REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 204 OF 2012

JOHN WAKARO NDEGWA……………………….....1ST APPELLANT

SIMON THUKU MWANGI……………………….....2ND APPELLANT

FRANCIS GUCHU NGUGI………………….....…….3RD APPELLANT

VERSUS

REPUBLIC……………………………………………… RESPONDENT

(Being an appeal against conviction and sentence in Othaya Senior Resident Magistrates' Court Criminal Case No. 76 of 2011 (Hon. F.W. Macharia (Mrs) on 19th November, 2012)

JUDGMENT

1. Background:

The appellants were charged with four counts of robbery with violence contrary **to section 296(2) of the Penal Code**. In each of the of the particulars of the four counts, the appellants are alleged to have severally and respectively robbed **Peter Thuita Kihara**, **Maina Kahuhia, Lewis Karunga Wachira** and **Simon Mureithi** of their valuables on the 18th day of December, 2009 at Smart Bar at Kairuthi market. At the time of the robbery, they are alleged to have been armed with dangerous weapons namely AK 47 rifle, pangas and rungus and that at or immediately before or after such robbery they threatened to use personal violence to their victims.

At the conclusion of their trial, the learned magistrate convicted the 1st and 3rd appellants on the 1st count and acquitted the 2nd appellant of the same count. All the three appellants were acquitted of the 2nd count. Only the 3rd appellant was convicted of the 3rd count and in the 4th count, the 2nd and the 3rd appellants were convicted but the 1st appellant was acquitted.

The appellants appealed against the conviction and sentence; they filed separate appeals but since they were charged and tried together those appeals were consolidated in this appeal. In their petitions which they filed in court on 19th December, 2012 they raised the same grounds against the lower court's judgment; as far as we understand them these grounds are as follows:-

1. The learned magistrate erred in law and fact in convicting them yet **section 25(a)** of the **Evidence Act** had been violated;

2. The learned magistrate erred in law and in fact in convicting the appellants yet **section 137(D)** of the **Criminal Procedure Code** had been violated;

3. The learned magistrate erred in law and in fact in convicting the appellants in disregard of the fact that **Force Standing Orders,** under Cap 46 with regard to identification parades, had been violated;

4. The learned magistrate erred in law and in fact in convicting the appellants in contravention of section 169 (1) and (2) of the Criminal Procedure Code;

5. The learned magistrate erred in law and in fact in convicting the 3rd appellant yet there was no nexus between the rifle used in the robbery and the 3rd appellant;

6. The learned magistrate erred in law and in fact "in failing to give the appellants the mandatory right of appeal;"

7. The learned magistrate erred in law and in fact in convicting the appellants without according them a just and a fair trial within a reasonable time.

We are minded that as the first appellate court we have to revisit the evidence, analyse it afresh and come to our own conclusions independent of the trial court's findings of fact but always being cautious that it is only the trial court that had the advantage of seeing and hearing the witnesses. The pronouncement of the law in this respect is found in the case of **Okeno versus Republic (1972) EA 32**, where the Court of Appeal stated that:-

> **An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 magistrates' findings can 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 page 36 of the decision thereof).**

2. The evidence at the trial

(a) The prosecution case:

Lewis Karunga Wachira (PW1) was drinking together with Joseph Kihara (deceased) at the latter's bar at Kairuthi centre on 18th December, 2009 at around 9.15 pm when they were ambushed and attacked by armed robbers. The robbers ordered them to lie down and all he saw from that position was a gun nozzle. These attackers confronted the cashier and from where he was he could only see their backs. He lost his identification card, 2ATM cards and Kshs 4,000/= to one of them in the course of the robbery. During the robbery, he heard a gunshot. After the attackers left, he called the assistant chief to inform him about the robbery. The police later arrived at the scene.

Samuel Muriithi (PW2) testified that he was confronted by one of the thugs as he walked out of the hotel in which he had been employed as watchman. This particular thug ordered him to lie down; a shot was fired at him when he hesitated to comply and lie down as ordered. He lost the sum of Kshs. 14, 850/=, a voters card and a cell phone to the thugs. He was able to see the person who stole from him because according to him, there was sufficient electricity light. When he was called at an identification parade on 18th March, 2010 he identified the 2nd appellant as the person who stole his property and whose description he had given to the police when he recorded his statement.

