REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 64 OF 2015

1. LAWRENCE OMBUNGA OTONDI

2. DOUGLAS RIOGI OTONDI……...…….....……APPELLANTS

VERSUS

REPUBLIC …….....…….....……...…… RESPONDENT

(Being an appeal against the judgment, conviction and sentence of Hon. P. K. Rugut, Senior Resident Magistrate in Rongo Principal Magistrates Court Criminal Case No. 5 of 2012 delivered on 27/07/ 2015)

JUDGMENT

INTRODUCTION:

1. The motor cycle riders in Sare-Awendo town within Awendo Sub-County of Migori County were visited by a series of unfamiliar customers between late 2011 and early 2012. Those customers posed as genuine ones who sought to be taken to various destinations only to turn out to be robbers instead. Those robbers had a unique way of executing their intentions. They would spray a hot pepper solution into the eyes of the riders as they conveniently took away the motor cycles and fled. That was undoubtedly a very worrying trend among the unsuspecting riders whom many had fallen prey to the robbers.

2. On 03/01/2012 the appellants herein, who are brothers, were arrested and upon completion of police investigations they were jointly charged with four counts of robbery with violence whose particulars were tailored as follows:-

Count I:-

On the 3rd day of January 2013 at 8:30 pm at Awendo Township in Migori County jointly robbed HEZRON ODHIAMBO OBONGI of Kshs. 4,000/= (Four Thousand Shillings Only) and at the time of such robbery struck the said HEZRON ODHIAMBO OBONGI with a 'Rungu'.

Count II:-

On the 22nd day of December 2011 at Awendo Township in Migori County within the Republic of Kenya jointly robbed SEVENSON OKINYI OCHIENG Motor Cycle registration KMCS 155B Bajaj Boxer red in colour valued at Kshs. 87,000/= and at the time of such robbery struck the said SEVENSON OKINYI OCHIENG with a 'Rungu'.

Count III:-

On the 18th day of November 2011 at Awendo Township in Migori County within the Republic of Kenya jointly robbed NICODEMUS OKOTH ODONGO Motor Cycle registration KMCQ 837F Bajaj Boxer red in colour valued at Kshs. 85,000/= and at the time of such robbery struck the said NICODEMUS OKOTH ODONGO with a 'Rungu'.

Count IV:-

On the 8th day of September 2011 at Awendo Township in Migori County within the Republic of Kenya jointly robbed VICTOR ODHIAMBO OLOO Motor Cycle registration KMCS 058H Bajaj Boxer blue in colour valued at Kshs. 83,000/= and at the time of such robbery struck the said VICTOR ODHIAMBO OLOO with a 'Rungu'.

3. The trial began on 09/03/2012 and ended with the delivery of judgment on 27/07/2015.

THE TRIAL:

The Prosecution's case:

4. The prosecution called 8 witnesses in a bid to prove the charges as against the then accused persons who are now the appellants in this appeal.

5. **PW1** was **HEZRON ODHIAMBO OBONGO.** He was the complainant in respect to Count I. He was a boda boda operator within Awendo Town and operated motor cycle registration number KMCS 841C make Bajaj Boxer red in colour. He recalled that on 03/01/2012 at around 8:30pm as he was awaiting for customers at the said stage, the second appellant appeared and asked PW1 to take him to Sony D60 Estate. That was the first time PW1 was seeing the second appellant. PW1 agreed and as he started the journey the passenger told him that he was to pick another person on the way. That so happened and the three of them proceeded on. The two passengers were both in jackets. Before reaching the intended destination, the passengers asked PW1 to stop. He complied but the passengers did not alight. Instead PW1 was sprayed with hot pepper solution in his eyes. He raised alarm and the second appellant physically assaulted him with his hands while threatening PW1 with a 'rungu' (club).

6. As PW1 raised alarm the two customers ran away leaving the club behind and as they also raised alarm. Some security personnel from a security firm who were on duty within the Sony Sugar premises managed to arrest the two people. The two appellants were taken to the Awendo Police Station together with PW1. It was PW1's further testimony that when he reached the Police station that is when he discovered that he had lost his Kshs. 3,000/= but he did not know how the money was taken from him.

7. **JOHN OKEYO ODOLL** who testified as **PW4** was one of the security officers from the security firm called Gilley Security who were on duty on 03/01/2012 within the Sony Sugar premises. He stated that at around 08:00pm. he heard screams which were near where he was and he immediately responded by running towards the direction the screams came from together with his colleagues. On reaching at the scene PW4 found that many people had already gathered and the two appellants had been arrested by the members of the public and were seated on the ground. He saw the first appellant carrying a bottle allegedly containing a hot pepper solution. PW4 also saw PW1 at the scene crying and saying that the appellants had wanted to rob him of his motor cycle by spraying the hot pepper solution in his eyes. As the members of public wanted to lynch the appellants, PW4 called for a tractor from the Sony Sugar factory and took the appellants to Awendo Police Station where he handed them over to the police.

