**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO 33 & 34 OF 2016**

***(Appeal originating from the conviction and sentence by Hon. C.WEKESA SRM in Nyeri S.O CASE NO.667 of 2013)***

**MERCY MUTHONI.....1ST APPELLANT**

**JOSEPH MURURI NDERITU……..……..2ND APPELLANT**

***VERSUS***

**REPUBLIC…….....RESPONDENT**

**J U D G M E N T**

The Appellants herein together with another were jointly charged with Robbery with violence contrary to section 296(2) of the penal code. particulars of the charge were that were that on 12th day of September 2013 at Lachuta farm in Nyeri, Gatarakwa location in Nyeri county within the Republic of Kenya jointly with another who was not before court robbed joseph weru murakaru of one mobile phone make MG1.cash kshs 18,000 and one motor vehicle registration number KBM 522Y Toyota succeed all valued at 722,500 and immediately before the time of such robbery used actual violence to the said joseph weru murakuru. The 3rd accused died before the trial was concluded. The two appellants herein were convicted on 10th may 2016 and sentenced to death.

The appeal is on conviction and sentence. Both appellants are represented by wahome Gikonyo Advocate.He set out grounds of appeal:

1. That the trial court erred in relying on evidence of a single witness the complainant herein

2. That the trial magistrate erred in rejecting the appellants alibi without testing as required by law.

3. Crucial witnesses were not called to adduce evidence.

Counsel for the appellant pointed out discrepancies in description of the vehicle allegedly robbed from the complainant. He said the registration number indicated in the charge sheet is KBM 522Y and while testifying the complaint ant said his vehicle was KBA 592Y probox and pw2 gave registration as KBN 522Y; he added that when the complainant was recalled he gave registration number of his vehicle as KBL522L.He submitted that the above contradiction give rise to a question as to how many vehicles were involved in this robbery. He submitted that despite the above glaring contradiction the learned trial magistrate proceeded to convict the appellants without any amendments done. He submitted that the prosecution is enjoined to prove particulars in the charge. He added that the logbook was not produced in court to prove ownership by the complainant.

On the issue of single identifying witness counsel for the appellant submitted that what happened in this case was dock identification. He submitted that the complainant testified that the appellants were not known to him prior to the incident but no identification paraded was conducted and complainant also contradicted himself in the clothes allegedly worn by the 1st appellant; at one point he said 1st appellant had worn green dress and later blue suit and on further cross examination he said he could not tell the shade of clothes worn by the 1st appellant. He added that the complainant admitted that he never recorded in his statement the description he was giving in court. Counsel submitted it is trite law that description should be given at the earliest opportunity. He referred to ***Msa C.A No.41 of 1998 Ziro Kalume vs. Republic*** where the court restated the problems of visual identification as set out in Patrick mabiswa vs republic criminal Appeal no.80 of 1996 as follows:-

1. Some people may have difficulty in distinguishing between different persons of only moderately similar appearances, and many witnesses to the crime are only able to see the perpetrators only fleetingly, often in very stressful circumstances.

2. Visual memory may fade with the passage of time

3. As is in the process of unconscious transference, a witness may confuse a face he recognized of an innocent person with that of offender.

The court of appeal held that had the judges of the high court addressed themselves on these issues they may well have reached a contrary opinion. He submitted that identification parade was necessary but the complainant admitted that he never attended and no reason was given as to why it was not conducted. Counsel submitted that the complainant was called to police station to identify the appellants without an identification being conducted as required by law. He added that record indicated the complainant gave description after the appellants had been arrested which is a reverse of what should have happened. He further submitted that there was no report from safaricom to confirm that the complaint communicated with the 2nd appellant. He said record show that pw2 indicated that he only saw the complainant. He submitted that despite asking for extract of occurrence book the appellants were not given. He further submitted that pw1, pw6 and pw8 contradicted themselves in description of the second appellant in that pw6 referred to him as youthful, pw1old man while pw8 aged. Further appellant 1 was said to have dust all over while no one said appellant 2 had dust. Counsel faulted the trial magistrate in framing issues by saying that he failed to appreciate the real issues in this matter. He said the real issue was evidence of single identifying witness and that the magistrate failed to test the complainant's evidence and to warn herself on the danger of relying on evidence of a single identifying witness. He referred to **Nyeri C.A no.384 of 2009 John Mutura Muraya vs *Republic*** where the court held that there is need to test with greatest care the evidence of a single witness. He also referred to Nakuru court of appeal no.146 of 2011 ***Charles Bowen Too & Geoffrey kipngetich vs Republic*** where the court held that it is trite law that evidence of dock identification is weak, worthless and cannot be used to found a conviction. He urged court to find that pw1's identification was dock identification. He said the magistrate indicated that the alibi has done little to displace prosecution evidence but never did testing, no reason was given for disregarding the alibi and failure to consider alibi constitute an error. He submitted that in view of the discrepancies the conviction be quashed and sentence set aside.

