REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

H. C.CR.A NO. 110 OF 2015

(CORAM: J. A. MAKAU – J.)

STEPHEN OWINO OPERE …..... APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

(Being an appeal against both the conviction and the sentence delivered on 20.11.2014 in Criminal Case No. 194 of 2012 in Siaya Law Court before Hon. R.M. Oanda – S.R.M.)

JUDGMENT

1. The Appellant **STEPHEN OWINO OPERE** with another faced a charge of **Robbery with Violence Contrary to Section 296(2) of the Penal Code**. The Particulars of the offence are that on the 19th day of April 2012 at Siaya Sub-Location in Ugenya District within Nyanza Province jointly with others not before court being armed with dangerous weapons namely pistol and kitchen knife robbed Margaret Sikoyo Ochieng a green bag containing Kshs.12,000, two mobile phones make Nokia, a wrist watch make Seiko, two bunches of keys and other personal effects all valued at Kshs.51,600/= and at or immediately before the time of such robbery threatened to use actual violence to the said Margaret Sikoyo Ochieng.

2. The complainant **MARGARET SIKOYO OCHIENG**, PW1 testified that on 19th April, 2012 at 6.30 p.m. she closed her shop and headed home driving her car Registration No. KAP 460B. That on approaching her home she saw some people around her home who comprised of the boys and others. That one of the two boys had a green T-Shirt with white stripes, that one of them was short and brown. That she drove straight to the gate and waited for it to be opened. That as she was waiting she saw another car, grey in colour and from nowhere another boy came running, he reached her, pulled out a gun from the sweater and pointed it at her telling her ***"Toa ama nikumalize."*** she pleaded with the boy not to kill her telling her she had some money amounting to Kshs.12,000/=. He entered his head into the car, opened PW1's handbag, ransacked it but ran way with it. That in the bag there was KShs12,000/=, two Nokia Phones make **N-79**, a wrist watch, two wallets, one with money and another with make ups, three bunches of keys and note books and he ran away. That PW1 came out of the car and started screaming. That the boys ran into the grey car and took off. She picked the registration numbers of the car as KAL 471T. The Police were notified and chased the car. That after an hour, PW1 was called by the Police and told that one person had been arrested and was at Bumala Police Station. She was asked to go and identify the person. That on arrival she was able to identify the boy who was in green shirt with white stripes, she stated she could identify his face well adding he was in court as first accused. She also testified she was asked to go and identify the car which was parked along Butula-Bumala High way road and she did. That her bag was inside the car. She checked and found her money, phones and one bunch of keys missing. She identified a wallet with maker as MFI – P1, an empty wallet as MFI-P2, note book, MFI – P3 (a) and (b), wrist watch – MFI – P4, Bunch of keys, MFI – P5 and Bag MFI P6. She testified

that there was a dead body inside the car. That on 24th April 2012 PW1 testified that she was called to Ukwala Police Station to identify the attackers in an identification parade. She testified the 1st accused (Appellant) was wearing a green T-Shirt with white stripes MFI P7. She also identified the car which was sprayed with bullets as MFI P.8. She testified the two accused persons were the persons she had identified on the road. She testified the one who took her hand bag was not present before the court. She stated at the material time it was not yet dark and that it was clear hence she did not confuse the attackers. She testified the two attackers are the ones present before Court and that she had not known them before. During cross-examination PW1 testified that the appellant never interfered with her in anyway and that she saw the appellant in green T-shirt. That she saw him run into the car and later she saw him at Bumala Police Station adding that she gave the appellant's description to the police. She testified that she was not at the scene when the appellant was arrested but she was called and was able to identify the appellant.

3. **PW2 Charles Odhiambo Otega** testified that on 19.4.212 at around 6.30 p.m. he received a telephone call over a robbery by people who had motor vehicle registration number KAL and who had driven towards Bumala direction. That he alerted his colleagues about it and after a while they saw a motor vehicle moving slowly. He raised alarm and informed Police as he had been told the occupants in the vehicle were armed. That Police pursued them and killed the driver. He identified the appellant in court who he testified was in a green T-Shirt MFI P7 and the vehicle as MFI P8. During cross-examination PW2 testified he identified the Appellant and that is why he was arrested.

