



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CRIMINAL APPEAL NO. 17 OF 2014

(Consolidated with criminal appeal no. 19 of 2014 and criminal appeal no. 22 of 2014)

R.V.P. WENDOH AND J.A.MAKAU JJ

JACKSON MWITI 1ST APPELLANT

JOSEPH MUGAMBI KIMENYI alias

MWAMBIA 2ND APPELLANT

FREDRICK MUTEMBEI KALUMA3RD APPELLANT

- V E R S U S -

REPUBLICRESPONDENT

(From the original conviction and sentence in criminal case no. 527 of 2012 of the Senior Resident Magistrate's court at Isiolo – J.M. Irura – Ag. P.M.)

JUDGEMENT

1. The Appellants JACKSON MWITI 1ST APPELLANT, JOSEPH MUGAMBI KIMENYI ALIAS MWAMBIA, 2nd Appellant and FREDRICK MUTEMBEI KALUMA 3rd Appellant were the first, second and third accused respectively in the trial before the lower court. They were charged with two counts of robbery with violence contrary to **Section 296 (2) of the Penal Code.** The particulars of the charge were as follows:-

Count I

On the 23rd day of October, 2012 at Kulamawe area in Isiolo county within eastern province, jointly while being armed with a dangerous/offensive weapon namely a rifle robbed MOHAN PREMSAGAR of cash money Kshs. 20,000/-.

Count II

On the 23rd day of October 2012 at Kulamawe area in Isiolo County within eastern province, jointly while being armed with a dangerous/offensive weapon namely a rifle

robbed JOSEPH MUREITHI of cash money Kshs. 42,000/- and a mobile phone make Nokia 1200 valued at Kshs. 2,500/- all valued at Kshs. 44,500/-.

2. After the trial the learned trial magistrate convicted the three appellants with an offence of robbery with violence on both counts and sentenced them to suffer death in respect of Count I and suspended sentence on Count II.

3. The Appellants were aggrieved by both conviction and sentence imposed on them by the lower court and therefore filed these appeals. The appeals have been consolidated and were heard together since they arose from the same trial in the lower court.

4. We have looked at the grounds of appeal filed by all the appellants and find that all these grounds can be summarized as follows:-

1. That the trial court erred in law and fact in failing to make a finding that the visual identification was not conducive in the circumstances and was not free from error against the 3rd appellant.

2. That the trial court erred in law and fact in failing to make a finding that the identification parades were conducted against the laid down rules and procedures and the same were substantially defective.

3. That the trial court erred in fact and law by failing to observe the appellants were not mentioned nor their description given in the first report made at the police station.

4. That the trial court erred in law and fact by failing to hold that the identification parade forms were totally inconsistent with the evidence of the purported identifying witnesses and hence the said evidence has no probative value.

5. That the trial court erred in fact by failing to appreciate the glaring inconsistencies, lacunas and loopholes in the prosecution's case.

6. That the trial magistrate erred in law and fact by not considering appellants' defence.

5. When the appeal came up for hearing the 1st and the 2nd appellant relied on their written submissions and stated that they had nothing else to add.

6. The 3rd Appellant was represented by Mr. Kenny Muriuki learned advocate. Mr. Muriuki relied on the supplementary petition of appeal whose grounds we have captured hereinabove. He argued all the five (5) grounds together. He urged that the visual identification of the 3rd appellant was not proper. He referred to evidence of PW1 at page 20 of the proceedings pointing out that no initial report was made before he was called to identification parade, urging that failure to make initial report and give description of the attackers was fatal to the prosecution case, adding report on attackers should be given before identification parade is carried out. He urged evidence of PW2, and PW3 was similar to that of PW1. He urged none of the witnesses gave the names of the attackers to the police before identification parade was carried out. He urged that the 3rd appellant had initially been apprehended in respect of breaking into a supermarket. He added on evidence of PW12 on page 74 that it meant identification was not in respect of robbery with violence. In support of that proposition on the initial report must have been made before identification parade is conducted he relied on the case of **Stephen Matu Kariuki & 2 others VS Republic Criminal Appeal No. 81 of 1985 (C.A. Nairobi) a page 6** where the court stated:

“Dr. Macharia was a single identifying witness, whose evidence had to be tested with the greatest care, as the trial court fortunately remembered (Roria v R [1967] EA 583). That cannot be done unless the identifying witness had made a report as to whether he could identify

the accused and given a description. His ability to identify the accused is then to be tested on an identification parade. (See R v Mohammed bin Allui (1942) 9 EACA 72, R v Shabai Bin Donaldi (1940) 7 EACA 60 and Owen Kimotho Kiarie (supra). If one is to test the evidence with the greatest care this was the way that Court of Appeal in England in R v Turnbull [1976] 3 All ER 549 saw the examination. The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance?

In what light? Was the observation impeded in any way, eg. by passing traffic or a press of people? 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 him and the accused's actual appearance? As a result of public disquiet in England that there were mistakes of identification, the Attorney-General agreed that the Director of Public Prosecution would not invite a witness to identify who has not previously identified the accused at an identification parade, to make a dock identification unless the witness's attendance at a parade was unnecessary or impractical or there were exceptional circumstances. (See Archbold, Criminal Pleading Evidence and Practice (40th edn) para 1348 et seq.) There is no evidence that there is any less disquiet in Kenya than in England, and as the authorities on the topic stretch back some 40 years. It is not asking too much that a witness is asked to give a description of the accused, and the prosecution to arrange for a fair identification parade."

7. Mr. Kenny Muriuki learned advocate urged that the identification parade exhibit 3 was purportedly carried out on 7/3/2013 but not on 22/11/2012. That PW5 stated it was on 22nd November, 2012 but PW12 stated it was on 7/3/2013. He urged that it is doubtful whether any identification parade was carried out and urged that such doubts should be exercised in favour of the 3rd appellant.

8. The state was represented by Mr. Moses Mungai, Learned State Counsel, who strongly opposed the appeal. He urged that the case is based on identification of the Appellants urging that the Appellants were properly recognized. That the ingredient of robbery with violence was also proved as there were guns and the attackers were more than one and something was stolen. He urged that the appellate court should consider whether the trial court took into account circumstances of the commission of the offence and the length of time. He urged that the offence took place during day time, that the attackers talked to the complainants and they scared the charging crowd. He urged that there was a first report which was taken by Investigating Officer when he went to the scene relying on evidence by PW9. He referred to his attached authorities and police standing orders. He submitted the issue of motorcycle at scene should have been considered. He urged PW4 was the owner of the motor cycle which was with the 1st appellant. On identification of the 3rd appellant Mr. Moses Mungai, learned state counsel he urged the trial court addressed the issue and identification of the 2nd appellant by PW3. He urged that the appeal be dismissed.

9. The 1st appellant in response submitted that he was not found with any stolen property. The 2nd appellant responded by stating that he was arrested before the complainant had made a report against him. He urged nothing was recovered from him and no evidence was adduced connecting him with the robbery.

10. Mr. Kenny Muriuki, learned advocate in reply submitted that the circumstance were not favourable for positive identification of the attackers. He urged that the court should take into account how long the appellant were under observation referring to the evidence of PW2 who said the incident was too fast, PW3 who stated he was lying down and submitted in such a situation none could identify the attackers. He submitted that the investigating officer and arresting officer

were not given description of the robbers in the initial report. He added that PW12's evidence is that identification period for 3rd appellant was on 7th March 2013 and not on 22nd November 2012.

11. We are first appellate court and as expected of us, we have subjected the entire evidence adduced before the trial court to a first evaluation and analysis while bearing in mind that we neither saw nor heard any of the witness and have given due allowance. We are guided by the Court of Appeal case which sets out the principles that apply on first appeal. These are ably set out in the case of **Isaac Nganga Kahiga alias Peter Njenga Kahiga v Republic Criminal Appeal No. 272 of 2005** as follows:-

“in the same way, a court hearing a first appeal (i.e. a first appellant court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO –v- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

“The first appellate court must itself weight conflicting evidence and draw its own conclusion (Shantilal M. Ruwala V Republic [1957] EA570.). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters V. Sunday Post, (1958) EA 424)”

12. This case rests on evidence of identification of the appellants by PW1, PW2 and PW3. Regarding the evidence of identification in the case of **FRANCIS KARIUKI NJERU & 7 OTHERS V REPUBLIC CRIMINAL APPEAL NO. 6 OF 2001 (UR)** the court stated as follows:-

“The evidence relating to identification had to be scrutinized carefully, and was only to be accepted and acted upon if the court was satisfied that the identification was positive and free from the possibility of error. The surrounding circumstances had to be considered and among the factors the court was required to consider was whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.”

