



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 25 OF 2012**

**JOEL OPWALA WABURIRI .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*-consolidated with-*

**CRIMINAL APPEAL NO. 26 OF 2012**

**MUSA SULEIMANI MUYA ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being Appeals against the conviction and sentence of H. Wandere – P.M. in Criminal Case No. 969 of 2011 delivered on 5<sup>th</sup> June, 2013 at Mumias.)*

**JUDGMENT**

**INTRODUCTION:**

1. The villages of Ekeru and Malaha in Mumias District of Kakamega County were visited by quite unfamiliar visitors in the night of 27<sup>th</sup> and 28<sup>th</sup> March 2011. These were a group of thugs who terrorized several homes, stole items and even sexually assaulted some women. This was undoubtedly a very sad night in the said villages.
2. Out of the police intervention, nine people were arrested and eventually arraigned before the Senior Principal Magistrate’s Court at Mumias where they faced several charges of robbery with violence and gang rape. For clarity purposes the said charges are as follows:-

***Count I: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.***

**JOHNSTONE AUGUSTINE MUTEKA2.ALEX MAKUNDA FIBANDA3.JOEL OPWALA**

**WABURIRI4.DOKA ABDULRAHMAN.5.MUSA SULEIMAN MUYA.6.ELIUD SIFUNA WAFULA.7.ALEX WANJALA OKOYANA.8.STEPHEN WANYAMA MAKOKHA.** On the night of 27<sup>th</sup> and 28<sup>th</sup> March, 2011 at Ekeru location in Mumias District within Kakamega County, jointly while armed with offensive weapons namely pangas, iron bars, axes and pistols robbed PETER OPENDA of four (4) mobile phones make NOKIA 6630, NOKIA 3310, NOKIA 210, NOKIA 1110 and a stove all valued at Ksh. 36,800/= the property of PETER OPENDA and immediately after the time of such robbery used actual violence to the said PETER OPENDA.

**Count II:- ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.**

**JOHNSTONE AUGUSTINE MUTEKA2.ALEX MAKUNDA FIBANDA3.JOEL OPWALA WABURIRI4.DOKA ABDULRAHMAN.5.MUSA SULEIMAN MUYA.6.ELIUD SIFUNA WAFULA.7.ALEX WANJALA OKOYANA.8.STEPHEN WANYAMA MAKOKHA.** On the night of 27<sup>th</sup> and 28<sup>th</sup> March, 2011 at Ekeru location in Mumias District within Kakamega County, jointly while armed with offensive weapons namely pangas, iron bars, axes and pistols robbed SALOME OPENDA of eye glasses, cash Ksh. 7,500/=, DVD make SONY, a pressure stove, three (3) bags, three (3) mobile phones make NOKIA 1110, NOKIA 6210, Vodafone, a motor vehicle registration number KAB 995z the property of SALOME OPENDA and immediately after the time of such robbery used actual violence to the said SALOME OPENDA.

**Count III:- ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.**

**JOHNSTONE AUGUSTINE MUTEKA2.ALEX MAKUNDA FIBANDA3. JOEL OPWALA WABURIRI4.DOKA ABDULRAHMAN.5.MUSA SULEIMAN MUYA.6.ELIUD SIFUNA WAFULA.7.ALEX WANJALA OKOYANA.8.STEPHEN WANYAMA MAKOKHA.** On the night of 27<sup>th</sup> and 28<sup>th</sup> March, 2011 in Mumias District within Kakamega County, jointly while armed with offensive weapons namely pangas, iron bars, axes and pistols robbed N C R of cash Ksh. 7,800/= and one mobile phone make NOKIA 1110 all valued at Ksh. 12,300/= the property of N C R and immediately after the time of such robbery used actual violence to the said N C R.

**Count IV:- ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.**

**JOHNSTONE AUGUSTINE MUTEKA 2. ALEX MAKUNDA FIBANDA 3. JOEL OPWALA WABURIRI 4. DOKA ABDULRAHMAN. 5. MUSA SULEIMAN MUYA. 6. ELIUD SIFUNA WAFULA. 7. ALEX WANJALA OKOYANA. 8. STEPHEN WANYAMA MAKOKHA.** On the night of 27<sup>th</sup> and 28<sup>th</sup> March, 2011 in Mumias District within Kakamega County, jointly while armed with offensive weapons namely pangas, iron bars, axes and pistols robbed B C R of one wallet containing cash Ksh. 3,000/=, one mobile phone make Alcatel, and one digital camera all valued at Ksh. 22,000/= the property of BENSON CHITAYI RAPANDO and immediately after the time of such robbery used actual violence to the said BENSON CHITAYI RAPANDO.

**Count V:- GANG RAPE CONTRARY TO SECTION 10 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2007 (2006).**

**ELIUD SIFUNA WAFULA:-** On the night of 27<sup>th</sup> and 28<sup>th</sup> March, 2011 in Mumias District within Kakamega County in association with Johnstone Augustine Muteka, Alex Makunda Fibanda, Joel Opwala Waburiri, Doka Abdulrahman, Musa Suleiman Muya, Alex Wanjala Okoyana, Stephen Wanyama Makokha intentionally and unlawfully caused his penis to penetrate the vagina of A A C without her consent.

**Count VI:- GANG RAPE CONTRARY TO SECTION 10 OF THE SEXUAL OFFENCES ACT**

**NO. 3 OF 2007 (2006).**

**ALEX WANJALA OKOYANA**:- On the night of 27<sup>th</sup> and 28<sup>th</sup> March, 2011 in Mumias District within Kakamega County in association with Johnstone Augustine Muteka, Alex Makunda Fibanda, Joel Opwala Waburiri, Doka Abdulrahman, Musa Suleiman Muya, Eliud Sifuna Wafula, Stephen Wanyama Makokha intentionally and unlawfully caused his penis to penetrate the vagina of A A C without her consent.