8. **SEVENSON OKINYI OCHIENG** testified as **PW2**. He was the complainant in respect to count II. PW2 operated his motor cycle registration number KMCS 155B make Bajaj Boxer red in

colour from the said Awendo Town stage just like PW1, He recalled that on 22/12/2011 at around 1:00pm as he had dropped a lady customer at Luara School and was on his way back to his operational base, he was stopped by a man who seemed to be a customer and who requested to be taken to a place known as the Labour Camp. As that was on his line of duty PW2 readily agreed and they headed to the place. While on the way they met an oncoming motor cycle with the rider and another person. They were then in a sugar plantation. PW2's passenger asked him to stopped as he had seen the person he wanted to meet on the other motor cycle. PW2 then stopped and his passenger went to talk to the other passenger. As the two were still talking, As PW2 was waiting for his customer he saw the other rider approach him and on nearing him he suddenly poured a hot pepper solution into PW2's eyes.

9. Sensing danger, PW2 attempted to remove the keys to his motor cycle but in vain. The attacker then drew out a knife and threatened him as the two other people who were allegedly having a talk joined the attacker in beating PW2. The attackers then took PW2's motor cycle and fled leaving PW2 in the sugar plantation. PW2 then sought some assistance from the nearby D.O.'s office where he was directed to report the incident to Awendo Police Station and he so did.
10. About 12 days later, that is on 03/01/2012, PW2 received information that some thieves had been arrested and he was called to attend an identification parade on 06/01/2012 at the Awendo Police Station. PW2 attended the parade and managed to identify the first appellant whom he described as the rider of the other motor cycle who spilled the hot pepper solution into his eyes.

11. **PW3** was the complainant in count IV. He was **VICTOR ODHIAMBO OLOO.** He also used to operate her mother's motor cycle registration number KMCS 058H make Bajaj Boxer blue in colour from the Awendo Town stage just like PW1 and PW2. He recalled that on 08/09/2011 at around 07:00pm as he was waiting for customers at Rapogi stage the two appellants herein, whom he did not know before then, appeared and requested to be taken to an Estate within Sony Sugar factory. That was Estate F37. Upon agreeing on the fare the two boarded the motor cycle where the first appellant sat at the back whereas the second appellant sat in the middle.

12. When the three reached the Sare bridge the first appellant requested PW3 for a helmet claiming that he was asthmatic. PW3 gave him one as he continued riding the motor cycle. As PW3 was riding uphill, he saw the first appellant stretch his leg and removed a nut which nut he hit PW3 with on the right shoulder. PW3 got hold of the nut and struggled with the first appellant as they both came off the motor cycle. The motor cycle then veered off the road. In the course of the struggle the first appellant removed a knife and PW3 ran away. It was the first appellant who rode the motor cycle as the two left PW3 behind. PW3 then reported the matter to the Awendo Police Station after a concerted search for the motor cycle two hours in vain.

13. PW3 was then called by PW1 on 06/01/2012 and was informed of an identification parade at the Police Station where he attended and identified both appellants herein.

14. The complainant in count III testified as **PW6**. He was one **NICODEMUS OKOTH ODONGO**. He was the rider of motor cycle registration number KMCQ 837F and was also stationed at the Awendo Town stage. That motor cycle belonged to one Nathan Odienya and PW6 had been in its possession for one year prior to the incident.

15. He recalled that on 18/11/2011 at around noon while he was awaiting for customers at the Awendo stage one person approached him and requested him to persue another motor cycle rider who had allegedly gone with that person's change. They agreed and headed towards the Sony Sugar factory using the Rapogi road. Along the said road PW6 and his customer passed another motor cycle who had a rider and another person and the PW6's customer informed PW6 that they had indeed caught up with the rider who had his change. PW6 stopped the motor cycle. As PW6 was awaiting for his customer to ask for his change, he was instead and suddenly sprayed with a hot pepper solution by the person who had been carried on the other motor cycle. PW6 fell down as the motor cycle rolled over. His customer slapped him and as he tried to stand up the customer drew a huge rungu hence forcing PW6 to run into the bush as the customer rode PW6's motor

cycle and left together with the other motor cycle. By that time PW6 could not see properly and he was rescued by a fellow rider who took him to Awendo where he reported to the owner of the motor cycle and they both went to report the incident with the Community Policing members before proceeding to Awendo Police Station where the incident was booked.

16. On 06/01/2012 PW6 was called and attended an identification parade at the Awendo Police Station where he recognized the second appellant as the person who was his customer. The owner of the motor cycle registration number KMCQ 837F one **NATHAN ODUOR ODIENYA** testified as **PW7**.
17. The Investigating Officer testified as **PW5** and the officer who conducted the identification parade testified as **PW8.**
18. With the evidence of PW8, the prosecution closed its case and the Court on 13/04/2015 placed the now appellants on their defences.

(b) **<u>The defence case</u>**:

19. Upon compliance with Section 211 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, the first appellant opted to remain silent whereas the second appellant opted to give sworn testimony. However it appears that the first appellant changed his mind and gave sworn testimony and called one witness who was the father to the appellants herein.

20. The appellants gave a straight forward defence in denying all the offences. According to the first appellant, the appellants were brothers who hailed from Nyabera Village in South Gucha District. The first appellant had a sick wife one Milka Orondi and had gone to get some medicine from a herbalist in Migori in the company of his brother the second appellant. As they were heading back home, it was late and since it was raining they decided to alight at Awendo town and spend at their father's residence in Estate E361 within the Sony Sugar factory premises.

21. On alighting at the Awendo stage they bordered a motor cycle which was stopped immediately on passing the Awendo Police Station and the rider raised alarm. People gathered and they were arrested and as they were about to be lynched, they were rescued by some security guards who took them to the police station.