4. **PW3 Gabriel Ochieng Dola** testified that on 20.4.2012 he was called by friends and asked where his brother's vehicle was. He called his brother who informed him he had given it to Jacktone Omondi to use to Thika. He told the friend the vehicle was at Thika but the friend cut his call off, only later to call him and inform him the vehicle was at Bumala, riddled with bullets and somebody had been killed. He later informed his brother who travelled to Ukwala Police Station and informed the D.C.I.O. about the incident. He identified this vehicle before court as MFI P8. He testified that he did not know the 1st accused (Appellant) but the 2nd accused.

5. **PW4 Nicholas Oluoch** testified that on 18th April 2012 he received a call from one Jacktone (2nd accused) asking him to let him use his car to run a few errands at Thika and he released his car to him and was to return it in the evening. That evening he called PW4 asking him to let him deliver the car the following day. That he did not do so. That on 20.4.2012 he got a call from his brother informing him he had information that the card had been spotted at Bumala Police Station and that it had been used in robbery. That the following day he received a call from DCIO Ukwala and he proceeded to Ukwala Police Station. That the 2nd accused was later arrested in Nairobi. PW4 testified the vehicle belong to him and identified the logbook MFI – P9 (a) and Transfer Form – MFI P9 (B), two receipts of purchase MFI P. 10 (a) and (b). He also identified the 2nd accused in the dock.

6. **PW5 No. 72631 Cpl. Isaac Kimurgor** testified that on 19.4.2012 at 1900 hrs he was informed of an ongoing robbery at the home of Margaret Nyagweno (PW1) and proceeded to the scene. PW1 informed them of a starlet grey vehicle in colour with 5 occupants. That they pursued the vehicle without success but later were informed the people had gone towards Bumala and one person had been killed. That they went to Bumala, confirmed the incident and conducted a search and recorded a recovered bag. That they escorted the arrested person to Ukwala Police Station. He identified the prisoner in Court as 1st accused (appellant). He also identified the vehicle in court as MFI P8. During cross-examination he testified the Police at Bumala had arrested the Appellant.

7. **PW6 No.99024928 APC Wilfred Juma** testified that on 19.4.2012 he was at Camp with Sgt Godfrey Muhoro when one Charles Odhiambo informed them of robbery at Sega and that the vehicle concerned had escaped to Bumala. That they erected a road block. That they saw vehicle KAL 421T Grey in colour and attempted to stop it but it did not stop. The occupants of the car shot at them and they followed the vehicle from behind on a motor cycle. That they exchanged fire and in the process they shot the driver and the vehicle stopped. They saw some men alight and got into the forest/bushes. They followed them and later heard communication in the town that one person in green T-shirt had been arrested and they re-arrested him. They called for re-enforcement and OCPD, D.C.I.O. from Busia and Ugunja found them at

the scene. That while at the scene PW1 joined them and identified the bag, MFI P.6 and some keys MFI P5. He identified the 1st accused in the dock as the person who they re-arrested. During cross-examination PW6 testified they got information from Charles Odhiambo who had been informed of the robbery by PW1. He testified the appellant was arrested without the town by members of public.

8. **PW7 No. 90089874 Snr. Sgt. Godrey Makhanu** testified that on 19.4.2012 he was at Burinda AP Camp with Wilfred Juma when a person in a motorcycle came and informed them of a robbery at Sega Township by robbers who escaped in a motor vehicle. That they armed themselves and proceeded to Bumala where they laid an ambush as they had the description of the vehicle. They saw a vehicle stopped it but it defied their orders to stop. That PW7 and his team followed the vehicle and in the process there was exchange of fire and shot dead the driver as others run away. They commenced search assisted by members of public and later members of public arrested one suspect and they called for re-enforcement and rescued the suspect. D.C.I.O., Busia, Ugenya, OCPD, Busia and many other officers proceeded to the scene. That the driver's body was removed form the scene and the vehicle towed away. PW1 came to the scene and identified the bag that was in the vehicle. PW7 identified the 1st accused in the dock who he had not known before. During cross-examination PW7 stated the appellant was arrested on the way to Lwanya after 10 minutes after the escape of the suspect. He further testified the exhibit were recovered in the vehicle used in the robbery and that the appellant was in green T-Shirt of Gor Mahia Football team. He admitted that he did ot give description of the appellant nor record about it in his statement.