Count VII:- **GANG RAPE CONTRARY TO SECTION 10 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2007 (2006).**

**STEPHEN WANYAMA MAKOKHA**:- On the night of 27<sup>th</sup> and 28<sup>th</sup> March, 2011 in Mumias District within Kakamega County in association with Johnstone Augustine Muteka, Alex Makunda Fibanda, Joel Opwala Waburiri, Doka Abdulrahman, Musa Suleiman Muya, Eliud Sifuna Wafula, Alex Wanjala Okoyana intentionally and unlawfully caused his penis to penetrate the vagina of A A C without her consent.

3. Among those charged were JOEL OPWALA WABURIRI and MUSA SULEIMAN MUYA as the 3<sup>rd</sup> and 5<sup>th</sup> Accused persons respectively. They are now the Appellants in these appeals.
4. The trial began on 05/09/2011 and ended with the delivery of judgment on 13/02/2012.

**THE TRIAL:**

**The Prosecution's case:**

5. The prosecution called 11 witnesses in a bid to prove the charges as against the then accused persons.

**PW1** was **SALOME NAFULA OPENDA** from Ekeru village. She recalled how a group of thugs invaded her home in the night of 27/03/2011 at around 08.45 pm armed with guns and pangas and ransacked her house, injured several people therein and eventually stole several items including her motor vehicle which her daughter had recently bought for the family. She had to undergo extensive treatment in Aga Khan Hospital and even at Lions Eye Clinic in Nairobi. She however did not manage to identify any of the said thugs. She was the complainant in respect to Count II.

6. **PW2** was PW1's employee who worked as a casual worker one **JARED SHIMEGA**. He also recounted how a group of thugs invaded PW1's home and took him and other two guards hostage. The thugs used him to gain access to the various houses in the homestead by forcing him to call the occupants for help. It was his testimony that the thugs were in police uniforms and were around 7 in number. In the process several people in the home were injured including PW1, and Abigail. PW2 managed to escape to the nearby sugar plantation as the ordeal was still on-going. It was his testimony that the gang had two guns a small one and a big one, pangas and metal bars. Though there was sufficient light from the electric lights in the home, PW2 did not identify any of the thugs as they hid their faces using the caps.
7. **PETER MALOBA OPENDA** testified as **PW3**. He is the son to PW1 and the father of one Abigail. Apart from recalling that on 27/03/2011 at around 08.00 p.m. being in his house taking evening tea and being heavily knocked on the head, he could not remember anything else as he remained unconscious for 6 days. He regained consciousness in a hospital in Eldoret where he was undergoing treatment and on returning home he found that his house had been broken into and several of his items lost. He was the complainant in respect to Count I. He did not identify any of the robbers.
8. **PW4** was **N W R**. From the evidence, it is clear that he is also known as **N C R** who was the complainant in Count III. PW4 recalled the events of the night of 27/03/2011 at around 11.00

p.m., when as a result of heavy barking of his dogs outside his house he woke up and used his mobile phone light to see what was happening. He flashed outside his house and saw many people in police uniform with torches and one of them had a gun. As he had by now opened the main door of his house “the police” entered inside and he was ordered to dress up. Three of them followed him to the bedroom and they were questioning him why he was indulging in illicit brew business but to him he was surprised as his business was a rider for hire (*boda-boda*). They took a total of Kshs. 7,800/= from him together with his other personal effects. He was later on hit with a metal bar as he was forced to sit down and he lost consciousness.

9. PW4 in the course of the ordeal stated that he managed to identify one of the robbers who had disguised themselves as Police Officers and though he was called to attend an identification parade he never identified him. The person, according to PW4, wore a black police uniform and had a torch. It was the light from the torch which made PW4 identify him. He recalled that he was dark and identified him in Court as the 4<sup>th</sup> accused person who was Dola Abdulraham. PW4 was later rescued from his house where he had been locked therein from outside and taken to Matungu hospital where he was treated and released. It was his further testimony that he knew the first, second, third, seventh, eighth and ninth accused persons as they were his fellow boda boda riders.
10. **B R** testified as **PW5**. He was the complainant in respect to Count IV and a photographer-cum-teacher. He recalled that on 27/03/2011 at around 11.00 p.m. while in his house with his wife, “a police officer” knocked the first door of his house who said that the police were searching for a lost television set. He immediately dressed up and went to open the main door. He saw nine “police officers” in police uniform as he put on the lights in the house. They also had torches which made PW5 identify them. He was forced into the bedroom by six of the ‘police officers’ and ordered to give them a camera. He was shocked. He obliged and they also took his money from his kiosk business amounting to Kshs. 3,000/=. When his wife realized that they were thugs instead, she managed to escape. PW5 also realized that they were instead thugs as they did not concern themselves with the issue of the Television set at all.
11. PW5 was then ordered to take the thugs to the home of **K R**, his brother. He was beaten and tied with a wire as he led them to his brother’s house. On being ordered, he called his brother for help who opened the main door to his house. K R was then beaten up as the thugs entered inside the house and took away money and other items.
12. The thugs then took hostage and commandeered PW5 to the Area Assistant Chief’s home while still being tied. He was asked to tell the Assistant Chief that he was in need of help. He so did and the Assistant Chief opened the door to her house. He witnessed the Assistant Chief being beaten and ordered to give Kshs. 400,000/=. They took her official uniforms and her cap and the crown and ordered her to dress up and follow them. The thugs equally ordered the said Chief’s husband one J N and the in-law one N. They were all now ordered to proceed to the main Malaha-Malava Road where they were forced to walk for a distance of about three kilometers to a place of one WANG’ALA who was a cattle dealer. The thugs beat the said Wang’ala and upon the wife raising alarm, they immediately left. The group of the hostages was again led to the home of one M who operated a butchery at Malaha. The Chief was ordered to ask M to open the door to his house. She complied, but no one came out of the house. They hit the kitchen door and sensing that there was no one, the thugs now decided to and indeed proceeded to rape the Chief. She was raped in turns. One A was also raped and after the ordeal all the people except the Chief were locked in M’s house and the thugs left with the Chief. They were later on rescued by the police and A and K taken to hospital.
13. PW5 was further assaulted by the thugs for refusing to drink beer while on the road. Though he could not recognize the one who forced him to take the beer, he stated that he clearly identified two of the members of the gang. They were the fourth and fifth accused persons in Court. He was so aided by the security lights at his home and further that the two stood next to him during the night journey which began at 11.00p.m. on 27/03/2011 to 04.00 a.m. on 28/03/2011. He was called to a parade at Mumias police station after one day and saw about 10 people lined up where