22. The first appellant's defence was corroborated by the second appellant who was the first appellant's brother and a teacher at Misera Primary School. The appellants' father also testified as their witness. To him his children, the appellants, had called him and informed him that they were going to spend in his house in Sony that evening but they never turned up instead they were arrested and taken to the Police Station.

23. As the appellants closed their cases, the judgment was set for and rendered on 27/07/2015 where the trial court found both appellants guilty in respect to counts I and IV, found the first appellant guilty in respect to count II and acquitted the second appellant on the count II as the court also found the second appellant guilty in respect to count III and acquitted the first appellant in that count. The appellants having been found guilty on the respective counts of robbery with violence were accordingly convicted. They were then sentenced to suffer death.

24. As a result of the said convictions and sentences, the appellants preferred an appeal before this Court. It is worth-noting that, on its part, the State did not prefer any appeal against the said judgment.

<u>THE APPEAL</u>:

25. The appellants mounted a joint appeal through **Messrs Gembe Capis Omolo & Company Advocates** by filing a Petition of Appeal dated 05/08/2015 and a Supplementary Petition of Appeal dated 23/11/2015. A total of seven grounds were preferred and were tailored as follows:

1. ***The learned magistrate erred both in law and fact when she convicted and sentenced both the appellants on the evidence which departed from the charge.***

2. The learned magistrte erred both in law and fact by convicting and sentencing the appellants on the evidence which were so inconsistent and raised many unanswered question.

3. The learned magistratge ought to have considered and acted on the evidence of the prosecution.

4. The learned magistrate failed to consider the evidence against each appellant and thus arrived at erroneous findings.

5. There was no proof of the charges against the appellants to the required standard.

6. The proceeding upon which the accused persons were convicted and sentenced were nullity as the same was done in total disregard of Article 50(2) (h) of kthe constitution of Kenya.

7. There was failure of justice as the accused persons did not undertstand the charges they were facing.

26. The appeal was canvassed by way of written submissions on the part of the appellants as the State relied on the record in opposing the appeal.

27. In a nutshell, the appellants mainly attacked the convictions on the issue of identification including how the identification parade was conducted and strenuously contended that they were not identified in accordance with the law. They further contended that their rights under **Article 50(2)(h) and (j)** of the **Constitution** were violated hence prayed that the appeal be allowed and they be set at liberty.

ANALYSIS & DETERMINATIONS:

28. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

29. In this analysis therefore, I shall endeavour to determine the following issues:-

a. ***Whether the appellants' were properly identified as the assailants;***

b. ***Whether the offences were proved as required in law.***

c. ***Whether the appellants' rights under Article 50 (2) of the Constitution were violated.***

We will consider each of the above issues singly.

a. **On whether the appellants were properly identified as the assailants:**

30. It is imperative to note that the evidence on identification in this matter was two-fold. On one fold there was the evidence of single identifying witnesses in respect to each count and on the other fold there was the evidence of the identification parade.

31. Further in all the counts, none of the witnesses knew the assailants before the incidences. That therefore means that none of the cases was based on recognition of the assailants but all were based on visual identifications. Whereas in count II and III the offences were allegedly committed during day time, in counts I and IV the offences were allegedly committed at night.

32. In view of the foregone, this Court will begin by having a look at the settled legal guidance in respect to visual identification by single witnesses as well as identification at night. The *locus classicus* is the much-celebrated case of **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, where the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***"... 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 with the Accused under observation? At what distance? 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 mistakes in recognition of close relatives and friends are sometimes made."***

33. The Court of Appeal in the case of **Wamunga vs. Republic (1989) KLR 426** stated as under;-

> ***"It is trite law that where the only evidence against a defendant is evidence of 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 conviction."***

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

34. It is therefore upon this Court to analyze the unique circumstances in each count and to determine whether there was positive visual identification of the appellants herein as the assailants. This Court hence remains under a legal duty to weigh the evidence with great care and to be appropriately satisfied that it is safe to act on the said evidence. This is based on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested.

35. Closely related to the issue of the visual identification is the issue of the identification parade. The conduct of identification parades was recently revisited by the Court of Appeal at Nyeri in **John Mwangi Kamau vs. Republic (2014) eKL**R where Honourable Justices Visram, Koome and Odek JJ.A. greatly and at length expressed themselves as under:-

> ***"15. Identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68& 69 of 2008. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DW1, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB. No. 45 of 24/6/2003; the assailants' were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical***

description of their assailants to the police. In Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, this Court observed:-

> *"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."*

16. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure? In Nathan Kamau Mugwe –vs- Republic- Criminal Appeal No. 63 of 2008 this Court faced with a similar situation expressed itself as follows:-

> *"As to the compliant in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.*
>
> *In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."*

17. Based on the foregoing, we are of the considered view that the failure to give the description did not invalidate the identification parade. We find the issue that falls for our consideration is the weight to be attached to the said identification evidence. On the issue of whether the identification parade was properly conducted we can do no better than to reproduce this Court's observations inDavid Mwita Wanja & 2 others –vs- Republic- Criminal Appeal No. 117 of 2005:-

> *"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -*

"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

"6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -

……

(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

……

(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"