9. **PW8 No. 231507 C.I. Simon Kirui** testified that on 19.4.2012 at 7.20 p.m. he was at Ukwala when he received a call from Cpl Kimurgor of Sega Patrol Post informing him of robbery that had taken place within Sega centre. He informed O.C.S. Ukwala to proceed to the scene. He also proceeded to the scene. That on the way Cpl. Kimurgor informed him he had gotten the description of the vehicle. He later received information of the interception of the vehicle and gunning down of one suspect. He proceeded to the scene and met with D.C.I.O. Busia, and Aps at the scene. He found at the scene vehicle Registration No. KAL425T Toytoa Starlet grey in colour, and a bag at the rear seat. They then contacted scene of crime who armed at the scene and took Photos of the scene. He further testified one suspect had been arrested and and was at the scene. That the complainant arrived at the scene and identified the bag. PW8 talked to the suspect and took over the case. He testified that the complainant identified the suspect through the T-Shirt he was wearing and they took over the T-shirt. That the following day he interviewed the appellant who could not explain why he was at Bumala. That after recording statements he charged the appellant with this offence. He also summoned the owner of the vehicle for questioning and who told him that he had given his vehicle to Jacktone Omondi. He then traced him at Nairobi and arrested him. He identified the appellant in the dock. He produced wallet for make up as exhibit P1, wallet exhibit P2, Two note books – exhibit P. 3 (a) and (b), wrist watch exhibit P4, Bunch of keys exhibit P5, Bag exhibit P6, Bag exhibit P6, T-shirt exhibit P7, T-Shirt exhibit P7, T-Shirt exhibit P7, Photographs of the vehicle exhibit P8. During cross-examination PW8 testified that he first found the appellant at the Police Station after members of Public had arrested him and the Police Officers had re-arrested him. PW8 stated that they did not conduct any identification parade.

10. That after evaluation of the prosecution case the trial court found the appellant had case to answer and placed the appellant on his defence who opted to give sworn defence and call no witness.

11. **DW1 Stephen Owino Opere** testified that by the time of his arrest he was employed by Idea Site Sea Food Ltd as a grader and that on 19.4.2012 he was stationed at three collection points, i.e. Osieko Beach, Port Victoria Beach and Busia Town from where he did his normal duties at Port Victoria, till around 5.05 p.m. then travelled with a lorry to Bumala on the way to Busia that at Bumala he told the driver to drop the fish at KZ Hotel and that he was to take a different vehicle that he was left at KZ Hotel where he stayed for one hour after which he proceeded to the stage. That while on a phone call he saw three officers who came to where he was and the people at the stage fled. He talked to them and gave them his identity card. He told them he was born and raised at Busia and that he speaks Luhya and Teso languages to which they told him he was lying, seized him and took his phone he then was arrested and locked in a house and later taken to police station and locked in cells. That a lady came and made a report and left with Police officers. The Police Officers later took him to another room and started beating him and thereafter placed him in cells. That while there another officer came with some clothes and a hand bag

and questioned him about the whereabouts of the vehicle he was travelling and told him he was lying. That he was assaulted but denied having been in possession of the items. That due to beating which resulted into his tooth falling he agreed to put on the cloths the police officers had come with. He was then taken outside where there was a car with a dead body inside. He was forced to carry the body into the land cruiser and later brought to Ukwala Police Station and the following day interrogated. That he was later charged with the present offence. During cross-examination he testified that he is from Siaya County, Uranga Division Alego.

12. The trial magistrate evaluated the prosecution and defence evidence and convicted the appellant for an offence of simple robbery contrary to **Section 296(1) of the Penal Code** and imprisoned him to serve three (3) years imprisonment.