he managed to pick the 5<sup>th</sup> accused person, MUSA SULEIMAN MUYA whom he had not known his name before until in Court. PW5 further gave the features which made him identify the 5<sup>th</sup> accused during cross-examination. PW5 attended that one parade and recalled recording statements with the police. He stated that he knew the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> accused persons.

14. **A A C** testified as **PW6**. She was married to one K C (also known as K R) and was a business lady running an M-PESA shop and a chemist. She narrated the events of the night of 27<sup>th</sup> / 28<sup>th</sup> March, 2011. As she was asleep with her husband, they were awoken by some noise from a lady. Her husband immediately put on the security lights and someone knocked the main door to their house. It was her husband's brother one B C, the PW5 herein. He was in the company of one person who identified himself as a police officer who said he had arrested PW5 over stolen items. The 'police' wanted to conduct a search in her house. Her husband then opened the door and the 'police officer' hit her husband. The man was dressed in police jungle uniform and wore an officer's cap and trousers. Her husband was forced to give money they use to operate the M-PESA business. He gave Kshs. 50,000/= and a further Kshs. 15,000/= which money was in the mobile phone. That ordeal happened in the bedroom. They were then forced to the sitting room. Several other people entered the house all in police uniforms and they commandeered her to take them to the Assistant Chief. On the way the gang ordered PW5, her brother-in-law, to fake some assistance so that the Chief opens her house. PW5 complied.

15. While at the sitting room in her house, PW6 observed that one of the thugs had a growth over his chin as the gang robbed several of their items in addition to the money. At the Chief's place, they were tied with strings and the Chief was taken along with them. They were led away to Wang'ala's home who was a stock dealer. The thugs beat him and the wife raised alarm. They immediately left and led them away. On the way they were forced to take liquor in shifts. On the way she was fondled with a promise of being infected with HIV/AIDS. They then reached the home of MULAHI and they found no one. They again left to the home of MALACHI where on also not getting anyone thereat, the thugs broke the house with axes and the Assistant Chief was brought in the field and raped. PW6 was also raped by 3 people and when her husband tried to intervene, he was hit with a metal rod. The two ladies were raped in turns and in that event, PW6 managed to identify those who raped her. One was KHANGA; the 2<sup>nd</sup> accused. There was also one person, tall in height who held her back, called STEPHEN, the 8<sup>th</sup> accused whom she knew from the market place where she ran her business. It is the said Stephen who then hit her on the thigh and made her face upwards. This person had gaps in his teeth as he talked. PW6 clearly saw the person and whom they even talked in the course of the ordeal. She identified that person as the 4<sup>th</sup> accused at the dock. She however did not identify the person at an identification parade because he was not paraded. She also identified the 6<sup>th</sup> accused person in the dock. The 7<sup>th</sup> accused was also identified by her. All those taken hostage were later on locked up in a room and the gang left with the Assistant Chief. It was the police who rescued them thereafter and she was taken to hospital.

It was PW6's testimony that at her place there was ample security lighting which enabled her to identify the assailants and further the three who raped her came very close to her and she could easily see them at a close range given that the ordeal took the whole night.

16. PW6 further testified that she identified the 3<sup>rd</sup> accused person in a parade conducted on 01/04/2011. There were 9 people on the parade and she picked him. On a second parade, she picked the 5<sup>th</sup> accused person on account of his chin. She stated that she never did a parade for the rest of the accused persons as she knew them, they were the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> accused persons. Apart from the 1<sup>st</sup> accused person, PW6 identified all the eight accused persons. She recorded a statement with the police and a further statement thereafter. In the initial statement to the police PW6 stated that it was one "**KHAMERE**" who had raped her and further stated that when she gave her first statement to the police she was afraid but after being properly counseled she went

ahead and disclosed the identities of all the people she had seen being involved in the heinous acts. PW6 stated that she managed to easily identify the assailants in the parades having been further aided with the light from the torches used throughout the ordeal.