18. PW5 (IP Francis) gave evidence of how the identification parade was conducted. He testified that the appellant was placed amongst eight members; the witnesses were in a different room while the parade was being prepared; none of the witnesses met the appellant before the parade; each witness was called alone to identify the assailants from the parade; after identification each witness was taken to a different place in order not to influence the others who had not gone through the parade. IP Francis testified that the appellant changed his position in the parade when each of the witnesses identified him. The appellant never objected to the manner in which the parade was conducted. Based on the foregoing evidence and the identification parade form on record we concur with the two lower courts that the identification parade was properly conducted. We also note that each witness identified the appellant as the assailant who was armed with the pistol. Therefore, there was corroboration of the identification evidence. We are of the considered view that the identification evidence was positive and free from error"

36. The Court of Appeal again and more recently further expressed itself on this aspect in **Douglas Kinyua Njeru vs. Republic (2015) e KLR** as under:-

"20.Identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68 & 69 of 2008. In Mwangi Mahita –vs- Republic (1976-80) 1KLR 153 this Court held,

"Whether or not a parade is so irregular as to necessitate being disregarded is, in

our view, a question of degree which has to be decided in the light of the circumstances of each case."

21. During cross examination Moses testified that though he had given the description of the appellant to the police the said description was not indicated in his initial report. Stephen testified that when he went to record his statement he was informed that suspects had been arrested and was requested to participate in an identification parade. He testified that he recorded his statement after he identified the appellant from the identification parade. Based on the foregoing there is no evidence that the said witnesses gave the appellant's description prior to the identification parade.

22. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure? In Nathan Kamau Mugwe –vs- Republic- Criminal Appeal No. 63 of 2008 this Court faced with a similar situation expressed itself as follows:-

"As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

23. Based on the foregoing, we are of the considered view that the failure to give the description did not invalidate the identification parade. We find the issue that falls for our consideration is the weight to be attached to the said identification evidence.

24. On the issue of whether the identification parade was properly conducted we can do no better than to reproduce this Court's observations in David Mwita Wanja & 2 others –vs- Republic- Criminal Appeal No. 117 of 2005:-

"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous

fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -

"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

"6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -

……..

(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

……

(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"

25. PW4, SP Morris Asila (SP Morris), gave evidence of how the identification parade was conducted. He testified that the appellant was placed amongst eight members; the witnesses were in a different room while the parade was being prepared; none of the witnesses met the appellant before the parade; each witness was called alone to identify the assailants from the parade; the parade comprised of members of similar height and complexion. The appellant never objected to the manner in which the parade was conducted. Based on the foregoing evidence and the identification parade form on record we concur with the two lower courts that the identification parade was properly conducted. We note that the identification parade was conducted a day after the incident while the impressions of the assailants were still fresh in the complainants' minds. We find that the identification evidence was safe and free from error."

37. I will now consider the evidence on record in light of the foregone. In respect to **count I**, the complainant PW1 stated that he was attacked by the two people whom he had carried on his motor cycle as passengers and that both wore jackets. There was no mention of how the assailants looked

like neither was any other and further description of the assailants given. PW1 did not either explain how he engaged the first assailant who approached him and asked to be taken to Sony Estate D60.

38. But there was the evidence of the arrest of the said people. PW1 stated that when he was sprayed with the hot pepper solution and started screaming, the two people ran away as they also screamed. According to PW1 the two people were arrested by the security personnel from the firm of Gilley Security. When PW4 heard the screams and mobilized his colleagues and hurried to the direction the screams came from, they found that the two people had already been arrested by members of public and were seated on the ground awaiting to be lynched. He intervened and took them to the Awendo Police Station. Further PW4 saw the first appellant carrying a bottle which was allegedly containing a hot pepper solution and which was likewise handed over to the police.

39. That position was fortified by the appellants themselves in their sworn defences when they confirmed that they had truly been carried by PW1 on his motor cycle as they were heading to their father's residence and who later on stopped and raised alarm against them. Members of the public responded promptly and as the appellants were about to be lynched, PW4 rescued them and took them to the police station.

40. PW1 also attended an identification parade on 06/01/2012 at Awendo Police Station which was conducted by the then Station's OCS one Chief Inspector Abdi Maalim who testified as PW8. As a result of the parade PW1 managed to further identify the appellants.

41. PW8 explained how he conducted the parade upon the request of the Investigating Officer, PW5. PW8 partly stated that:

> ***'....I had 10 members in the parade.....informed them (that is the two suspects) the procedure and reason for the parade and their right to summon a friend or take a position that may be changed. I listed the names in the P56 Form..... The members had similar age, height and general appearance.....the 1st witness Victor Oloo identified 2 suspects .....the 2nd witness Hezron Ombogo identified 2 suspects.....he punched their shoulders.....the third witness Nicodemus Okoth identified Lawrence Omuya in position 3 but did not identify the 1st suspect Douglas Otieno.....the 4th witness Samson Okinyi Ochieng identifird 2nd suspect Lawrence Ombuga.....but did not identify the 1st suspect.....After completing the parade, I asked if they were satisfied.....I signed the form, the 2 suspects signed the form.....the 2 suspects are the accused persons in court. I did not know them before."***

42. PW8 also explained that the appellants freely changed positions in the parade as they wished after every witness and that the witnesses never met or saw the suspects prior to the parade since the witnesses were in PW8's office and the suspects and the other parade members were behind the station's crime office. Each witness was called alone to identify the assailants from the parade and after that the witness was instead led to crime office such that the witnesses never had an opportunity to communicate with each other.