13. Aggrieved by the conviction and sentence the appellant lodged this appeal raising ten (10) grounds of appeal as follows:

> ***i. The Appellant was first taken to court on 20.4.2012, the record shows he was charged on 24.4.2012.***
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> ***ii. The record and proceedings do not set out which language the appellant chose for his trial, in breach of his right to fair trial.***
>
> ***iii. The charge and particulars set out therein were defective to the extent that they could not form the basis for a competent trial.***
>
> ***iv. The Learned trial Magistrate erred in both law and fact in failing to appreciate the glaring, contradictions in the evidence by the prosecution witnesses.***
>
> ***v. The trial court erred in both law and fact in failing to appreciate that the evidence tendered by the prosecution witnesses was insufficient to be the basis of a sound conviction.***
>
> ***vi. The trial court erred both in fact and law in failing to appreciate that the evidence of identification was wanting, insufficient to be the basis of sound conviction.***
>
> ***vii. The trial court shifted the burden of proof to the Appellant.***
>
> ***The trial court erred both in law and fact in making conclusions, findings, and drawing interferences not based on evidence on record, thereby reaching a wrong decision.***
>
> ***ix. The Learned trial Magistrate did not comply with Section 169 of the Criminal Procedure Code in writing and the judgment herein.***
>
> ***x.The judgment of the subordinate court is against the weight of evidence on record***.

14. I am the first appellate court, I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis and will draw my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanour. I am guided on the duties of a first appellate court by the Court of Appeal decision of **Kiilu and another V. R. (2005) 1 KLR 174** where the court of Appeal held thus:-

> "***an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."***
>
> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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."

15. The learned counsel for the Appellant Mr Kasamani emphasized that the key issues in this appeal relates to the charge and particulars set out therein being defective to the extent that they could not form the basis for a competent trial, that with the court finding that the attackers were not armed and the complainant never reported that there was violence against her and the court's finding that the attackers were not armed the charge of robbery with violence could not stand, that the charge of robbery with violence was reduced to simple robbery without laying of basis for its reduction, that the arrest of the appellant by members of public has no nexus to the offence of robbery herein, that the appellant was not properly identified, that the identification of the appellant after the arrest at Police Station where the complainant was shown the appellant and told he is the one who had robbed her was flawed, that the identification of the appellant by Gor Mahia T-Shirt was insufficient and incorrect, that no exhibit was recovered from the appellant to connect him with the offence, that none of the members of public who arrested the appellant was called as a witness because they would have been hostile witnesses for the prosecution. The Learned Counsel in support of the appeal relied on the case on of **Samuel Gichuru Matu V. Republic CR. A No. 88/2000 C.A. at Nairobi**, on issue of identification and independent witnesses the learned Counsel further submitted the prosecution evidence was riddled with contradictions, especially on evidence of PW6 and PW7, and lastly urged the Court did not specifically indicate the language used in the proceedings and urges the Court to allow the appeal against both the conviction and sentence.

16. The State opposed the appeal through M/s. M. Odumba Learned State Counsel who submitted that the charge was not defective and faulted the trial Magistrates Court's findings to the effect that there was no gun nor threat and that the robbers were not armed as a misapprehension of the evidence. The State Counsel also faulted the trial Magistrate for reducing the charge from robbery to simple robbery urging the trial Court came to the wrong conclusion. The Learned State Counsel submitted that the complainant properly identified the appellant as the offence took place at 6.30 p.m. adding the complainant identified the appellant by green T-Shirt with white stripes which the appellant was wearing adding as such there was no need for identification parade as PW1 had sufficiently identified the appellant. The Learned State Counsel submitted that exhibits were recovered from motor vehicle MFI P8. which had five (5) occupants including the appellant. On prosecution's failure to call members of public who had arrested the appellant the State Counsel submitted it is the discretion of the prosecution in a Criminal case to call witnesses who they deem fit and failure to call the members of public who arrested the appellant did not prejudice the appellant in any way. She prayed that the appeal be dismissed.

17**. Mr. Kasamani Learned Advocate** in a quick rejoinder urged that the prosecution had not filed a cross-appeal and upon conceding that there was a mistake on conviction they cant ask this court to confirm a conviction which they considered wrong on law nor can they ask court to enhance the sentence. On exhibits he submitted none was recovered form the appellant and the only recovered ones were from the vehicle and had no nexus between the appellant and the car.