17. In respect to the parade involving the 5<sup>th</sup> accused person, the PW6 was shocked to see that the parade form (MFI XVI) stated that she never identified him. It was her evidence though that she had picked him out at the parade and could easily so recognize him as he was of brown complexion and picked him out in the parade involving 9 people. After being briefly examined by the Court, PW6 completed her testimony. PW6 was the complainant in Counts V, VI and VII.
18. **No. 8585595 Insp. DANIEL KAIRU** testified as **PW7**. He was attached to the Crime Office at Mumias Police Station and conducted two identification parades at the request of the Investigating Officer, PC Peter Mulanya.
19. The day was 03/04/2011 and one of the parades was for the 5<sup>th</sup> accused person, MUSA SULEIMAN. He informed the accused person of the purpose of the parade. He managed to get 8 other persons of similar age, height, general appearance and class of life as the 5<sup>th</sup> accused person. The 5<sup>th</sup> accused person was asked to place himself on the parade where he placed himself between persons number 4 and 5. Five persons were called to identify the 5<sup>th</sup> accused in the parade. The first one was K R who identified him by touching. The second person failed to identify him. After the two persons, the 5<sup>th</sup> accused person shifted position to between the 7<sup>th</sup> and 8<sup>th</sup> persons on the parade. The fourth person identified him. PW6 also identified the 5<sup>th</sup> accused person who was between the 7<sup>th</sup> and 8<sup>th</sup> persons in the parade. The 5<sup>th</sup> accused person changed position to between the 3<sup>rd</sup> and 4<sup>th</sup> persons on the parade and the last person failed to identify him.
20. Upon enquiry, the 5<sup>th</sup> accused person replied that he was satisfied with the way the parade was undertaken and voluntarily signed the parade form which was produced in evidence. The parade was conducted between 01.00 p.m. and 01.40 p.m. at the Mumias Police Station Search Room. PW7 testified that he complied with all necessary procedures guiding the conduct of identification parades and the 5<sup>th</sup> accused never raised any objection thereto.
21. Earlier on between 12.20p.m. and 01.00 p.m., PW7 had conducted another parade for one JOEL OKWARO ABURIRI who had freely consented to participate therein. He was also placed with 8 other people of similar age, height and appearance and of life style as the suspect who was the third accused before the trial court. The suspect placed himself between members 5 and 6 in the parade and PW6 identified him by touching him. He signed the parade form as he was satisfied on how the parade was conducted. The form was also produced as an exhibit.
22. On cross-examination by the 3<sup>rd</sup> accused person, PW7 clarified that he had taken 5 or so minutes to explain to him the purpose of the parade and the procedures and he opted not to have a relative present during the parade. He confirmed that the 3<sup>rd</sup> accused person was between the 5<sup>th</sup> and 6<sup>th</sup> persons in the parade. PW7 further confirmed that there were about 9 or so members in the parade and that he never talked to the complainant about the suspect's position because it was the suspect himself who chose where to stand. It also came out that the members in the twin parades were different and that the witnesses who proceeded to take part in the parades were kept far away from the suspects; indeed at the police canteen. He further informed the Court that all parade attendants wore different clothings and that the third accused person was neither assaulted nor forced to sign the parade form.
23. On examination by the Court, PW7 confirmed that he never communicated with the witnesses since he did not know who had been called. The witnesses had been placed around 50 metres away and where they were was enclosed. He denied any assault on the suspects as there was no reason to that effect and reiterated that the parades were done without any breach of the guidelines and procedure and the parade forms were signed voluntarily.

24. **PC PETER MULANYA (NO. 53564)**, the Investigating Officer testified as **PW8**. He was attached to Mumias Police Station C.I.D. section and accompanied the OCS to visit various scenes of robbery which had taken place in the night of 27<sup>th</sup> and 28<sup>th</sup> March, 2011. They visited various homes which had been robbed and also visited some victims who were in hospital. They interviewed the victims and also recovered two caps and two berets in a sugar plantation.
25. It was his further testimony that through their own ways and informers they received information on who had taken part in the robberies and started tracing them in their homes. The OCPD Mumias Police Division then organized two raids to try and arrest the suspects. The raids were done and several people were arrested and the complainants were called to identify them if they were among the members of the gang. The accused persons were later arraigned in Court upon identification by the complainants. He recorded statements from witnesses and gathered all evidence including on the injuries sustained by the complainants. He also asked the OCS and IP Kairu to conduct parades for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused persons as the rest of the suspects declined.
26. **PW9** was the then OCS at Mumias Police Station **one C.I. SHADRACK OPIYO**. He was requested by the Investigating officer to conduct a parade for the 4<sup>th</sup> accused person who declined to so attend on grounds that the members were not of similar appearance as himself since he was the only one with teeth gaps. The 4<sup>th</sup> accused person did not sign the parade form which was eventually produced as exhibit XIII.
27. **PW10** was **No. 47941 PC. ALFRED ROBIA KIVESO** who also assisted in the investigations by recording statements, issuing P3 forms and visiting the scenes of robbery. He in particular arrested the 6<sup>th</sup> accused person in Bungoma in the company of one PC Momayi and also the 7<sup>th</sup> accused person at Makunga with PC Cheruiyot.
28. **PW11** was a clinical officer **one ISAAC MUKHANA** based at Makunga District Hospital. He testified on the injuries sustained by the various victims during the robberies and produced their treatment notes and P3 Forms as exhibits in the case.
29. With the evidence of PW11, the prosecution closed its case and the Court on 25/11/2011 placed all the accused persons on their defences.

(b) **The defence case:**

30. Upon compliance with Section 211 of the Criminal Procedure Code, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> accused persons opted to give sworn testimonies. The 1<sup>st</sup> and 9<sup>th</sup> accused persons opted further to call one witness each whereas the 2<sup>nd</sup> accused person opted to give unsworn testimony with no witnesses to call.
31. The **1<sup>st</sup> accused person** denied taking part in the robberies either as charged or otherwise. He was surprised when he was arrested and later charged with the other accused persons. He stated that on the alleged night he was asleep at home with his wife. **The 2<sup>nd</sup> accused person** was equally shocked to be made part of the case. He was arrested on the road and later charged in court. He denied being called "**KHAHERE**" and remained unaware if there was any robbery as alleged.
32. **The 3<sup>rd</sup> accused person** was a shoe repairer in Malaha Market. On 30/03/2011 on returning home from work he learnt that the police had sought for him and in the morning he presented himself to the police station. He was then taken to K R and L M'S place without being told why and that is why he learnt of some robberies. He confirmed knowing N R, B C and A A quite well and had no grudge with them. He alleged to be at home on the day of the robberies with his wife.
33. **The 4<sup>th</sup> accused person** denied any involvement in the robberies as he was arrested at the police

station as he was undertaking C.S.O duties as a result of previous conviction and sentence. He also confirmed refusal to undergo a parade.