43. This Court has carefully perused the Identification Parade Form which was produced in evidence. It is true that the form has very clear guidelines on how parades are to be conducted. From the evidence on record it is clear that the appellants participated in the parade voluntarily and they also signed the parade form as required. The appellants never objected to the manner in which the parade was conducted. in any way. It is this Court's finding that the parade was properly conducted.

44. On the foregone evidence, this Court is satisfied that the appellants were the same people who had bordered PW1's motor cycle and who were eventually arrested by members of public and taken to the Police station by PW4 and were positively identified by PW1 in the parade.

45. On **count II**, PW2 stated that it was the first appellant who had attacked him by spraying the hot pepper solution into his eyes as he was on his motor cycle awaiting for his customer who was talking to the person whom the first appellant had carried on his motor cycle. The suspect approached him as PW2 observed him well. He had a leather jacket and a cap. The attack was also committed in broad day light. It was that very person whom PW2 caught his face in the parade as he stood between the second and fourth members and whom he identified him as his assailant.

46. Having already found that the parade was properly conducted, this Court is further satisfied that the circumstances that prevailed during the attack on PW2 favored a possible identification and that the first appellant's identification as one of the PW2's attackers was proper and free from error.

47. On **count III,** the incident just like in count **II** took place during day time. PW6 was approached by a customer who wanted him to persue another motor cycle rider who had allegedly gone with the customer's change. The two talked and agreed on the fare and began the journey which ended up with the theft of PW6's motor cycle. PW6 observed the customer and described the ordeal as follows:-

> ***'...The customer had a dark complexion with red eyes he was small-bodied.....my customer slapped me.....my customer removed a rungu.....the incident took about 10 minutes....***
>
> ***,,,,,,I attended the identification parade of 10 people, I knew and recognized my customer from the stage, his (sic) the 2nd accused person.....He was number 3 on the parade. I identified him since we spoke face to face at the stage for some time. I caught his face, he was not very dark in complexion with a medium- sized body. I also saw his clothes that day, he had a green t-shirt and black pair of jeans, he had a red cap....."***

On cross-examination PW6 reiterated that:

> ***'.....after you slapped me, you rode the motor cycle away and another person sat with you.....'***

48. From the foregone set of circumstances and in light of the law as revisited hereinbefore, this Court is satisfied that the second appellant was positively identified.

49. On **count IV,** the incident took place at around 07:00pm. and PW3 managed to identify both appellants in the parade. He partly described the incident as follows:

> ***'.....two people the accused came asking me to take them to F-37 an estate within Sony company. 1st accused sat behind, the 2nd accused sat in the middle,.....1st accused asked for my helmet.....I gave him as we went uphill I saw him stretching his leg, he removed a nut, I then held it he hit my right shoulder, the first accused alighted.....we struggled with 1st accused, he then removed a knife and I ran away.....At the stage I saw them since we negotiated the fare .....it took time to negotiate, it was raining, it was a bit dark, ...there was natural light I identified you. I could see as far as 50 metres. We negotiated for about 20 minutes with the 1st accused.....I went there the parade was conducted.....I identified both accused persons. They had been lined up.....***
>
> ***.....I identified the 2nd accused, I saw his face, the 1st accused was brown, the 2nd black in (there) complexion.'***

50. On a wholesome consideration of the circumstances and the law, the identification of the appellants by PW3 cannot be faulted. They were positively identified.

51. In reaching the above findings I have also taken into consideration the appellants' sworn defences. There is concurrence that the appellants were arrested at the scene and as described by PW1 save that they contend they never took part in the incident. They also confirm that they were rescued from the angry members of public by some security guards who took them to the Police station.

52. The learned trial magistrate likewise visited the defence and after due consideration she was not convinced by its design and tenure and described it as an afterthought. I agree with the trial court. I say so because PW1 used to carry customers to various destinations in the cause of his normal business. He took time to negotiate with the customer and eventually agreed to take him to the intended destination. It is not reasonably foreseeable that PW1, in a surprise turn of events, would just raise alarm against his customer without any cause. That aside, an identification parade was conducted. The appellants were identified even by other complainants whom they attacked on other dates.

53. The father to the appellants did not in any way assist the appellants. His evidence centered on the appellants' character and their background. By therefore placing the defence and the prosecution evidence side by side, I find that the prosecution case was not reasonably shaken. Likewise I find the defence devoid of any merit.

54. In sum, I return the verdict that the appellants were variously identified by the complainants as those who took part in the events subject of the appeal.

(b) <u>Whether the offences were proved in law:</u>

55. The appellants were jointly convicted on counts I and IV and so respectively convicted in counts II and III with the offences of robbery with violence. Having rested the issue of identification, I will now proceed to determine whether the alleged robberies were proved in law and as framed in the counts.

56. The starting point is what the law provides on the offence of robbery with violence. The offence of robbery with violence is a creation of **Sections 295 and 296(2)** of the Penal Code and for clarity purposes we shall reproduce them as tailored:-

> *"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.*
>
> *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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."*

57. From the foregone legal provisions it can be seen that the offence of robbery with violence is made up of two parts. The first part is the **robbery** and the other part is the **violence**.