18. The Appellant contends that the charge and particulars set out therein are defective to the extent that they could not form the basis for a competent trial. The particulars of the charge sheet are as follows:-

"On the 19th day of April, 2012 at Siaya Sub-Location in Ugenya District within Nyanza Province jointly with others not before Court being armed with dangerous weapons namely pistol and kitchen knife robbed Margaret Sikoyo Ochieng a green bag containing Kshs.12,000/=, two mobile phones make Nokia, a wrist watch make Seiko, two bunches of keys and other personal effect all valued at Kshs.51,600/= and at or immediately before the time of such robbery threatened to use actual violence to the said Margaret Sikoyo Ochieng."

19**. Section 134 of the C.P.C. Provides** that:-

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence

charged"

20. PW1 in her evidence specifically testified that she saw more than two boys before the incident and one of them was armed with a gun which he pulled from his sweater and pointed it at her telling her "***Toa ama nikumalize***"

21. In this case I am of the view that the charge satisfied all ingredients of charge in accordance with **Section 134 of Criminal Procedure Code.** I find that there was no defect in the charge.

22. On the ingredients of the offence of robbery with violence contrary to **Section 296 (2) of Penal Code the Court of Appeal** in the **Case of Martin Mungathia V. Republic Criminal ppeal No. 56 of 2013** quoting with approval from the case of **Johana Ndungu V. R. Criminal Appeal No. 116 of 1995** stated a charge under that Section has three ingredients thus:-

"(a)"If the offender is armed with any dangerous or offensive weapon or instrument or

(b) If he is in company with one or more other person or

(c) If, at or immediately before or immediately after the time of robbery he wounds, beats, strikes or uses any other violence to any person."

23. I am alive to the requirement that proving any one of the ingredients of robbery with violence is enough to sustain a conviction under **Section 296(2) of the Penal Code.** In the instant case the evidence of the complainant is that she was attacked by three people and that one was armed with a gun. Considering that the complainant was attacked by three people and one had a gun I am satisfied the ingredients of the offence of Robbery with Violence was proved and that whoever pulled the gun out or at the complainant was in the company of the other one or more persons and that it matters not that the gun was not pulled at her by the appellant. Further even if the three were not armed the appellant being in company of one or more other person that satisfied the ingredient of Robbery with Violence

24. The Learned trial Magistrate in his judgment at page 72 line 4 addressed himself thus:-

"She never reported that there were any threats to use actual violence against her. She too did not state whether the attackers were armed or not."

and further went on to state:-

"I have considered the totality of the evidence on record. I find the evidence on record does not meet the required threshold of Section 296 (2) of the Penal Code."

25. The Learned trial Magistrate finding that the ingredients of robbery with violence Contrary **Section 296 (2) of the C.P.C.** were not established was misapprehension of the law and the evidence before him as to what constitutes robbery with violence. That his purported reduction of the offence of robbery with violence to simple robbery was not based on any known principles of law and was an error in law. The offence disclosed by the evidence of PW1 and particulars of the charge sheet was that of robbery with violence and not simple robbery. The state conceded that the trial court was in error in reducing the offence to simple robbery yet they asked this court to confirm the conviction based on misapprehension of evidence. This court cannot do so. The State having noted the mistake should not have proceeded with the appeal without filling a cross-appeal to challenge the wrongful conviction and sentence. I find that it is wrong for State to urge the court to confirm conviction which the State knows is wrong nor can it be enhanced. I find the conviction on simple robbery in view of glaring evidence pointing to an offence of **Robbery with Violence contrary to Section 296(2) Penal Code** to be unlawful and unjustified as there are no reasons for reduction of the offence nor can this court having found the conviction to be wrongful and/or unlawful enhance the sentence even if there was evidence in support as doing so would prejudice the appellant and especially when the State had not filed a cross-appeal having been aware that the conviction was wrongful yet it supported it.

26. The Appellant contend the Learned trial court erred in failing to re-evaluate evidence on record. The Court of Appeal in the case of **Salim Juma Dimiro V. R. Criminal Appeal No. 114 of 2004 at Mombasa** categorically stated that re-evaluation of evidence is a matter of law. I this case the appellant faced a charge of **Robbery with Violence Contrary to Section 296(2) of the Penal Code.** It is therefore the duty of this court to examine if in dealing with the evidence of identification of the appellant the trial court made an error. In the case of **Abdala Bin Wendo V R (1953) 20 EACA, 166,** it was held that where the conditions for identification are difficult, there is always need for other evidence, circumstantial or direct pointing at the guilt of the accused to be produced. In the case of **R V Turnbull & Others (1973) ALL ER 549**, the court considered what factors the Court should take into account when only evidence turns on identification by a single witness. The Court stated:-