Ms. Mwaniki for the state submitted that the state is conceding to the appeal on the issue of identification. She submitted that there is no doubt as to whether robbery took place but there is doubt as to whether the appellants were identified as perpetrators and nothing was recovered from them. She submitted that prosecution relied on evidence of identification by pw1.she said that the appellants were not known to pw1 and no identification parade was conducted as confirmed by the investigating officer. She said that the prosecution were at fault by claiming that identification was by recognition yet pw1 never gave description of perpetrators. She conceded that the trial magistrate erred by failing to test the evidence of a single witness and only dealt with the issue by saying that a fact can be proved by a single witness she agreed that failure by trial court to warn itself is fatal to prosecution case. And that is the major reason why they are conceding the appeal. She also agreed that there were discrepancies in description of motor vehicle in question, no amendment was done. She agreed with authorities cited by counsel for the appellant.

This being the first appellate court, the appellant expects this court to reevaluate evidence adduced before and arrive at my own conclusion. I do so while bearing in mind the fact that the trial court had opportunity to hear the witnesses and make observation on their demeanor which I did not. Despite the fact that the state conceded to the appeal, I have duty to reevaluate evidence before the trial court and arrive at my own conclusion as stated above.

Pw1 testified that on 12th September 2013, he was at Chaka town when the 2nd appellant approached and asked him to take him (2nd appellant) to kiawara.A2 asked pw1 to wait for 30 to 40 minutes for lady who was to accompany him (A2). pw1 gave A2 his phone number so that he could call when the lady arrived. After 45 minutes A2 called pw1 informing him that the lady had arrived.pw1 said A2 was wearing a brown jacket while A1 wore a green dress.pw1 said while he was fueling at kiganjo A1 was making calls. A1 asked pw1 to pick two youths at mweiga to help her load vegetables. At mweiga two people including A3 entered the vehicle. He said A3 wore a black jacket and white cap.He said they negotiated purchase of vegetables then the youth asked for money to leave with their families and A1 gave them. They agreed to pick the youths at mweiga after giving money to their families. They were found ahead and picked. On the way they asked pw1 to divert the vehicle to marram road. He resisted but, later agreed. He was asked to stop on seeing someone stand near a tree. Pw1 said he stopped when they reached the tree but there was no one and after stopping one of the occupants grabbed him by his neck from behind.pw1 sensed trouble. He was beaten using fists from behind while being told he had disturbed them. He said at the point he was about to lose consciousness, they tried to start the vehicle but it failed. They stopped beating him and asked him to show cut out which he did. The vehicle moved as they continued beating him. They tied his hands as he struggled with them. He moved out with A2.The vehicle moved then stopped when 3rd Accused who was driving realized that A2 was not in the vehicle. He said the lady came out to help A2 enter the vehicle then the vehicle left as he remained behind. He was later taken to mweiga hospital and after hospital he went to mweiga police station and recorded statement. They went to kiawara police station and found A1and A2 having been arrested. He later got information that A3 had been arrested .He said A3 was taken to mweiga police station and he identified him. He said A3's black jacket and cap were found in the vehicle. He said his vehicle had been knocked; it didn't have a glass and his jacket which had kshs 18,000 was not in the vehicle. He also lost his mobile phone. He said he had not seen the accused persons before and said that they were the ones in the dock.In cross examination he said he described the person who hired his vehicle as an old man and that he did not have front teeth but that was not recorded in his statement. He confirmed that no identification parade was conducted.pw2 said he heard pw1 scream. He went to the scene and saw him tied with a rope; he said he saw motor vehicle KBM522X PROBOX move from the scene towards Mweiga.He gave the vehicle registration number to the people after failing to reach police on trying to call. He said after 2 hours the vehicle was seen fueling. He called a police officer and followed the vehicle using a motor cycle. He said people threw stones on the vehicle breaking glasses. He said apart from pw1, he did not see any one else.pw3 and pw7 both administration police officers received information that motor vehicle KBM522Y had been stolen. They rushed to Nyeri-nyahururu road. They saw the vehicle and when they stopped it two men alighted and run they gave chase and arrested the one who was driving the vehicle. He said the person they arrested is A3.on cross examination he said he had not seen A1 and A2 the appellants herein and he never arrested them.pw4 a scenes of crime officer said he photographed the vehicle; he produced photograph of motor vehicle KBN522Y.PW5 clinician confirmed that the complainant sustained human bite on the right ear lobe and the right hand. He produced p3 in court as exhibit.pw6 said motor vehicle KBM622Y fueled at Albiso where he worked. He said A1 had stood at the side of the petrol station for 30 minutes. He said the motor cycle operators knew that the vehicle was stolen and they stoned it.He said two young men were in the vehicle and A2 was one of them. He said he identified A2 because he knew him. In cross examination pw6 said he did not know A2 and that he had not known him before going to the petrol station for 10 minutes.pw8 a police officer said together with his colleague, they responded to screams at mweiga matatu stage and found an aged man having been surrounded by members of public. He said they were told he had stolen a vehicle with a lady who had boarded a matatu. They checked the matatu and found A1 who was full of dust. He said the vehicle was KBM522Y Toyota succeed. In cross examination he said members of public saw the appellants come out of the vehicle.