34. **The 5<sup>th</sup> accused person** denied the charges before court and explained that on 31/03/2011 he was arrested by police and taken to his house where a search was conducted. He was later on charged with being in possession of cannabis sativa and was released on a cash bail of Kshs. 1,000/=. He explained that he had a previous grudge with P.C. Mulama which arose from persistent demands by the officer for free rides on the accused person's vehicle. He was re-arrested by the said P.C. Mulama and taken to Mumias Police Station and thereafter released. Later that day he was again re-arrested and eventually taken in for a parade after the police officers showed him to the complainants. He contended that the parade was not properly conducted.

35. **The 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> accused persons** also contended that they never took part in the said robberies and that they were never at the said places of robberies and separately contended that PW6 was not telling the truth. They were surprised to be arraigned in court facing such serious charges.

36. On 16/01/2012 the accused persons closed their cases and judgment was set for 03/02/2012.

37. On 13/02/2012 the trial court delivered its judgment where it acquitted all the accused persons except the 3<sup>rd</sup> and 5<sup>th</sup> accused persons. The two were found guilty on the counts of robbery with violence being counts I, II, III and IV and accordingly convicted. They were sentenced to suffer death.

38. As a result of the said conviction and sentence, the said 3<sup>rd</sup> and 5<sup>th</sup> accused persons preferred the appeals before this Court. It is worth-noting that the State did not prefer any appeal against the said judgment.

#### **THE APPEALS:**

39. On 23/02/2012, **JOEL OPWALA WABURIRI** filed his Petition of Appeal dated 20/02/2012 raising six grounds of appeal. That was Appeal No. 25 of 2012. On the same day, **MUSA SULEIMAN** also filed his Petition of Appeal evenly dated 20/02/2012 and preferred six grounds of appeal being appeal No. 26 of 2012. The two appeals were consolidated with Appeal No. 25 of 2012 being the lead file hence **JOEL OPWALA WABURIRI** became the first appellant and **MUSA SULEIMAN** became the second appellant herein respectively.

40. For precision purposes, we will reproduce the grounds in the said Petitions of Appeal as under:-

#### **1<sup>st</sup> Appellant's Grounds of Appeal:-**

1. ***THAT, I pleaded not guilty to the appended charges.***
2. ***THAT, the learned trial magistrate erred in law and facts by relying on the exaggerated and unauthenticated evidence of the prosecution witness who is my neighbour and well known to me and when she reported to the police she said that she was attacked by unknown assailants, and the parade was conducted and she identified me thus violating my rights as enshrined in chapter 46 forces standing orders of parade.***
3. ***THAT, the learned trial magistrate erred in law and facts when he failed to note the truth that A C confessed during the trial that she identified me at parade because she know me very well as a neighbour and not because I was among the alleged assailants who attacked her.***
4. ***THAT, the learned trial magistrate erred in law and facts by failing to consider the fact that the evidence that the prosecution intended to use was not availed to me so that I can prepare***

*myself thus violating my constitutional rights of a fair trial as enshrined in chapter four article 50 (2), (j) and article 25 (c) that stipulated that my constitutional rights of fair trial is unlimited.*

5. *THAT, the learned trial magistrate erred in law and facts when he failed to consider the fact that my defence was not shaken by the prosecution.*
6. *THAT, the learned trial magistrate erred in law and facts when he never considered the truth that I was not arrested with anything that the prosecution alleged was stolen.*

#### 2<sup>nd</sup> Appellant's Grounds of Appeal:-

1. *THAT, I pleaded not guilty to the appended charges.*
2. *THAT, the learned trial magistrate erred in law and facts when he failed to consider the fact that I was not arrested with any items alleged to have been stolen from the complainants.*
3. *THAT, the learned trial magistrate erred in law and facts when he failed to consider the truth that the complainant never gave the police the physical appearance of the alleged assailants or their description that resembles the appellant in the first report.*
4. *THAT, the learned trial magistrate erred in law and facts when he failed to consider the fact that I was not informed the reason of my arrest until four days later when I was informed about a parade and I was not allowed to have a solicitor or a friend when the parade took place, thus violating my constitutional rights of a fair trial as enshrined in chapter four, article 25 (2) that stipulates that my fundamental rights for a fair trial is unlimited. And chapter 46 forces standing orders clause 6 (iv) (a), (c) and (v), which was bad in law.*
5. *THAT, the learned trial magistrate erred in law and facts when he failed to consider that I was not given adequate time and facilities to prepare my defence as enshrined in chapter 4 article 50 (2) (c) of the Constitution of Kenya.*
6. *THAT, the learned trial magistrate erred in law and facts when he failed to consider the fact that my defence was not shaken by the prosecution.*

41. Both Appellants prayed that the appeals be allowed, convictions quashed and sentences set aside and they be set at liberty.

42. When the appeals came up for hearing on 02/03/2015, the Appellants appeared in person while the State was represented by Mr. Ng'etich Learned State Counsel. The Appellants relied on their written submissions and also responded to the oral submissions by the state. Mr. Ng'etich opposed the appeals contending that the convictions were safe and the sentence remained legal. He prayed for the dismissal of the appeals.