13. Besides the above in the case of **GABRIEL KAMAU NJOROGEV REPUBLIC (1982 – 88) 1KAR 113** the Court of Appeal held :-

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

14. The facts of the prosecution are that on 23rd October 2012 at 5.30 p.m. PW1 went to buy metal at the shop of PW2. That upon agreeing on the purchase price, PW2 prepared a receipt of Kshs. 36960 as metal were being removed. PW1 was counting the money when the 2nd appellant who is tall said “*lalenichini*”. He was wearing a white scarf which had a black spot on the head and a khaki jacket which was long and was brown in colour. He also had a gun which had a pointed edge; that the 3rd appellant took PW1 money amounting to Kshs. 42000/- by removing it from PW1's pocket and also took his mobile phone; That they then proceeded to Mohan, PW2, in the counter and took money from the cash box too.; that after taking the money they started moving away; that members of the public outside the shop started throwing stones and saying

“weziwezi”; that PW1 went out and saw four (4) people; that the 1st appellant was among them but did not get inside the shop. The robbers went to the motorbikes which were waiting outside.; the said motorcycles were red in colour. That one of the motorcycle did not start while the other started; that two of the attackers ran on foot when their motorcycle failed to start and the others drove away. PW1 was not able to see who was riding the motorcycle. The motorcycle which failed to start was Reg.No. KMCK 676D. On 22nd November 2012 at 7.30 a.m. PW1 got report that the people who had robbed him had been arrested. He proceeded to Isiolo and an identification parade was conducted .He identified one of the appellant’s who was in the dock because of his short beard; that when identification parade was done for the 3rd appellant he identified the 3rd appellant.

15. PW2 MOHAN PROMSAGAN testified that on 23rd October 2012 at about 5.00 p.m. he was at his hardware shop when PW1 came to buy some metal bars. He gave him quotation of Kshs. 36960; that as PW1 was removing the money from his pocket in a flash of seconds he saw people running who came, held PW1 and asked PW2 to put his head down.He noticed the third person was left outside. The money was snatched by one of the persons from PW1 and he proceeded to where PW2 was, the 2nd person had a gun pointing towards the shop; the person who was outside was short and medium sized; that it happened so quickly that PW2 was not able to note the assailants’ complexion. That the person who robbed PW1 was a little shorter but who had the gun was tall and was wearing a jacket; that he was not wearing anything on the face; that one of the persons got PW2’s cashbox and took away all notes. PW2 got out and found people stoning the people as the person who had the gun was threatening the members of the public with the gun; the robbers then rushed to the motorbikes, but one of them failed to start; the occupants ran through a footpath and disappeared, while the other three left in a motorcycle. PW2 rang police and OCS with police officers came. They took away the motorcycle that the robbers had left behind. That the following day PW2 was called at the station and was asked if he could be able to identify any of the persons in the parade but he was not able to identify any of them.

16. PW3 ESANYON EKALE testified that on 23rd October 2012 at about 5.00 p.m he was inside the workshop of PW2 when PW2 agreed with PW1 on purchase price of metal bars; that Romano PW5 was inside the shop when suddenly two people got inside the hardware shop of PW2. One of them had a gun and was wearing a jacket that was brown in colour, he was slim person and dark in colour, the other was shorter than him. He was wearing a checked blue and white shirt. PW3 did not know what the person did to the customer (PW1) as he was lying down and what he got from the counter. When the attacker left he got up and saw the person carrying a black paper bag and saw the person who had the gun at the motorbike; that one of the motorbike was left behind as it could not start. It was KMCK 676D but he was not able to note the other motorbike registration number. The rider of the motorbike which could not start ran towards Bulapesa, got inside a mosque and disappeared and the others left in a motorbike; that police came and took away the motorbike left behind; that after 4 days PW3 heard some people had been arrested. He went to the station on 25/10/2012 and wrote his statement. He told police that if he saw the people he would be able to identify them; that on 25/10/2012 he identified the 3rd appellant in a certain room at the police station. He identified him because he had seen his face on the day of the robbery.