> "------ ***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? In what light? Was the observation impeded in any way? 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 the 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 his actual appearance? ----- Recognition may be more reliable than identification of a stranger, but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistake in recognition of close relatives or friends are sometimes made."***

27. In the assistant case it is clear that the evidence against the appellant is the testimony of a single witness coupled with circumstantial evidence relating to his arr**est. In the case of Charles O. Maitanyi V R. (1986) KLR 198, the court of Appeal held thus:-**

> ***"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 the greatest care the evidence of a single witness respecting identification"***

28. In the present case the evidence on identification of the appellant is that of the complainant alone. PW1's evidence is that on 19.4.2012 at 6.30 p.m. she closed her shop and proceeded to her home in Motor vehicle Registration Number KAP 460B, and on approaching home she saw two boys and some other people, one of the said boys had a green T-Shirt with white stripes and was short and brown, that as she was waiting for gate to be opened she saw a car, grey in colour and another boy running and on reaching her, he pulled a gun at her from a sweater and pointed at her, telling her ***"Toa ama nikumalize"***. He entered his head into her car and took off with her handbag. He and the other boys ran into the grey car and took off. She picked the registration number of the car KAL 421 T. The Police ran after the car. That after an hour PW1 was called by police and told one person had been arrested and was at Bumala. She went to Bumala Police Station where she identified the boy who was in green T-Shirt with white stripes. PW1 stated she reported both at Sega Police Post and Bumala Police Station. PW6 and PW7 testified that members of public who participated in search arrested a suspect who was dressed in a green T-Shirt and they re-arrested him. PW8 testified a suspect had been arrested and that he went to Police Station and met the suspect and that the complainant came to Police Station and identified the suspect through the T-Shirt he was wearing. He further stated they did not conduct any identification parade. The Appellant denied having committed the offence and even being in green. T-Shirt at the time of his arrest by members of Public. He testified that he was forced by Police Officers at Police Station to change his clothes and wear the green T-Shirt with white stripes.

29. The critical issue for my consideration is whether PW1, PW6, PW7 and PW8 were able to identify the appellant. PW1 in the instant case did not make first report to Bumala Police Station or any station or other person stating what it was that enabled her to identify the appellant. PW1 did not state what time she reached at her gate and what time it was when she saw the boy in a green T-Shirt with white stripes, how long he was under her observation and from what distance and in what light and whether the observation was free from any impediment. PW1 did not state whether she had even seen the boy before. It is clear from her evidence the boy was a total stranger to her. She gave the reason for remembering

him as he was in a green T-Shirt with white stripes but such shirts are commonly available as a commodity of trade. She did not give any special mark that would enable her pick the boy in such dress. That the arrest of the appellant was after an hour and quite a long distance from the scene of the incident. The complainant was not at the scene at the time of the arrest of the appellant and had lost sight of the boy she had seen since he left in a speeding car before subsequent arrest of the appellant.

30. PW8 was the investigating officer and in his testimony he never mentioned or made reference in the Occurrence Book to the effect that the complainant PW1 gave description of the attackers. The complainant never said she was attacked by persons known to her. PW1 in her evidence stated she identified the Appellant by green T-Shirt with white stripes but interesting enough she never made an initial report or statement giving the description of the appellant (**See Case of Charles Gitonga Stephen V R eKLR 2006**) PW8 testified that PW1 identified the appellant while at Police cells and there was no identification parade. That mode of identification is flawed and cannot be allowed to stand. That identification by green T-Shirt with white stripes if allowed to stand would amount to gross injustice to the appellant and on the contrary green T-Shirt with white stripes are readily available in the open market and every person can buy and use the same. Secondly the appellant was not arrested immediately and at the scene of robbery. That when the appellants was arrested the complainant was not there to identify him. It is my finding and view failure by PW1 to give description of the assailant at the earliest opportunity and before arrest, and failure also for police to conduct identification parade coupled with PW8 taking PW1 to police cells and showing her the appellant and telling her he was one of her attackers weakens the prosecution's evidence on identification of the attackers. PW1 should have given the description of her attackers and should not have been allowed to see the appellant at Police cells before identification parade was conducted **(see case of Moses Munyao Mucheru V R. on Criminal Appeal No. 63 of 1987**)

