REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 134 OF 2013

JOSEPH MURIGU WAMAE……..……1ST APPELLANT

PAUL NDIRANGU WANJIRU…….....…..……...2ND APPELLANT

VERSUS

REPUBLIC……....……...…RESPONDENT

(Appeal from original conviction and sentence in Mukurweini Senior Principal Magistrates' Court Criminal Case No. 274 of 2013 (Hon. W. Kagendo) on 30th October, 2013)

JUDGMENT

The appellants were charged and tried alongside three other persons with three counts of robbery with violence contrary to section **296(2)** of the **Penal Code, cap. 63.** The first appellant was also charged with the offence of being in possession of suspected stolen property contrary to section **323** of the Penal Code; in the alternative, he was charged with the offence of handling stolen goods contrary to **section 322(1)(2)** of the **Penal Code.**

The particulars of offence of the first count of robbery with violence were that on the 2nd day of August, 2011 at Rukira village in Nyeri South District within Nyeri County, jointly with others not before court, and while armed with dangerous weapons, namely pangas, crowbars and rungus, the appellants robbed **Ephantus Muiru Nyaga (Ephantus) (PW1)** of a cell phone (of LG make) valued at Kshs. 5,000/=, a wrist watch (of casio make) valued at Kshs. 5,000 and cash of Kshs. 60,000/= all valued at Kshs. 70,000/= and at and immediately before and immediately after the time of such robbery, they used actual violence on the said **Ephantus Muiru Nyaga.**

On the same date and place, the appellants also robbed **Teresa Gathoni Nyaga (Teresa) (PW2),** in similar circumstances, of her cell phone (nokia 1100) valued at Kshs 4,500/=, three pangas valued at Kshs 1,800/=, an axe valued at Kshs 650 and cash of Kshs 2,000/= all valued at Kshs 8,900/=. This robbery on Teresa was the basis of the second count of the offence of robbery with violence.

The particulars of the third count were also similar to those of the preceding two counts except that the appellants are alleged to have robbed **Patrick Joel Kipchirchir** of Kshs 50.

As for the offence of being in possession of suspected stolen property, it was alleged that on 8th September, 2011 at Majengo village in Nyeri central district within Nyeri County and while being detained by police Constable Aloise Muriuki in exercise of the powers conferred upon him by section 26 of the Criminal Procedure Code, the first appellant is said to have been found in possession of a mobile phone (nokia s 5130) reasonably suspected to have been stolen or unlawfully obtained.

The appellants were convicted of the first and third counts and acquitted of the second count. The second appellant was also acquitted in respect of the fourth count. The rest of the accused persons with whom the appellants were charged were acquitted of all the counts. The appellants were sentenced to death on the first count and, inevitably, their sentence on the third count was suspended. Being dissatisfied with the convictions and sentences meted out against them, the appellants appealed to this court. They filed separate appeals but since they were charged and tried jointly, their appeals were consolidated on 13th August, 2015 when they first came up for hearing.

The first appellant's grounds of appeal revolved around the recovery and possession of a cell phone alleged to have been robbed from one of the complainants at time of the robbery. According to the first appellant, the learned magistrate erred in law and in fact in overlooking the fact that the stolen cell phone was only passed to him by a party who did not testify despite the fact that the appellant not only pointed him out to the police but that he was also arrested and charged though he later absconded in a previous trial. According to the appellant, the evidence of the person who gave him the cell phone, would probably have exonerated him and the learned magistrate erred in law and in fact in failing to take this fact into consideration. He also impugned the decision of the learned magistrate because while he was convicted solely because he was found in possession of the stolen cell phone, he was not positively identified. His case was that he was convicted against the weight of evidence and that the case against him was not proved beyond reasonable doubt.

The second appellant's appeal on the other hand, rested on the question of whether he was positively identified. According to him, the circumstances under which he is alleged to have been identified were not favourable; in particular, the learned magistrate was faulted for ignoring the fact that the description of the appellant was not given to the police by the complainant in his initial report. He stated that the prosecution case was riddled with inconsistencies and contradictions and that the learned magistrate shifted the burden of proof from the prosecution to him. In any event, the case against him was not proved beyond reasonable doubt. The learned magistrate was also faulted for disregarding the appellant's alibi.