17. PW4 SABINA KARAMBU testified that motorbike Reg.No. KMCT 119B was owned by her brother and the 1st appellant was her employee as a rider of the said motor cycle; that on 24th October 2012 he had through her employee Rebecca Muthoni left motorbike Reg. no. KMCT 119B at the witness’s shop so as to attend his grandmothers funeral. That in the afternoon the police from Isiolo Police station took away the motorbike as it was alleged it was used in commission of the offence; that Rebecca was arrested on 25.10.2012 and released. PW4 thereafter recorded statement.

18. PW5 ROMANO KIBET EDOME employee of PW2 testified that on 23/10/2012 at 5.00 p.m he was at PW2’s shop when a customer came and ordered for certain Y12 bars; that when he was

going out when someone held him by his shirt. He threw the person and went to the corridor. He testified the person who held his shirt was shorter than the one who had a gun, dark and well-built than the one with the gun. He could not remember the clothes he was wearing. The person with gun was tall. That the person who held his shirt is before court, he stated it was the 3rd appellant and the 2nd appellant was the one who had the firearm. He testified that when the attackers left the hardware; that one of the motorbikes failed to start and the rider escaped on foot whereas the other escaped using the other motorbike Reg. no. KMCK 119B; that PW5 was later called and told someone had been arrested. PW5, PW2 and PW3 went to police station and were asked to identify the robbers. PW5 identified the 1st appellant because he was wearing a black jacket at the time of robbery and riding KMCT 119B and on the others he could not remember. PW5 testified he identified the person who held his shirt because of his physical appearance. On being cross-examined PW5 admitted that on the material date of robbery he was not able to see the registration number of the motorbike which he gave as KMCT 1193B because it was between 100-150 metres away. He further admitted that he identified the 1st appellant because of the black jacket only.

19. PW6, FAITH GACHERI evidence relates to ownership of motor cycle KMCK 676D. She testified that she is the owner of the said motorbike which was being ridden by her employee Mutuma; that on 23.10.2012 she learnt of her motorbike being at police station. She called Mutuma who could not be reached but later got him and on being asked why the motorbike was at police station and he told her he found out that he would be locked in police cells; that since then he switched off his phone and has not been traced to date.

20. PW7 KENNETH KOOME MWENDA, a bodaboda operator confirmed motorbike KMCK 676D belongs to PW6 and that he is the one who got Mutuma as a rider for PW6's motorbike; that on 23.10.2012 at about 6.00 p.m. he found the motorbike at PW2's place; that on 25th October 2012 he recorded his statement with police. He testified since then he has not seen Mutuma again.

21. PW8 No. 83971 Cpl. Mohamed Khalifa testified that on 7.3.2012 he was called by C.I. Ndungu and told that one of the robbers they were looking for, for on an offence of robbery committed last year had gone home and was threatening his father demanding money from him. PW8 proceeded to the home of the father of the alleged robber in company of area chief, found him and arrested him. PW8 escorted him to Isiolo Police station. The suspect was the 3rd appellant. He handed the 3rd appellant to investigating officer. PW8 on being cross-examined by the 3rd appellant agreed the first report did not indicate the names of the robbers.