43. In a nutshell, the Appellants attacked the conviction on the main issue of identification including how the parades were conducted and strenuously contended that they were not identified in accordance with the law. They further contended that they were not arrested with any of the items allegedly stolen from the victims, that their defences were not properly considered and that their rights under Article 50 (2) of the Constitution were violated hence were not accorded a fair hearing. These issues were *inter alia* expounded in their submissions.

#### ANALYSIS & DETERMINATION:

44. 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.

45. In our analysis therefore, we 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:**

46. It is the evidence of PW6 and PW7 which points to the 1<sup>st</sup> Appellant herein in terms of identification. On the part of the 2<sup>nd</sup> Appellant, the evidence of PW5, PW6 and PW7 points to his identification.

47. The incidents subject of these appeals took place at night. It was the night of 27<sup>th</sup>/28<sup>th</sup> March, 2011. It involved a gang of robbers numbering between 7-10 who camouflaged themselves as police officers and who seem to have organized the ordeal quite well. They also had torches. They moved with precision from one house to another robbing, injuring people and then raped two women being PW6 and the Area Assistant Chief who never took part in the matter. It cannot be ruled out that the gang knew the areas so well or were under the guidance of such people who knew the area well as well as the victims. The terror group struck at around 08.00 p.m. on 27/03/2011 and those who had been taken captive including PW6 were eventually locked in a house at around 4.00 a.m. on 28/03/2011. The ordeal therefore took a maximum period of around 8 hours depending on the time a victim was encountered. For instance the gang struck at PW6's house at around 11.00 p.m. hence PW6 was under siege for a period of around 5 hours. During this period PW6 testified that she had an opportunity of carefully observing the 2<sup>nd</sup> Appellant herein while in her sitting room which room was well lit. She in particular noted a growth over his chin and that she walked with the gang for quite sometime as they talked. Further during the rape ordeal the people who included the appellants herein lay on top of her as she was lying down facing upwards and she again had an opportunity of observing them. They also talked during the rape ordeal. PW6 positively identified the 2<sup>nd</sup> Appellant on a parade as well as the 1<sup>st</sup> Appellant.

48. PW6 knew the 1<sup>st</sup> Appellant herein as a neighbour who severally used to visit her for her services in M-PESA and the butchery. The 1<sup>st</sup> Appellant was a well-known shoe repairer in the market place. PW6 managed to disclose the identity of the Appellants to the police after her first statement and upon being counseled as the ordeal was so heavy on her and she had been threatened by the assailants not to name them. PW6 further clarified that the 2<sup>nd</sup> Appellant was brown in complexion and although he was a stranger in the area, PW6 had ample opportunity to carefully observe him hence, she alluded, her identification was not in error.

49. PW5 was taken hostage by the gang as from 11.00 p.m. to 04.00 a.m. and was all along in their company. He stated that he had an opportunity of observing the 2<sup>nd</sup> Appellant herein as they walked almost together throughout the ordeal. Further at his brother's house (K R) the security lights were well lit and he observed the 2<sup>nd</sup> Appellant well who stood next to him with another assailant who was later on released by the trial court. To this end, PW5 at page 24 of the proceedings stated that **"its only two people I did identify on the way"**. He later on picked the 2<sup>nd</sup> Appellant herein in a parade at the Mumias Police Station.

50. The onus now lies upon this Court on analysis of the foregone circumstances to determine whether there was positive identification of the Appellants herein as the assailants. This Court is under a legal duty to weigh the above 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.

51. 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.

52. In **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, 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.”***

53. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

***“On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-***

***“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”***

***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”***

54. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night:-

***“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so***

***familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”***

55. Before we proceed further, he will take a look at the evidence on the identification parades. Two such parades were conducted by PW7 who was an Inspector of Police. Out of these parades both Appellants herein were identified by being touched. The 1<sup>st</sup> Appellant was identified by PW6 and the 2<sup>nd</sup> Appellant was identified by PW5 and PW6. But it is the Appellants' contention that the parades were not conducted in accordance with the law and further that the victims failed to give the description of the assailants to the police in their first report. Subsequently therefore, the appellants contend there was no such basis for holding the parades and the outcome thereof remains a nullity in law.

56. PW7 stated clearly how he conducted the twin parades using different members and spent time explaining to the Appellants herein the purpose of the parade. The Appellants, separately though, consented to undertake the parades. He was categorical that in each parade he endeavored to get members who were not less than 8 in number of similar age, height, general appearance and class of life as the Appellants herein. He further clarified that there was no contact between the witnesses and the Appellants at all since the witnesses were in an enclosed Police Canteen about 50 metres from where the parade was conducted. The parades were conducted inside the Mumias Police Station Search room. He further stated that he was not shown the witnesses neither did he discuss anything with them prior to their parades. The Appellants never raised any objection to how the parades were conducted and did sign the parade forms voluntarily. To PW7 he fully complied with the regulations on the conduct of the parades and to him the same remained free from any error. It is also on record that one accused person declined to undergo a parade when he realized that the members were not of similar characters as himself. PW7 also gave the Appellants the liberty of changing positions in the parade which the 2<sup>nd</sup> Appellant herein took advantage of as well as that of having their relatives, which none utilized.

57. The conduct of identification parades was recently revisited by the Court of Appeal at Nyeri in **John Mwangi Kamau vs. Republic (2014) eKLR** 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 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;”

**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”**

58. 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.”**

59. We have carefully perused the identification parade forms on record and on the analysis of how the parades were conducted by PW7 and the results thereof, and we do concur with the learned trial magistrate that the parades were properly conducted and the Appellants properly identified.