The appellant's grievances have to be evaluated against the evidence on record and thus it is necessary for this honourable court to reconsider that evidence afresh. A further, and perhaps a stronger reason for afresh analysis and evaluation of the evidence is that, as the first appellate court, this honourable court is not restricted in its determinations by the factual findings of the trial court; it is instead legally bound to form its own opinion based on a fresh analysis of the evidence regardless of the trial court's findings. All it has to bear in mind is that the trial court is presumed to have had the benefit of hearing and seeing the witnesses. **(See Okeno versus Republic (1972) EA 32).**

The record shows that of the three complainants, the first two were a married couple; the couple was attacked in their house at about 1:45 AM on 2nd August, 2011. They were woken from sleep by their barking dogs. According to **Ephantus (PW1),** he heard people jump into his compound; he saw ten of them. Some of these intruders went to the store where his employee, **Patrick Joel Kipchirchir**, slept. Others came to his house and broke the door open.

Before they broke the door, they threatened to kill Ephantus regardless of whether he opened the door or not. He gave them the sum of Kshs 60,000/= through the window but that could not appease them for they still forced their way and broke into his house and eventually got into the bedroom where he and his wife **Teresa (PW2)** had locked themselves.

Ephantus cut one of them with his panga when they eventually gained entry into his bedroom; they retaliated and cut him on his head. He was seriously injured as a result of which he lost consciousness and had to be admitted in the intensive care unit of Outspan hospital in Nyeri. A P3 form produced in court by the clinical officer, **Gumo Waitere (PW8)** showed that he sustained a cut wound to the scalp and the degree of injury was described as "maim." As at the time he testified, almost 2 years after the incident, he had not fully recovered and that he suffered from a memory lapse; he couldn't remember all that happened.

Amongst the properties he lost during the robbery was a cell phone of LG make and which cost him Kshs

5000/=. He identified the phone in court as the one that was robbed from him. He also identified the box in which this phone had apparently been wrapped when he purchased it.

The witness testified that he was able to identify two of his attackers; one of them had escaped and he was not before court while the other one was the first accused but who, as noted, was acquitted. He admitted, however, that in his statement to the police he did not state whether he recognised or identified any one at the time of the incident. He also couldn't pick any of the accused persons including the appellants in the identification parades that were subsequently conducted.

Ephantus' wife, **Teresia (PW2),** corroborated her husband's testimony and added that at the time they were attacked, their son **Job Ngari (PW5)** was also in the house but in a separate bedroom. She testified that when she was woken up by the barking dogs, she opened the window curtains and saw many people in the compound. According to her the security lights were on and thus she had no problem in seeing the strangers. She screamed for help as the robbers struggled and broke into the house and their bedroom. They eventually gained entry and cut her husband. They demanded money from her. She gave them her cell phone and a sum of Kshs 2000/=. They threatened to kill her if she did not give them money; they even hit her hand with a metal and fractured it. **Gumo Waitere (PW8)** who produced her P3 form confirmed that indeed she suffered a fracture of the left arm. Since she did not have any other money to give them, she pleaded with them to give her time to pray before they killed her. She managed to escape in the process and went to a neighbour's home from where she called and alerted her son-in-law, Gerald Mwangi, of the robbery. Gerald called police officers who came and accompanied her back to the house. They found her husband unconscious; they took him to hospital where he was admitted for four weeks. She was also admitted in the same hospital for treatment of her fractured hand.

It was her evidence that during the robbery, she was able to identify two of the robbers. She could not recall the exact date when she attended the identification parades; she testified however, that on 5th August, 2011 she managed to identify the second appellant and the fourth accused person. It was her evidence that she saw the second appellant outside the house when she opened the curtains while the fourth accused was the person who cut her hand. She admitted that she did not know the two of them before but that she gave their description to the police in her initial report. According to her one was "tall and black" while the other one was "tall but not very black". It is not clear from her evidence who between the second appellant and the fourth accused person was tall and black or was tall but not very back. When she was referred to her statement, however, she admitted that it described the second appellant as "short, dark and stout."

The witness also identified her husband's phone together with the box in which it was purchased. The person in whose possession this phone was found was **Catherine Mweni Kitheni (PW3).** She testified that between 30th and 31st August 2011, her brother **Simon Wambua Kitheka (PW6)** visited her and left his phone with her; he took her phone in exchange. On 8th September, 2011, police officers came to her place of work and enquired from her whether she knew **Wambua (PW6)**. She told them that she not only knew him but she also took them to where he was.

Simon Wambua Kitheka (PW6) himself admitted that indeed he and his sister **Mweni (PW3)** swapped phones; he testified that he purchased the phone from the first appellant at Kshs. 2,800/=. He pointed out the first appellant to the police.