22. PW9 CPL. MARK ARAWO, the investigating officer testified that on 23/10/2012 he was called by OCS C.I. Ochindo who told him PW2 had called claiming he had been robbed by armed gangsters numbering five. That they ordered them to lie down and asked for money. PW9 and other officers proceeded to the scene of robbery; they interrogated PW3 who stated that the robbers comprised of one robber who was tall and had a headscarf and armed with a firearm while the other one was short and had a knife; that they wore masks on the face apart from the headscarf worn on the head by the tall person. He said he could identify them if he sees them. He said he lay down inside the counter while the cashier lay down inside the counter; that after robbery, the robbers escaped using waiting motorbike. PW2 stated he lay down on his stomach and PW2 got up he found the robbers had left one motorbike outside his hardware shop. PW9 testified that PW1 was at the scene and had given him similar statement to that of PW2. PW1 explained he could identify the robbers if he saw them. PW1 showed PW9 where he lay down when he was asked to lie down. He stated the complainants told him the incident took ten minutes. He then recovered the abandoned motorbike registration KMCK 676D Sanger red in colour. PW9 interrogated the workers of PW2 who stated they were able to see the robbers. That PW6 owner of motorbike KMCK 676D recorded statements with him; that acting on information on 24/10.2012 they recovered motorbike red in colour reg.no. KMCT 119B and arrested one Rebecca Muthoni who they released after investigation and after receiving an agreement between the 1st appellant and PW4. The 1st appellant was subsequently arrested; that identification parade was conducted in respect of the 1st appellant on 25th October 2012 and PW5 managed to identify

the 1st appellant. That the 2nd appellant was arrested with the others and that the 2nd appellant was taken to court and joined with the 1st appellant. PW9 organized for identification parade to be done but none was conducted.

23. The 3rd appellant was arrested after PW9 got information from an informer. The 3rd appellant was apprehended on 7th March 2013. He was booked and arraigned in court the following day and his case was consolidated with that of the 1st and the 2nd appellant. PW9 testified the 3rd appellant was identified on a parade that had been conducted on 22nd November 2013 when he had been arrested for breaking in at Shalom supermarket.

24. PW10 65344 PC. SIMON WAWERU testified that on 24th October 2012 at about 7.30 a.m. OCS C.I. Ochindo called him to go and check whether a motorbike in the incident of robbery of 23rd October 2012 was there and arrest the rider. He proceeded to the scene with APC Mwololo; that at 12 p.m. an informer called him and told him the rider one Mwitwa had been seen at Kiwanja ya ndege; they proceeded to the place and found the 1st appellant who they arrested and searched the 1st appellant who took them to where the motorbike registration KMCT 119B was kept. He took PW10 to his house and a search conducted and he found some clothes which he had put in the bag. Some of which were wet and inside there was a knife. He told PW10 the clothes were wet as he wanted to go with them to attend his deceased grandmother's funeral; that after arrest of the 1st appellant an identification parade was conducted. PW10 then handed over the 1st appellant to CPL Arawo who charged the appellant with the offence of robbery with violence.

25. On 5th November, 2012 PW10 testified he received further information from his informer that a robber had been spotted at a bar in Bulapesa. He called APC Mwololo and proceeded to the bar. PW10 arrested the 2nd appellant and two others and called the informer to assist in identifying the person by the name Mwambia. He released the two and detained the 2nd appellant. He is not aware if any identification parade was done in respect of the 2nd appellant. PW10 did not know why the 3rd accused person was arrested.

26. PW11 No. 47297 AG. IP. STEPHEN MWACHIA conducted identification parade over a suspect who had been arrested for robbery with violence. The suspect was Jackson Mwitwa, the 1st appellant. There were three witnesses, PW2, PW3 and PW5. PW2 and PW3 did not identify the 1st appellant but PW5 identified him. He produced identification parade as Exhibit 6.

27. PW12 NO. 233757 C.I JULIUS NDUNGU testified that on 22nd November 2012 he was requested to conduct an identification parade in respect of the 3rd appellant; there were three witnesses PW1, PW3 and PW5; the 3rd appellant was identified by PW1, PW3 and PW5. PW12 produced identification parade forms as exhibit 3, 4 and 8.

28. The 1st appellant Jackson Mwitwa Thambura gave unsworn defence of alibi. He alleged that on the material date of robbery he was at Meru.