31. The appellant's Counsel faulted the trial Court urging that it failed to comply with **Section 169 of C.P.C.** in writing the judgment. Section 169 of the Criminal Procedure Code Provides:-

> ***"(1) Every such judgment shall, except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***
>
> ***(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.***
>
> ***(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."***

32. I have very carefully perused the trial court's judgment and indeed I have found that the trial court did not comply with the provisions of Section 169 of Criminal Procedure Code, however that notwithstanding as I have re-evaluated and analyzed the evidence and raised several issues for determination, which I have, I am of the view that the appellant wont be prejudiced in anyway by such failure I have in this appeal dealt with such issues, I therefore hold that cannot be a basis for praying for the appeal to be allowed.

33. The Appellant contend that the trial court erred both in law and fact in failing to appreciate the graying and contradictory evidence by the prosecution witnesses. It was submitted on behalf of the appellant that there were contradictions made by the prosecution witnesses PW6 and PW7. The appellant did not point out the fundamental inconsistencies that dent the prosecution case and was under obligation to do so. In the case of **Martin Mungathia V. Republic Criminal Appeal No. 56 of 2013 (C.A. At Nyeri) the Court of Appeal** addressed itself thus:-

> ***"The appellant contends that the trial court as first appellate court failed to reconcile the***

inconsistencies in the prosecution evidence. It is the appellant's case that the testimony of the complainant PW1 is inconsistent, that the inconsistencies were not considered by the courts below. We have examined the testimony of the complainant Pw1 and we are satisfied that there are no fundamental inconsistencies that dent the prosecution's case.The appellant has not succinctly identified the alleged inconsistencies and how they dent the prosecution's case."

34. In the case of **Njuki V. Republic (2002) 1 KLR 771** it was stated as follows:-

"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."

35. In the instant case no discrepancies have been specifically raised in the evidence of PW6 and PW7. The court cannot go about fishing for undisclosed discrepancies as it is the duty of the appellant having asserted that there were discrepancies to point them out and show how they dent the prosecution case failure whereof the court where the case is proved against the accused is entitled to proceed to convict.

36. The appellant's Counsel faulted the prosecution's case on the ground that vital witnesses specifically members of public who arrested the appellant were not called as witnesses. I have gone through the appellant's defence and have not noted anywhere where he stated the arresting officers or members of public were not called as witnesses to testify in this matter. The Appellant's Counsel in his submissions did not point out the names of the vital witnesses other than stating arresting members of public were not called as witnesses. PW5, PW6, PW7 and PW8 gave evidence on how the appellant was arrested. There is no doubt from the evidence of the said witnesses that the appellant was arrested, by members of public who were not called to testify on how they arrested him. In the instant case I find that the evidence of members of public who arrested the appellant would have buttressed the prosecution's case, however there is sufficient evidence that the appellant was arrested at a distance from the place where motor vehicle KAL 421T, was which was said to have been involved in robbery. There was no direct evidence to connect the appellant with the vehicle. The failure to call witnesses could not have been the basis of any adverse inference. The appellant might have been arrested on mere suspicion but as there was no evidence on the basis of his arrest. This court shall not engage in mere speculation over that issue.

37. Having considered the appeal I have come to the conclusion that the evidence adduced against the appellant fell fair too short of proof to the required standard in criminal cases.The Offence of Robbery with violence was not proved nor the offence of Simple Robbery as against the appellant. I find the conviction against the appellant with lesser charge of Robbery with Violence Contrary to Section 296 (1) of the Penal Code was unsafe and should not be allowed to stand. I accordingly quash the conviction and set aside the sentence. I order the appellant be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 28TH DAY OF APRIL, 2016.

J. A. MAKAU

JUDGE.

DELIVERED IN THE OPEN COURT

IN THE PRESENCE OF:-

Mr. Kasamani for State:

M/s Odumba for State.

Court Clerk: Kevin Odhiambo

Court Clerk: Mohammed Akide:

J. A. MAKAU

JUDGE.