Job Ngari Nyaga (PW5) testified that on the material date was in his parents' house; he saw about 10 people jump over the gate and get into their compound while armed with weapons such as axes and iron bars. They broke the main door and entered the house. Sensing danger, he escaped through the back door, jumped over the gate and sought help from the neighbours. By the time they got back to the house, the robbers had left but his father was lying unconscious in his bedroom.

The witness attended identification parades in which he identified several suspects; he identified one suspect in the first identification parade but the suspect he identified was not in court. In the second parade, he was able to identify the second appellant and in the third period he identified the first appellant. He was not very clear on the dates he participated in the parades and the suspects he identified;

he appeared to state that he identified the second appellant on two different dates. He also testified that he attended two parades and identified the second appellant and the fifth accused person on a certain day and picked out the first appellant on a different day; however, he again stated that he identified five suspects in total. During his cross-examination, he testified that he attended five identification parades and except for the first parade, he could not recall whom he identified in the rest of the parades.

Corporal Axebrose Wambua (PW7) testified that he arrested two suspects connected with the robbery in issue; he had been given their names by police constable Muriuki who was the then deputy Officer in Charge of Nyeri police station. One suspect escaped while the other one was arraigned in court and charged as the fourth accused.

The identification parade in respect of the second appellant was conducted by chief inspector of police **Jackson Kiema (PW9);** he was requested to conduct the parade on 18th September, 2011 by one Alloyce Muriuki. When he enquired from the appellant whether he had any objection to the identification parade he answered in the negative. He informed him of his rights in such an exercise; he organised the parade of eight members in addition to the appellant. According to him they were of similar appearance to the appellant. The appellant chose to stand between the sixth and the seventh member of the parade. The first witness **Teresa(PW2)** picked the appellant out. He was asked if there was any comment to make and he replied that he had none. He then asked him if he wished to change his position before the second witness attended the parade; he chose to stand between the fifth and sixth person's. The second witness, **Job Nyaga (PW5)** picked him out by touching him. Again, the suspect said he had no comment to make after he had been identified by the second witness.

Jackson Kiema (PW9) also conducted a second parade on 11th September, 2011; this time round the suspect was one Osman Ibrahim Githaiga, the fourth accused person, while the witness was **Job Nyaga (PW5).** Again, the witness picked him out by touching him on the shoulder.

Senior Sergeant Francis Wambua (PW10) investigated the case; he visited the crime scene soon after the robbery together with police constable Aloyce Muriuki. He testified that he found a rock at the scene; it is this rock that had apparently been used to break the door to the complainants' house. He also established that there was blood on the bed and the doors were stained with blood also. The window grills had been cut and the window panes broken. The first and second complainants had been taken to hospital. He picked some items for forensic analysis. Later, his colleague Muriuki arrested two suspects whom he named as Shaban and Wamae (apparently the first appellant). One of the two had an injury on his hand; he is the one who absconded.

Inspector of **police Salesio (PW11)** testified that he conducted an identification parade on 11th September, 2011 in respect of the first appellant. The witnesses who attended this parade were **Teresa(PW2)** and **Job Nyaga (PW5). Teresa (PW2)** was not able to identify the suspect but **Nyaga (PW5)** did by touching him on the shoulders.

The trial court held that the prosecution had established a prima facie case against all the accused persons including the appellants and therefore they were put on their defence. They all opted to testify on oath. As far as the first appellant is concerned, he testified that he operated a kiosk at Majengo and that on 2nd August, 2013 somebody left his phone with him. Again, on a certain date he couldn't recall one Shabban Mutiga gave him a phone as security for the sum of Kshs 1,200/= which he lent him. He later disposed of the phone to recover his money when Sabban did not return. Later, the person he sold the phone to came back with the police who arrested him. Shabban was also arrested and he was previously charged but he absconded. He admitted that **Job Ngari (PW5)** identified him in the third parade. The first appellant called **Lawrence Mwangi Hunja (DW1)** as his witness; he testified that indeed on 7th October, 2011, Shabban sought from him Kshs 1000/=; he did not have the money and so he moved to the next shop which happens to have been the first appellant's. He was given the money on the security of the phone he left the first appellant with.