29. The 2nd appellant Joseph Mugambi Kimenyi stated on that date he closed his butchery and went home at about 7.30 p.m. He went to riverside bar and started drinking; he claimed that at about 10.00 p.m. Some police officers came and told them that it was not yet 11.00 p.m. He was arrested and taken to Isiolo Police Station; that on 6th November 2012 CPL Arawo called him and asked for money but he did not have money; the following day he was brought to court and charged with robbery with violence. He stated he stayed from 5th November 2012 upto to 12th November, 2012 when his case was consolidated with that of the 1st appellant.

30. The 3rd appellant Fredrick Mutembei Kalume gave a detailed defence of alibi and called DW4 Henry Muteithe. He testified that he had left Isiolo town on 21st October 2012 to his farm to

plant with people; that he remained at the farm from 22nd October upto 25th October 2012; that on 21st November 2012 he was arrested while drinking at Universal Club.; that on 22nd November 2012 he was taken to identification parade. He stated he was identified by the 3rd witness; that on 7.3.212 at 8.30 a.m. he was arrested and charged with the offence of robbery.

31. We have carefully examined the evidence of the complainants PW1 and PW2, and that of PW3 and PW5 upon which they claim they saw and identified the appellants. Our observation is that though the offence took place at 5.00 p.m. during the broad daylight, according to PW2, the robbers ordered them to lie down; that the robbery happened so quickly that they were unable to note the complexion of the robbers; according to PW1 one of the attackers ordered them to lie down, he was wearing a white scarf; according to PW3 two people suddenly got inside the hardware shop. PW3 testified he was lying down and did not know what the robber did to the customer; PW5 went to the corridor where he had come from; PW5 could not remember the clothes worn by the gangster; that the person who had a gun threatened them and they ran away. PW9 testified that PW1 and PW2 when he went to the scene, explained to him that the robbers had masks on their face, apart from the headscarf worn on the head by the tall person; that both PW1 and PW2 lay down on their stomach during the time of the robbery and got up when the robbers had gone; that the workers of PW2 were at that time outside. PW9 said the robbery took 10 minutes, whereas we have observed PW1 and PW2 they did not say how long the robbery took.

32. The learned trial magistrate in her judgment stated:-

“PW1, PW3 and PW5 were able to give a description of the people they saw. According to them the robber holding the firearm was tall and slim and had a headscarf which had white and black spots on the head and a long brown jacket. They were categorized that he had not covered his face. PW5 on the other hand had noticed a robber who held him by his shirt and who had a checked blue and white shirt as the robbers were entering the hardware. . .”

33. We have carefully considered the basis of identification of the robbers relied upon by the learned trial magistrate. We note the learned trial magistrate's finding is not supported by evidence of PW1, PW2, PW3, PW5 and PW9 and had the trial court carefully considered and evaluated the evidence of the said witnesses as we have analysed and reevaluated hereinabove she would have come to a different conclusion.

34. In the instant case, we have found the conditions to have been unfavourable for positive identification as the witnesses did not have the robbers under their observation for long, as the robbery was quick and witnesses were lying down; the robbers had covered their faces as per PW9; the observation was also impaired by masks worn by the robbers; the witnesses had not seen the robbers before the incident; none of them had a specific reason for remembering the robbers; that there was no material description of the accused by PW1, PW2, PW3 and PW5 to PW9 who claimed to have first seen them.

35. We note in the instant case that the Appellant's descriptions were not given to the police before they were arrested and subjected to identification parade. It is trite law that before identification can be conducted, the identifying witness is required to have made a report as to whether he could identify the accused person and give a description of the suspect. His ability to identify the witness is then tested on identification parade. PW2 was unable to identify any of the robbers. PW1 described one of the robbers as tall and his clothes. He further described the robbers as the 2nd accused and 3rd accused person. PW3 described the robbers by their height and dressing. PW5 described the robbers by their height and complexion. The learned trial magistrate in her judgment stated:-

“when the police officers visited the scene he was categorical that they handed over to them the motorcycle which was abandoned after it failed to start. He added that the following day he was called for ID parade and he was able to identify the 1st accused as the one who had a black jacket.