58. **Robbery** is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: **<u>Theft</u>** and **<u>the use of or threat to use actual violence.</u>**

59. On the other hand the offence of **robbery with violence** is committed when robbery is proved and further if any one of the following three ingredients are established:-

> ***(a) The offender is armed with any dangerous or offensive weapon or instrument, or***

(b) The offender is in the company of one or more other person or persons, or

(c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

60. And as said, in this discourse I will endeavour to demonstrate whether or not the offences were proved as required in law.

61. **On count 1**, what was allegedly stolen from PW1 was Kshs. 4,000/=. In support of the charge PW1 was however categoric that he did not know how he lost the money or how the appellants took his money. He only realized that he had instead lost Kshs. 3,000/= when he reached the Police station.
62. I have carefully perused and considered PW1's evidence. He narrated how he was sprayed with a hot pepper solution and immediately raised alarm as the appellants threatened to beat him with a club. PW1 did not state that at any point in time that the appellants or any of them took his money. He only realized that he had lost the money when he reached the police station.

63. The appellants ran away when PW1 raised alarm as they also screamed; maybe with a view to confuse those who were likely to respond to the call of help by PW1. The appellants were then arrested and by the time PW4 reached the scene he found that many people had already gathered and the appellants were seated on the ground. PW4 also saw PW1 crying that his eyes were painful as a result of the pepper.

64. The above set of circumstances do not point to the fact that the appellants either took or attempted to take PW1's money. Given that PW1 was crying in pain and taking into account the number of people who had gathered at the scene coupled with the fact that it was in the night, there are many possibilities on how PW1 may have lost his money, if at all he had any.

65. This Court is therefore not convinced that the appellants robbed PW1 of his money as alleged. Consequently the conviction in count I was not founded in law and cannot stand. It is hereby quashed and the sentence set aside.

66. **On count II**, PW2 was the complainant. He stated that he was in the transport business and operated his own motor cycle. It is that motor cycle registration number KMCS 155B that he alleged to have been stolen by three people including the first appellant whom he positively identified.

67. Although PW2 did not produce the registration book for his motor cycle which he said it was at his home at the time he testified before the trial court, there is evidence that PW2 reported the theft both to the D.O. and the police immediately the incident took place. Further PW2 stated that he had bought the motor cycle make Bajaj Boxer at Kshs. 87,000/= which price is in tandem with the prices of the other like motor cycles which were stolen from PW3 and PW6. PW2 also attended a parade where he identified the first appellant as among the three people he had interacted with during the time when he lost his motor cycle and which was never recovered. Even in the absence of the ownership documents, I am satisfied that PW2 was in possession of the motor cycle registration number KMCS 155B which he was later on robbed of.
68. PW2 also testified that when the first appellant sprayed the pepper solution into his eyes, he attempted to remove the keys to his motor cycle but the first appellant removed a knife and threatened him. Further the first appellant was joined by his counterparts and they jointly beat PW2 as he was resisting the theft of his motor cycle.

69. Although there is no evidence that PW2 sought for any medical intervention as a result of the assault, the fact that the first appellant was armed with a knife and threatened PW2 and that the first appellant was in the company of two other people suffices.

70. This Court is in total agreement with the finding of the trial court in respect to count II. The first

appellant was rightly found guilty as charged and convicted. The conviction is therefore affirmed.

71. **On count III**, the ownership of the motor cycle registration number KMCQ 837F was well settled. PW7 testified as the one who bought it. He produced a Sale Receipt for Kshs. 80,000/= as an exhibit which receipt was also attached with a VAT Receipt. He also produced the registration book for the motor cycle which was still in the name of the dealer. I have also confirmed that the Engine and Chassis numbers in the sale receipt and the registration book tally.

72. PW6 was in possession of the motor cycle at the time of the theft. The motor cycle was never recovered. As PW6 carried the second appellant to persue 'his change' from another motor cyclist and as they passed a motor cyclist who had carried another person, the second appellant asked PW6 to stop as he that caught up with the one who had his change. PW6 stopped and was immediately sprayed with pepper by the person who had been carried on the other motor cycle. PW6 fell down and the second appellant slapped him. As PW6 attempted to stand, the second appellant removed a club and PW6 remained on the ground. The three people then left with his motor cycle.

73. The fact that the second appellant was in the company of two other people during the theft and that the second appellant drew a club and threatened to beat PW6 is clear that the offence of robbery with violence was committed even in the absence of any medical evidence to prove that PW6 was assaulted. The conviction in count III is hence affirmed.
74. **On Count IV,** PW3 was in possession of the motor cycle registration number KMCS 058H which belonged to PW3's mother. A sale receipt was produced as an exhibit on the ownership. PW3 testified that he was attacked by the appellants whom he had carried on the motor cycle and as he struggled with the first appellant, the said first appellant drew a knife and PW3 ran away into safety as the appellants went away with the motor cycle which was never recovered.

75. The prosecution having proved that the motor cycle was stolen and that the first appellant was armed with a knife which he threatened PW3 with and that the first appellant was in the company of the second appellant then that suffices the proof of the offence of robbery with violence even in the absence of proof of any injury on PW3. I hereby affirm the conviction on count IV as well.

76. Before I leave this discussion, I will have a look at some other issues that were raised by the appellants' Counsel in his submissions in urging this Court to allow the appeal.