The second appellant testified that on 16th September, 2011, he beat his wife Esther Wambaire who had

come home at around 11 PM drunk. He could not allow her in the house. The following morning at about 1.45 AM police men came to his house; he knew one of them whom he identified as police Constable Muriuki. They sought to know why he had beaten his wife; they asked him to accompany them to the police station even after he explained why he had beaten her. He was then booked and confined in a police cell. At about 8 PM on the same day he met his wife before the District Criminal Investigations Officer. His wife asked the police to release him because their differences could be resolved domestically. On 18th September, 2011, the officer in charge of the police station in which he had been detained asked him to join an identification parade. It was in this parade that **Job Ngari(PW5)** identified him. He was charged with the offences for which he was convicted the following day. He denied having committed the offences against him and alleged that the charges against him were fabricated. He said that on the date the offences are alleged to have been committed he was at his house alone. He produced a copy the occurrence book extract of 17th September, 2011 to demonstrate that he had been arrested and booked for the offence of assault and not that of robbery with violence.

From the foregoing evidence, there is no doubt that the offence of robbery with violence was committed**.** This offence is defined in **section 295** of the Penal Code, **Chapter 63 Laws of Kenya** but the ingredients of a crime of robbery with violence and the penalty thereof are prescribed under section **296(2)** of the Code.

Section 295 of the Penal Code states;

> ***295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***

Section **296(2)** of the Code defines when robbery as defined under **section 295** graduates into robbery with violence; it says:-

> ***296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.***

It is apparent from this section that an accused person will be convicted of the offence of robbery with violence if the prosecution will prove that the robbery victim was not only robbed but also that at the time of the robbery any of the following circumstances were brought to bear:-

> (a) The accused was armed with any weapon or instrument that may be deemed to be dangerous or offensive;
>
> (b) The accused was in the company of one or more persons;
>
> (c) Immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to any person.

The facts as established at the trial fit squarely within the circumstances or conditions prescribed in section **296 (2)** of the **Penal Code**. The complainants were not only attacked and robbed by a group of people armed with crude weapons but they were also injured in the course of the robbery. There was sufficient evidence that the offence of robbery with violence was proved to the required standard. The only question is whether the appellants perpetrated this crime and the appropriate place to find its answer is from the evidence on record.

The conviction of the appellants was primarily based on the evidence of possession of a phone that is alleged to have been stolen from **Ephantus(PW1)** at the time of robbery and their identification by the second complainant **Teresa (PW2)** and **Job Ngare (PW5).** As a matter of fact, the appellants' appeal

revolves around the trial court's finding on these two issues.

In his testimony, **Sgt. Francis Wambua (PW10)**, said that he picked the following items from the scene: a blood-stained envelope from a table; a blood-stained cloth which he picked from the bedroom; and some clothes which he found in the "table room". He identified these items in court.

As far as his evidence on the recovery of the first complainant's phone is concerned, he testified that he only saw his colleague with it. According to him, the first complainant gave them the empty case or box in which the phone had been wrapped.

It is apparent from the evidence of **Sgt Francis Wambua (PW10)** that he visited the scene with police constable Aloise Muriuki; the latter did not testify apparently because he had passed on and for this reason the court admitted his statement in evidence without calling him to testify; the statement was produced by **Sgt. Wambua** himself.

I had chance to peruse the statement and it is clear on its face that it was recorded on 10th September, 2011. The late Muriuki listed eight items they collected from the scene; the last of these recoveries was an empty box or case for an LG phone whose particulars were given as LG GU 285 IMEI: 358-749-03-530-559-8.

One thing that I quickly noted from Muriuki's statement with regard to the items collected from the scene is that while the statement was specific where all the items had been recovered, it did not state where the box bearing the particulars of the phone was recovered from. It is to be noted that the evidence relating to the complainant's phone was central to the conviction of the appellant and therefore it deserved considerable attention from the trial court.

My own assessment of this evidence reveals some inconsistencies that heavily weigh against its probative value. For instance, both **Sgt Wambua** and **constable Muriuki** were consistent that they did not find the first two complainants at the scene as they had been rushed to the hospital. If that is the case then it cannot be true, as suggested by Sgt Wambua, that **Ephantus (PW1),** the first complainant, gave them the empty box that bore the details of his phone. And if Sgt. Wambua's evidence was to be believed, then the statement of constable Muriuki that among the items collected at the scene of crime was this particular box would be cast in doubt. I cannot also fail to note that the apparent contradiction in the version by constable Muriuki and Sgt. Wambua is against the backdrop of lack of any inventory of the items recovered at the scene of crime.