60. The above judicial precedents also settled the issue of the first report by the complainants to the police as well as that of an Appellant having not been arrested with any of the alleged stolen items. The witnesses stated that they gave their initial statements to the police and thereafter they made further statements. Indeed PW6 had to undergo counseling before she was able to open up to what had transpired. This had also been caused by the fear injected upon her by the gang of robbers that once she discloses their identities they would kill her. Be that as it may, we equally find that the issue of the first report does not in any way lessen the results on the identification parades conducted by PW7. Likewise the failure to recover any of the alleged stolen items upon the Appellants does not create innocence upon the Appellants.

61. We have also carefully examined the Appellants defences tendered during the trial before the lower court. On the part of the 1<sup>st</sup> Appellant, he recalled how he received information from his wife on 30/03/2011 that he was needed by police and since it was late, he availed himself the following day and he was arrested and put in cells. He was mixed up and charged with people he did not know. Though the police took him to various houses of the complainants he was surprised to hear of the robberies since he was not involved and had no grudge with them at all. He confirmed knowing at least PW5 and PW6 very well. He took the position that he remained at home on the day of the alleged robberies with his wife.

62. On the part of the 2<sup>nd</sup> Appellant herein, he raised the issue of being framed up due to a grudge between himself and one police officer P.C. Mulama over his demands to be given free rides in his car. He recalled that he had initially been arrested with being in possession of bhang and he was charged and released on cash bail of Kshs. 1,000/= on denying the charges. On 09/04/2011 as he had gone to Court over the matter he went to see the said P.C. Mulama and he was arrested but later on released. On reaching home that very day he saw P.C. Mulama in company of another police officer who took him to the station and eventually a parade was conducted and he was eventually charged with offences which he knew nothing about.

63. The 1<sup>st</sup> Appellant did admit knowing PW5 and PW6 very well and confirmed being a shoe repairer at Malaha. This was in line with the evidence of the witnesses. Having been identified aforesaid, the defence he tendered did not do much to unravel the prosecution’s evidence. We therefore find that the 1<sup>st</sup> Appellant’s defence did not cast any doubt on the prosecution’s case.

64. On the 2<sup>nd</sup> Appellant’s defence, we have noted that the issue of the grudge was not brought out anywhere during the prosecution’s case. He only raised the same in his defence. Had he raised it

with the appropriate witnesses say at least with the Investigating officer, the same would have been interrogated accordingly and an appropriate finding made, but the way the issue was handled leaves the Court with the only finding that the same is an afterthought. It is equally rejected. We therefore come to the conclusion that the learned trial magistrate rightly scrutinized the Appellants' defences and did not shift any burden of proof to the Appellants as the defences did not displace the prosecution's evidence at all.

65. We therefore find that the Appellants were properly and sufficiently identified by PW5 and PW6 as the witnesses had a lot of time with the Appellants, talked, walked together and even took instructions from them. Further, the witnesses knew the 1<sup>st</sup> Appellant quite well as they interacted with him on daily basis at the PW6's business at Malaha. The security lights and the light from the assailants' torches also gave such opportunities for ideal identification. We also note that the identification parades were properly conducted and the Appellants rightly identified.

66. In sum, we find that the Appellants' herein were properly and sufficiently identified and that the identification evidence taken in totality was safe and free from error.

**(b) Whether the offences were proved in law.**

67. The Appellants herein were convicted on the four counts of robbery with violence. They are Counts I, II, III and IV in the Charge Sheet.

Having rested the issue of identification, we now proceed to determine whether the alleged robberies took place in the manner as framed in the counts.

68. **On Count 1**, the complainant was Peter Openda who testified as PW3. As he was in his house in the evening of 27/03/2011 he was knocked and fell unconscious and remained so for 6 days. PW11 the Clinical Officer who filled in the P3 form for PW3 confirmed impaired fractures on the head which injuries were consistent with the treatment forms from Matungu Hospital, St. Mary's hospital and Moi Teaching and Referral Hospital where PW3 had initially received treatment. All these documents were produced as exhibits. According to PW11, PW3 received the injuries from a blunt object.

It is PW3's evidence that when he eventually returned to his house he found that several of his properties had been lost during the ordeal including 4 mobile phones and a stove.

69. **On count II**, PW1 was the complainant who was woken up by a mobile phone which rung and was informed that her son was unwell in one of the houses in the homestead. Since the security lights were on and as she opened the main door to her house she saw a total of four people carrying guns and pangas dressed in police uniforms. She was pushed back into the house and as she insisted to go and see her child, she saw another group of the 'police officers' with guns, pangas and pangas which assaulted her on the face, eyes, belly and all over the body. She was eventually taken to hospital with the other family members who were also injured and she was admitted for four days as her head was badly swollen.

70. PW1 testified that during the attack, a motor vehicle registration number KAB 995Z make Nissan Sunny which her daughter had bought for her was stolen together with money, DVDs, a stove among others. The vehicle was later on recovered and its logbook produced as an exhibit. PW11 produced a duly filled P3 form for PW1 alongside all the treatment notes from the institutions which PW1 had received treatment after the ordeal.

71. **On count III**, the complainant was **N C R**, PW4. He was a boda-boda rider in Malaha. On the very night, he was woken up by the barking of his dogs and opened both the doors leading to his bedroom and the main door to his house. He saw several '**police officers**' coming to his house and one was armed with a gun. They had bright torches which overpowered the light from his mobile phone torch. He was eventually robbed of his money and his other items and hit on the

head whereby he fell down and remained unconscious only to gain consciousness after the gang had left. He later on went to Matungu Hospital and then to Kakamega General Hospital. On reporting the matter to the police he was issued with a P3 form which was later on filled and produced in Court as an exhibit by PW11. The treatment notes were also produced and PW11 confirmed the injuries.