Pw9 a police officer from Mweiga police station reported that an old man hired his vehicle to Lachuta area to buy vegetables. He said pw1 reported that he would be able to identify the suspects if he saw

them. He confirmed that the jacket and cap he found in the vehicle belonged to A3 who died. He confirmed that no identification parade was done.

From the evidence adduced there is no doubt that pw1, pw6 and pw8 were seeing the suspects for the first time on the day of alleged robbery. There is also no doubt that the appellants were not among the two people who run out of the vehicle on being intercepted by pw3 and pw7 .The two administration police officers referred to the 3rd accused as one of those who run out of the vehicle.pw8 said it is members of public saw the appellants come out of the vehicle but none of them testified. The complainant admitted that no identification parade was conducted. He also admitted that it was his first time to see the suspects.pw6 who talked of seeing A1 stand at petrol station never connected her to the alleged stolen vehicle. As it relate A2 pw6 said he had not seen him before but identification paraded was conducted to confirm if he identified him.Pw1 talked of old man while pw6 talked of a youth. Both were referring to A2.Pw8 said he did investigate the number used to call the complainant.

I agree with counsel for the appellants and the state counsel that the trial magistrate erred in believing prosecution evidence on identification by recognition yet the appellants were not known to the complainant before. The complainant also never gave description when giving initial report and pw2 also contradicted herself on description of clothes worn by A1 and finally said he did know the shade of her clothing. What happened was dock identification which is not safe more so in a situation where there is no other evidence linking the appellants to the offence. I agree with the holding in ***Nbi C.A NO.6 of 1986 Maitanyi vs Republic (1986) KLR*** that the trial magistrate should have carefully tested the evidence of pw1. The trial court should have warned itself of the dangers of relying on evidence of a single identifying witness and subject the evidence to test.No enquiry was also made as concern ownership of the vehicle. Different registration numbers were given by the witnesses. Prosecution never amended the charge neither did the complainant avail ownership documents. This raises doubt as to which vehicle was seen fueling at Pw6's petrol station. The issue was left unanswered.

From the foregoing I find the conviction unsafe, proceed to quash it and set aside the sentence imposed. The appellants to be released unless lawfully held.

Dated and signed at Nairobi this……..day of……2017.

**……**

**RACHEL NGETICH**

**HIGH COURT JUDGE**

Delivered at Nyeri this 26TH day of JULY 2017.

……..

JUDGE