Turning to the evidence of the first complainant himself, all he said about the phone was this;

> ***"I lost my phone LG I had bought for Kshs 5000/=. The police later told me that they had recovered the phone in Naromoru. I can see the phone that was recovered-MF-1. I also have the box that contained the phone-MF-2"***

It is obvious from this statement that the complainant did not say that the phone which the police recovered was his. Neither did he offer any evidence to suggest that the phone he may have lost was the phone that the police recovered. He did not for instance produce the receipt for payment for the phone or give any evidence of its whereabouts or even give the particulars of the phone which are alleged to have been on the box in which it had been wrapped.

I must not be mistaken to be saying that the complainant did not lose a phone; it is quite possible that he lost it at the time of the robbery and in all probability, the phone that was exhibited in court could be the phone he lost; however, rather than leave it to conjecture, the burden was always on the prosecution to prove beyond reasonable doubt that this was the case. If it was its case that the appellant was tied to the robbery because he was found in possession of the complainant's phone, albeit constructively, the prosecution had to provide concrete evidence linking the complainant's lost phone to that which was exhibited in court as the one the appellant was found in possession of. In this regard, I would have expected the complainant, at the very least, to give evidence, for instance, of the similarity between the

particulars of the recovered phone and those of his phone considering that the box on which the details of this phone are alleged to have been inscribed, had been recovered, notwithstanding the cloud of doubt hanging over the evidence on how it was recovered.

One other thing that I must mention here is that, going by the statement of constable Muriuki, the investigation officers were aware of the details of the phone as early as 2nd August, 2011. However, although the appellants were arraigned in court on 4th July, 2013, more than two years later, the details of the phone which constable Muriuki elaborately spelt out in his statement were not given in the particulars of the offence. These details were necessary because they would certainly provide a basis to bridge the complainant's evidence on the loss of his phone and the phone that was subsequently recovered. More so, there were, and I certainly believe there still are, thousands of phones of the complainant's phone's make out there in the market. If the prosecution had the information to distinguish the complainant's phone from the rest of the phones, there is no reason why it omitted this vital information from the particulars of the offence.

In view of these inconsistencies, contradictions and omissions with respect to the evidence on the recovery of the complainant's phone, I have reached the conclusion that it was not safe to convict the first appellant on the basis that he was linked with possession of this particular item that is alleged to been stolen at the time of the violent robbery.

The other evidence that this court has to interrogate is that of identification and the question whose answer this court is concerned with is whether there was satisfactory evidence at the trial that the appellants were positively identified.

There were four people at the complainants' home at the time of the robbery; three of them attended identification parades in which the appellants were identified. The first complainant, **Ephantus (PW1),** however, could not identify any of the appellants and therefore the trial court was left with the evidence of **Teresa(PW2)** and **Job Ngare Nyaga(PW5)** in this regard.

According to **Teresa (PW2),** she was able to identify some of the robbers at the time of the robbery since there was sufficient electricity light. It was her evidence that she saw the second appellant outside the house when she opened the window curtains. The other person she identified was the fourth accused person; the latter was however acquitted and the evidence against him is now of little concern.

The witness admitted that she did not know the persons before but in her initial report to the police, she gave their descriptions as being respectively being "tall and black" and "tall but not very black" while the other was "not too tall" and that "he was short." Initially, it was not clear from her evidence which of these descriptions was the second appellant's but when she was referred to her statement during cross-examination she testified that she had described the second appellant as "short, dark and stout." She reiterated in response to her cross-examination by the second appellant that as far as she was concerned, he could properly be described as being short and dark. She was able to pick him out in the identification parade.

As far as the evidence **Job Ngare (PW5)** is concerned, there is doubt as to whether the trial court should have concluded, as it did, that he positively identified the two appellants. According to his evidence, he saw about ten people jump over the gate; they quickly moved into action at different places in the compound. It was also his testimony that he spent about a minute watching them. As much as the witness testified that the security lights were on and therefore there was sufficient light, it is doubtful a minute was sufficient time for all or either of the intruders to leave an impression on his mind as to be able to describe them and identify them in a subsequent identification parade. If at all the appellants were positioned in such a way that he could identify them with ease, then he should have stated so in clear and unambiguous terms; as things stand no such evidence was offered. The conclusion that one can make is that the conditions for positive identification of the appellants by the Job Ngare(PW5) were not favourable. Perhaps to demonstrate this point, the witness himself admitted that apart from one person who was not in court, he could not remember in which parades he picked the two appellants.

In her judgment, the learned magistrate appreciated the inadequacies inherent in Job Ngare's (PW5's) evidence as far as identification of the appellants was concerned. She correctly found as a fact that this witness peeped through the window only for a minute before he escaped and since the robbers were scattered he could not have identified the fifth accused person. Accordingly, she held, quite correctly in my view, that she could not convict him on the basis of identification evidence of this particular witness.