77. One of the issues was the contention that the prosecution evidence was riddled with inconsistencies, contradictions and loose ends. Counsel submitted that there were gross inconsistencies and contradictions on the number of the members who were on the parade as PW1 did not mention anything to do with the parade, PW2 said there were 18 members, PW3 stated that the members were 16, according to PW6 and PW8 they were 10 members and according to PW5 they were 9 members. It was further submitted that the solution which was allegedly proved to be hot pepper was not scientifically proved to be so. It was also contended that the witnesses talked about a nut and knife having been used in the commission of the offences and not a 'rungu' as it appeared in all the counts.

78. On the number of people who were on the parade, I will say that the identification parades are usually conducted in strict adherence to the Police Standing Orders as provided for in the **Police Act,** Chapter 84 of the Laws of Kenya. The witnesses do not have an opportunity to see the members before the parade. When the witness eventually appears at the parade, that witness has an obligation to have a careful look at the members and to see if he/she can identify them. It is therefore likely that a witness may not have the time to count and know the number of parade members with precision. Such a witness is likely to give any approximate number of the parade members when so asked during the trial. That may explain the difference in the numbers of the parade members by the witnesses. It however remains safe to go by the number of the members as stated by the officer who conducted the parade. In this case it was PW8 who confirmed to the court that they were 10 members in the parade.

79. It is still clear in the record that all the witnesses gave the number of the parade members as more than 8. Since the Police Standing Orders require a minimum of 8 members in any parade, the discrepancies in the number of the parade members cannot be said to have had such a grave effect on the trial.

80. On the issue of the pepper solution and having carefully considered the prosecution's evidence, this Court equally finds that the failure of the prosecution to offer a scientific proof of the solution did not adversely affect the prosecution case. On the issue of the nut and a 'rungu', there is evidence that the nut had been affixed to one end of a 'rungu' and as such the reference to either of the terms 'nut' or 'rungu'.

81. The effect of the contradictions and inconsistencies as pointed out by the appellants' Counsel and as further revealed in the evidence is that they are of minor nature and did not occasion any failure of justice on the part of the appellants. I find that they are curable under **Section 382** of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya. In fortifying that finding, I echo the words of the Learned Judge in **R =vs Pius Nyamweya Momanyi, Kisii HCRA No. 265 of 2009 (UR)** when he stated thus:-

> ***"...It is trite law that minor discrepancies and contradictions should not affect a conviction."***

82. The other issue raised by the appellants' Counsel was that PW5 (the investigating officer) informed the court that he only investigated the first count and since the other investigator(s) never testified then the appellants ought to benefit from that lapse on the part of the prosecution. In answer to that, I wish to refer to the evidence of PW5 when he stated that:

> ***'....The other complaints were investigated by sergeantMutiso before we combined efforts.....***

83. That therefore confirms that the investigations were jointly conducted by more than one officer and as such it was not necessarily a must that all the officers who took part in those investigations were to testify. That is so provided in **Section 143** of the Evidence Act, Chapter 80 of the Laws of Kenya.

84. However, if the prosecution fails to call very crucial witnesses in a trial without any justification, then the inference that had the witnesses been called their evidence was likely to have been adverse to the prosecution is usually made. **(See: Bukenya & Others -versus- Uganda (1972)EA 549** and **Nguku -versus- Republic (1985)KLR 412).** In this case, I am not about to make that inference because requisite evidence was adduced.

85. If this Court got the appellants well in their written submissions, they contended that if for instance two accused persons are jointly charged in one count then a court cannot severe that count and convict one and acquit the other. Put differently, in such a scenario a court has either to convict or acquit both unless the charge is amended. I do not think so. That is because a court is bound by the evidence and the law before it. A court is called to act fairly, justly and within the applicable legal confines. A court can only convict when the evidence adduced has reached the required legal threshold and if that threshold is not reached an accused person has to be acquitted. That is so regardless of the number of accused persons jointly charged. The only exception to that position would be in respect to the offences which require more than one person to be committed and in instances where only one person is found to be guilty. Since the offences facing the appellants in this case do not fall within that exception, I find that the trial court did not err in finding one appellant guilty and the other not guilty in a count where they had been jointly charged.

(c) **On whether Article 50(2) of the Constitution was contravened**:

86. The appellants further contended that their rights to a fair trial under **Article 50(2)(h)** and **(j)** of

the **Constitution** were infringed.

Article 50(2)(h) and **(j)** of the Constitution provides as follows;-

> ***"(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;***
>
> **……..**
>
> **……..**
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."***

87. In respect to **Article 50(2)(h)** of the **Constitution**, the appellants argued that they were entitled to legal representation at state's expense in the trial court. To their surprise, the State failed to provide such legal representation and neither were they informed of their right. They argued that since their right to a fair trial was violated then they are entitled to an acquittal.

88. It is a fact that the appellants were unrepresented during their trial. They were however represented by Mr. Gembe Counsel during the hearing of this appeal. I did not hear Mr. Gembe inform me that he was handling the appeal as a pauper brief. He must therefore have been adequately instructed. Further the appellants are not on record as having informed the trial court that they could not afford the services of a legal representative and as such needed the court's intervention.

