his evidence would have been adverse to the prosecution's case."

47. Therefore if the evidence adduced is barely sufficient to sustain the prosecution case, as in my view was the case here, the failure to call the people who arrested the appellant must be taken against the prosecution case. This was the position in **James Kuloba Walishe vs. Republic [2008] eKLR** where the Court held that:

"In this case we do not understand the basis of the appellant's conviction on all the three counts since none of the witnesses made a prior report that the appellant was one of the attackers. There is no evidence to show that the complainants in counts 2, 4 and 5 made a report to the police after the robbery that they were able to recognize one of the attackers. Equally there is no evidence to show that the description of the appellant was given to the police by any of the victims of the robbery at the time the first report was made to the police. We have noted that the prosecution did not call the person who arrested the appellant in order for us to understand why the appellant was arrested. All the prosecution witnesses confirmed that they did not arrest or participate in the arrest of the appellant. In their evidence before court PW2, PW3, PW4 and PW5 stated that they found the appellant at Kawangware chief's office having been arrested by other persons. The arresting of the appellant and the circumstances that led to his arrest is very difficult to discern from the evidence tendered by the prosecution."

48. In this case there is no reason why the appellant was arrested save for the fact that the police went to rescue him from the mob. He seems to have been arrested based on the evidence of PW2 whose evidence must be discredited by the act of the police taking him to the vehicle in which the appellant was.

49. In this case the conviction of the appellant was based on the evidence of a single single identifying witness, PW2, whose identification was not with respect to the fact that he witnessed the appellant committing the offence, but that it was the appellant who sold him the motor cycle. Nevertheless, he did not know the appellant prior to the incident and his evidence still remained that of a single identifying witness. In **Maitanyi vs. Republic [1986] KLR 198**, it was held, with respect to the reliability of the evidence of a single identifying witness as follows:

"Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with greatest care the evidence of a single witness respecting identification…The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made."

50. In **Wamunga versus Republic (1989) KLR 424** the Court of Appeal spoke of the evidence of identification generally in the following terms:

"It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is

enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

51. The same court acknowledged in **Ogeto versus Republic (2004) KLR 19** that a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult; it noted as follows:-

"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken."

52. In **Abdala bin Wendo & Another versus Republic (1953), 20 EACA 166** the East African Court of Appeal it held that:

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

53. The Court of Appeal for East Africa discussed the danger of relying on such evidence without warning in **Roria versus Republic (1967) EA 583 at page 584**. It stated:

"A conviction resting entirely on identity invariably causes a degree of uneasiness…That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

54. It was therefore held in **Criminal Appeal No. 24 of 2000 Paul Etole & Reuben Ombima vs. Republic**, as follows:

"The appeal of the 2nd appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

55. In this case considering the imprudent and unusual action of the police in showing PW2 the appellant when the case did not rest on recognition, in my view renders the purported identification of the appellant by PW2 doubtful. When that evidence is disregarded, the prosecution case must fail.

56. In the premises I find that the prosecution failed to prove the case against the appellant beyond reasonable doubt. In the circumstances the benefit must go to the appellant.

57. Consequently I find this appeal merited and the same is allowed. The appellant's conviction is hereby set aside and his sentence quashed. I hereby direct that he be at liberty to be set free forthwith unless otherwise lawfully held.

58. Right of appeal within 14 days.

59. Orders accordingly.

Judgement read, signed and delivered in open Court at Mombasa this 17th day of December, 2018.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Miss Ogega for the Respondent

CA Lavender