He was also called for a second ID parade where he was able to identify the 3rd person as the one who had held his shirt. He identified the two ID parade forms the two accused persons whom he had identified.

36. We further note that the learned trial magistrate relied on dock Identification in her judgment when she stated:-

“In the instant case the time and the duration of the robbery favoured proper identification of the robbers taking into consideration that the 2nd accused person was arrested within two weeks of the commission of the offence. I also take note that three key prosecution witnesses positively identified the 2nd accused person before court as the one who had the firearm and the one who was wearing a long brown jacket and spotted headscarf and also the one who was the tallest of the robbers the visual identification by the three witnesses is in my considered opinion sufficient and there is therefore no doubt in my mind that the 2nd accused person is the one who held the gun and threatened people during the robbery.”

37. We have carefully considered the identification parade conducted in respect of all the three appellants in which the 1st and the 3rd appellants were identified by witnesses. The witnesses had not given the description of the robbers before their arrest. The appellants were arrested on information by so called informers who did not record any statements before the complainants or their witness had given description of the robbers. The description of the robbers by the complainants on the height and dressing of the robbers alone by all standards cannot be said to be enough description of any particular individual because in the society there are very many short and tall individuals and unless the manner of dressing is so special or unique, though in our view that may not suffice, we are of the view that such a description cannot be used as a basis of arresting someone and subjecting him to an identification parade.

38. We therefore find that the learned trial magistrate was in error in accepting visual identification of the appellant in open court as ordinarily a dock identification alone should not be accepted unless the witnesses had in advance given a description of the assailants and identified the suspect on a properly conducted parade.

39. We now turn to the identification parade. The identifying witnesses had not in the first report given description of the robbers. They were called after the appellants were arrested. None of the witnesses had given physical appearances of the suspects save stating that they were either tall or short. PW9 testified the robbers had masks at the time of robbery. We therefore find that the prosecution witnesses could not identify the robbers and it is therefore our finding that the identification parade as against all the appellants worthless.

40. On appellants defence of alibi the trial court held that the 1st appellant's defence was not credible as no form of death certificate or eulogy or even a witness was called to support the alibi. The trial court proceeded to draw its own inferences thereafter. As regards defence of the 2nd appellant the trial magistrate noted no identification parade was conducted in respect of the 2nd appellant; that there was no evidence on the clothes he was wearing and that it is not clear on what investigating officer relied on in connecting the 2nd appellant with robbery however the court held in its own opinion the circumstances were proper for identification. The court therefore rejected the 2nd appellant's defence. In respect of defence of the 3rd appellant's the court noted that his defence was of alibi which he had raised in his cross-examination but the court rejected the same as it found that there were discrepancies in what the 3rd appellant and his witness had stated. The court concluded that the appellant defence of alibi was not sustainable.

41. In cases where defence of alibi is raised the accused does not assume the burden of proving the defence of alibi. In criminal cases the burden of proof lies squarely on the prosecution, except in those cases where the section creating the offence specifically places some evidential burden on the accused person to establish a fact or rebut a presumption or prove a defence of a particular

kind. It is the duty of the prosecution to disapprove of alibi defence an accused puts forward unless it appears to the court that the alibi cannot be sustained or was raised at time which did not give room for the prosecution to check and disapprove it (see case of **NJUKI & 4 OTHERS v R (2002) 1KAR771**).

42. We have an evaluation of the appellants' defence of alibi; we find that the prosecution did not disapprove of any of the appellant's alibi defence. The trial court was therefore in error in dismissing the appellants' defence of alibi.

43. Having come to this conclusion we have of this case, we find that the prosecution failed to prove the charge of robbery with violence against all the appellants to the required standard, i.e. proof beyond any reasonable doubt. In the circumstances, we find that the appeals have merits and should be allowed.

We accordingly, allow the appeals, quash the

Convictions and set aside the sentence. We order that the appellants should be set at liberty forthwith unless they are otherwise lawfully held.

DATED, SIGNED AND DELIVERED ON THIS 24TH DAY OF SEPTEMBER 2015.

R.V.P. WENDOH

J.A. MAKAU

JUDGE

JUDGE

24.9.2015

24.9.2015