89. The importance of a Counsel's participation in a criminal trial was reiterated by the Court of Appeal in ***David Njoroge Macharia vs Republic; Criminal Appeal No. 497 of 2007*** where it delivered itself thus:-

> ***"The counsel's role at the trial stage is most vital. This is because of his knowledge of the applicable laws and rules of procedure in the matter before the court, and his ability to relate them to the fact sieve relevant, admissible, and sometimes complex evidences from what is irrelevant and inadmissible. A lay person may not have the ability to effectively do so and hence the need to hire the service of a legal representative. The importance of a counsel's participation was succinctly articulated by Lord Denning in his decision in Pett-vs Greyhound Racing Association (1968) 2 ALL E.R 545, at 549. He had this to say:***
>
> > *'it is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue –tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: 'you can ask any questions you like; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task."*

90. According to the Constitution, the right to legal representation to an Accused person by the State and at the State's expense crystallizes when substantial injustice would otherwise result. The Court of Appeal in the case of **David Macharia Njoroge vs. Republic (2011) eKLR** analysed several aspects of this right and as regards the applicability of Article 50 of the Constitution, the Court held as follows:-

> ***"State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigend to him by the State and at state expense,***

if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.

We are of the considered view that in addition to situations where 'substantial injustice would otherwise result.' persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."

91. More recently, the Court of Appeal differently constituted in the case of **Karisa Chengo & 2 others vs. Republic Criminal Appeal Nos. 44, 45 and 76 of 2014** at Malindi had a detailed discussion on this right and in finding that the appellants' right was not infringed for want of proof that the appellants could not afford legal representation, the Court had this to say:-

"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occassioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.

Again, this Court differently constituted in the case of Moses Gitonga Kimani vs. Republic, Meru Criminal Appeal No. 69 of 2013, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows:-

> *"It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation."*

It is therefore apparent that the provisions of Article 261 and the Fifth Schedule to the Constitution, that would give effect to the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. We must however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the Constitution to provide guidelines on legal representation at State's expense. We believe time is now ripe and nigh for the enactment of such legislation.

That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under Article 25 of the Constitution.

The problem of lack of legal representation for persons charged with capital offences cannot be wished away, it is here with us and there is therefore need to have legislation in place as it would guide how that right would be achieved and be in line with the internationally acceptable standards. To that end, we strongly urge Parliament to fast track the enactment of the envisaged legislation under Article 261 of the Constitution. The legislation would entail a comprehensive approach that would address the issue of realization of the right to legal representation at the state's expense and should be done in close consultation with various interested stakeholders in recognition of the principle of public participation as envisaged in Articles 9 and 10 of the Constitution. The Attorney General must therefore move with speed and jump start the process leading to the enactment of that legislation. However, we take comfort in the fact that the draft legal aid bill is in the works. We believe this would be crucial in enabling the State to meet and fulfil its obligations with regard to the fulfilment of the Bill of Rights under Article 19 of the Constitution.

As regards the denial of that representation in the instant case, we do not think that an acquittal is the remedy available to the appellants as they submitted. It cannot have been the intention of the framers of the Constitution, to halt all criminal prosecutions of persons charged with capital offences until the implementation of a scheme to provide legal representation to all persons charged with such offences. Sadly, again an acquittal is not the remedy available to the appellants even if their right was violated in the trial court. This Court in Julius Kamau Mbugua v Republic Criminal Appeal No. 50 of 2008 has held that an acquittal is not an appropriate remedy where the alleged violation of fundamental rights of the accused has been proved. Nor did the appellant point out that the substantial injustice was caused to them by such failure. The respective records show that they were never inhibited at all in the prosecution of their cases during the trial. They actively participated in their trials and subjected to intense cross-examination the witnesses availed by the prosecution. We therefore discern no substantial injustice occasioned to the appellants by the State's failure to accord them legal representation. This ground must of necessity therefore fail."

92. From the above analysis, I do find that since the appellants have demonstrated their ability to, and indeed engaged a Counsel in this appeal, it is sufficiently clear that they had the ability to so afford legal representation during the trial but opted not to. They further actively participated in their trials and subjected witnesses to intense examination. I hence find that no injustice was occasioned to them by the State's failure to accord them legal representation.

93. Turning to the submission that the appellants' right under **Article 50(2)(h)** of the **Constitution** was infringed, I wish to point out that I have carefully gone through the record before the trial court and did not find anywhere where the appellants protested to the court that they needed time and any particular facilities to aid him prepare their defence.

94. On the aspect of the appellants being informed in advance of the evidence the prosecution intended to rely on, the record before the trial court is also very clear. The appellants never raised any issue about the statements or at all. They participated in the trial until when they tendered their defences on oath. I therefore find that the appellants' contention that their rights under **Article 50(2)(j)** of the **Constitution** were violated not to be holding.

95. This Court is eventually satisfied that none of the appellants' rights under **Article 50(2)(h)** and **(j)** of the **Constitution** were infringed in the circumstances of this case.

DISPOSITION:

96.I believe I have said enough. The upshot of all the above is as follows:-

(a) The appeal against the conviction and sentence in count I succeeds. The conviction is hereby quashed and the sentence set aside.

(b) The appeals against counts II, III and IV are unsuccessful and are hereby dismissed. The convictions and death sentences on counts II, III and IV are hereby affirmed.

(c) Since a person can only die once, the death sentences in counts II and III shall in the first instance be held in abeyance.

97.Right of appeal explained.

Orders accordingly.

DELIVERED, DATED and SIGNED this 20th day of July, 2016.

A.C. MRIMA

JUDGE