72. **On Count IV, PW5 B C R** was the complainant who was a photographer and a teacher. When the “**police officers**” knocked the door to his house and informed him they were looking for a stolen Television set, he obediently opened the main door and they came in. He was then forced to give his camera, mobile phone make Vodafone and money Kshs. 3,000/=. Around six people forced him into his bedroom and demanded for the said items. He was held tightly, beaten and tied using a wire. He remained tied all the way to his brother’s house and even to the Assistant Chief’s house where he was forced to feign that he was in danger and needed help. He so did to his brother K R and the Assistant Chief. After being rescued by the police in the morning he went to hospital since he had been further beaten on his refusal to take beer as the gang ransacked homes in the villages. He was treated at Matungu hospital and on reporting to the police a P3 form was issued which was filled in by PW11. He also produced the treatment notes from Matungu Hospital which all confirmed the injuries.

73. As to counts V, VI and VII on gang rape were dismissed by the trial Court and the prosecution did not appeal against such and still did not raise that issue before us during the hearing of the appeal, we shall equally rest that matter at that.

74. The record is quite clear that when the gang undertook the operation in the area they were heavily armed with a pistol, a gun, axes, panga and iron bars. These items were actually used to inflict injury on the complainants. For avoidance of doubt, this evidence was clearly adduced by PW2, **JARED SHIMENGA**, who was PW1’s casual worker and who was the first person to be attacked by the gang and was used to gain access to PW1’s and PW3’s houses. His evidence on how the gang was armed with those dangerous items was corroborated by PW1, PW4, PW5 and PW6. There is consistency in the totality of the evidence that it is the same gang of robbers who ravaged the villages, attacked and injured the victims, robbed them and even sexually assaulted some women. Actual violence was visited upon the complainants before, during and even after the robberies were done on them at various places. We do further note that the record has no any other explanation on how the complainants were so injured save during the said violent robberies.

75. From the analysis on identification coupled with the foregone, we are satisfied that Counts I, II, III and IV were proved as so required in law as against the Appellants herein. We therefore concur with the analysis, findings and decisions of the learned trial magistrate on the said counts hence we uphold both the conviction and sentence on the same.

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

76. The Appellants herein further contended that their rights to a fair trial under Article 50 (2) of the Constitution were infringed. The 1<sup>st</sup> Appellant alleges that sub-article (2) (j) was infringed whereas the 2<sup>nd</sup> Appellant alleges that sub-article (2) (c) was infringed.

**Article 50 (2) (c) and (j)** of the Constitution provides as follows:-

***“(c) to have adequate time and facilities to prepare a defence.***

.....

.....

.....

***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”***

77. We have carefully gone through the record before the trial court and did not find anywhere where the 2<sup>nd</sup> Appellant protested to the court that he needed time and any particular facilities to aid him prepare his defence. 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 very clear. On 08/07/2011 when the then accused persons took plea, Mr. Namatsi Advocate appeared and sought for the supply of statements by the prosecution. Other accused persons also requested for the same. The Court made the following order:-

***“COURT ORDER:- The accused be supplied with police statement .....*”**

On 03/08/2011 the matter came up for hearing and Mr. Nandwa Counsel appeared and indicated that he had not been yet supplied with statements. The prosecution responded as follows:-

***‘That on the statements, I will state that since it is essential that the defence be supplied with documents that the matter proceeds tomorrow .....*”**

78. The Court made a detailed ruling and emphasized the need for all the accused persons to be supplied with all the statements as so required by the Constitution and made the following specific orders:-

***“..... because as I have said the matter is complex. It is a matter of right that accused first be supplied with the statement in this matter before the matter proceed.***

***It will be necessary in future that the state meets the expenses for the statements as it used to happen during the committal bundle proceedings under the CPC.***

***The prosecution to supply defence with statements that the matter proceeds tomorrow. All counsels to attend.”***

79. When the matter was finally set down for hearing on 05/09/2011, the then accused persons who were represented by Counsels opted to proceed without them and the Court ordered the trial to begin. None of the then accused persons, including the Appellants herein, raised any issue to the effect that the order of the Court made on 03/08/2011 on the supply of statements had not been complied with. The trial then began and proceeded until judgment and again and at no point in time was the issue of statements revisited. Indeed it is on record that the prosecution witnesses were examined on their statements as recorded with the police. We therefore find that the Appellants’ contention that their rights under Article 50 (2) (j) of the Constitution were violated not to be holding. This ground equally fails as we reiterate the finding of the Court of Appeal at **Kisumu in Kassam Ukiru vs. Republic (2014) e KLR**, when it expressed itself as follows:-

***“(iv) Article 50 (2) (j) relates to right of access to evidence to be relied upon at the trial. The record indeed shows that the appellant’s counsel on 11<sup>th</sup> February, 2008 applied for witness’s statements and a copy of the charge sheet. The trial magistrate then made an order to that effect. The record does not show that the appellant revisited the issue any other time. There is no evidence that the prosecution continued to deny the appellant or his counsel access to witness statements after the order of the learned trial magistrate.”***

80. The Court eventually found that there was no prejudice that was visited upon the Appellant in the foregone circumstances.

**DISPOSITION:**

81. The upshot of all the above is that both appeals are not meritorious and are hereby dismissed in

their entirety. Right of appeal in 14 days.

It is so ordered.

**DELIVERED, DATED and SIGNED this 22<sup>nd</sup> day of July, 2015.**

**R.N. SITATI**

**A.C. MRIMA**

**JUDGE**

**JUDGE**