But even after she had come to this come to this conclusion, the learned magistrate still held that the same witness, Job Ngare (PW5), properly identified the second appellant. My humble view is that having come to the conclusion that the conditions were unfavourable for a positive identification of the of the fifth accused person, she could not come to any different conclusion with respect to any other person, including the second appellant unless it could be demonstrated that the circumstances under which the second appellant was identified were more favourable. It cannot be that the same set of circumstances were favourable for identification of one of the accused and unfavourable for identification of the other. It follows that the learned magistrate misdirected herself on evidence by holding that the **Job Ngare (PW5)** properly identified the 2nd appellant.

In conclusion, I am inclined to find that the prosecution case against the first appellant did not measure to the required standard. For reasons I have given, he could not be linked to the robbery by the mere fact he was found in possession of some phone that was allegedly stolen from the first complainant at the material time. I cannot also say that he was positively identified. His conviction was, in my humble view, unsafe.

As far as the second appellant is concerned, **Teresa's (PW2's)** evidence was that she attended three different parades; she could not identify any one in the first parade. On the 5th August, 2011, she apparently attended another parade in which she was able to identify the second appellant. She singled the appellant out because, according to her, he fitted the physical appearance whose description she had given to the police.

Having discounted the evidence of **Job Ngare (5)** the evidence of **Teresa (PW2)** turns out to be the evidence of a single identification witness. The learned magistrate did not treat it as such for the obvious reason that she accepted, albeit mistakenly, the evidence of identification of both **Ngare (PW5)** and **Teresa (PW2).**

The circumstances under which the second appellant was arrested and the timing of an identification parade from which he was picked called for a closer scrutiny of the evidence of Teresa(PW2) particularly in the context of the danger of relying on the evidence of a single identification witness.

According to the parade forms exhibited in court, Teresa (PW2) attended identification parades on three different dates; these the 11th September, 2011, the 18th September, 2011 and the 29th December, 2011. It is in the parade that was conducted on 18th September, 2011 that she identified the second appellant. This date is crucial because on the same day at about 1.45 AM the appellant had been arrested and booked for the offence of assault; he is alleged to have assaulted one Esther Wambaire. As a matter of fact, the entry in the Occurrence Book of that day, a copy of which was availed in court at his instance, showed that the second appellant was to be charged with the offences of assault and creating disturbances.

This evidence was consistent with his defence that he had beaten his wife, Esther Wambaire the previous night and locked her outside the house. She returned with police officers who arrested him the following morning.

When this evidence is considered in its entirety, it cannot be coincidental that the second appellant was arrested for allegedly committing a particular offence and on the same day he was arrested, he is asked to participate in an identification parade as a suspect of a totally different offence. There is no evidence that prior to this arrest, the appellant was a suspect of the offences for which he was charged and convicted.

If the trial court was to determine that the appellant was identified by one and not two identification witnesses and proceed to consider the circumstances under which the appellant was subjected to an

identification parade, it would have probably warned itself on the danger of convicting him solely on the basis of a single identification witness.

There is a great deal of jurisprudence on this sort of evidence but the primary principle is that the trial court must warn itself and be cautious of the danger of basing a conviction solely on the evidence of a single identification witness. In **Wamunga versus Republic (1989) KLR 424** the Court of Appeal reiterated this position and stated thus:

> ***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.***

Again, in the Court of Appeal decision in O**geto versus Republic (2004) KLR 19** it was acknowledged that a fact can be proved by a single identification witness but the court cautioned that such evidence must be admitted with care where circumstances of identification are found to be difficult; the court said: -

> ***"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".***

It is quite possible that **Teresa (PW2)** was honest in her evidence but considering all the circumstances wholesomely, it is quite probable that she might have been mistaken in her identification of the second appellant.

The other related angle to the circumstances which the learned magistrate ought to have considered in evaluating the evidence against the appellant was his defence. It appears that the learned magistrate never considered the second appellant's uncontroverted defence, that the charges against him were made up considering that the evidence available shows he was charged and convicted of offences that are totally different from those he was booked for. At the very least, the learned magistrate ought to have given some reason why she disregarded or dismissed the second appellant's defence.

All in all, I find the appellants' appeal merited. Accordingly, I quash their convictions and set aside their respective sentences. They are set at liberty unless they lawfully held

Dated, signed and delivered in open court this 21st day of April, 2017

Ngaah Jairus

JUDGE