One other complainant who was robbed on the material night was **Joseph Mwangi Kiragu (PW6)**. He testified that on the material date and night he was walking home from work when he was confronted by a person who ordered him to kneel down. This person hit him with an object from behind. He fell down and the sum of Kshs 3,000/= was stolen from him. He did not manage to see the attacker because it was dark. While he was lying down he heard two gunshots that were fired in the air. He could see what was being fired and according to him, it looked like the gun before court.

Another victim of the robbery was **Peter Thuita Kihara (P11).** He testified that he was a bar attendant at Smart Point Bar. On the 18th December, 2009 he was at the counter counting money when he heard the sound of a gun being cocked. He saw the person who had the gun at the door. There were other intruders who had taken strategic positions; one stood close to where the customers were, the other stood where the beer was normally served and yet the other took a position at the door to the counter. This particular intruder forced the counter door open and ordered this witness to lie down. He hit him on the head with the blunt side of the panga he was armed with and picked Kshs 5,800/= from the cashbox; he also took this witness' Motorolla phone. The other attackers were busy robbing other customers. As the attack took place, there was sufficient electricity light from the two bulbs in the bar and also from the security light.

The witness said was able to identify the 1st appellant as the person who had attacked him in an identification parade that was conducted on 10th February, 2010.

In cross-examination, however, the witness testified that he could not identify his assailant because it was at night; he said that he did not know the person who attacked him. Neither did he give the description of the attackers to the police, so he admitted.

Corporal Nicholas Chimasya (PW3), who was then attached to Othaya police station was on night patrol on the material night when he got information that Kairuthi area had been attacked. He proceeded to the scene and found his colleagues Inspector Omondi and Constable Chirchir already there. According to this witness these officers had collected four bullets from the scene.

It was the evidence of this witness that the 1st appellant was arrested by officers from the Flying Squad in Othaya and Nyeri. Upon interrogation he confessed to having been involved in the robbery. The 2nd appellant denied the offence, but was subjected to an identification parade in which he was picked out by one of the victims of the robbery. As for the 3rd appellant, the officer got information on 21st February 2011, that a suspect had been arrested in Thika with a gun without a certificate. Upon examination of the gun, it was found to be that which the bullets recovered at the scene of crime had been fired from. This appellant was arrested in Thika after the hearing of a different case against. The witness produced in court the spent cartridges that had been handed over to him by Inspector Omondi who was apparently deceased at the time this witness testified.

Upon cross examination he said that Simon Muriithi (PW2) had indicated in his statement that he could not identify the attackers because it was dark.

Police Constable Salim Muhamed (PW4) who was then attached at Othaya Criminal Investigations Department (CID) office testified that on 12th March, 2010 he was summoned to Othaya police station by Sgt Francis Wambua. He went to the station accompanied by Constable Irungu. When they went to the station Sgt Wambua told them that there was a suspect of robbery with violence in Othaya town; he described his clothing and directed them where they could find him. This officer, accompanied by his colleagues found the alleged suspect in the direction of Othaya hospital. The suspect happened to be the 2nd appellant. He was arrested and taken to Othaya police station. This officer testified that he knew the accused as he had been arrested and charged in a different case at Mukurweini.

Chief Inspector of Police Emmanuel Lagat (PW5) based at the CID headquarters at Nairobi examined the three cartridges collected from the scene of crime to ascertain their calibre and the gun from which they had been shot. He also examined an assault AK rifle serial no. 847515 brought to him by police from Thika. His examination revealed that the spent cartridges had been fired from that rifle. He also

established that the gun had been used twice in Nyeri and once in Othaya.

The identification parade out of which the 1st appellant was picked as one of the robbers was conducted by **Chief Inspector of Police Jackson Kiema (PW7)** who was then based at Othaya police station. The officer conducted the parade on 10th February 2010. According to him, sergeant Wambua came to his office with two witnesses. PW 7 left them in his office as he went to the cell in which the 1st appellant was held in custody. He informed him of the presence of two witnesses who wanted to identify a suspect in an identification parade. The 1st appellant had no objection to the parade and he in fact chose a position amongst the eight members in the parade that was subsequently organised. The members of the parade were of the same physical features as the appellant**. The 1st witness, Maina Kinuthia identified him by a touch on his** shoulder. He was asked to change his position but opted to remain at the same position though he removed his jacket in readiness for the 2nd witness. The 2nd witness, **Peter Thuita (PW11)** also picked him out. When asked whether he was satisfied, the appellant expressed his displeasure at the parade because he remained in the same position when the 2nd witness picked him out. The officer signed the parade form which he produced and was admitted in evidence.

It also alleged that the 1st appellant confessed to the crime with which he was charged and convicted. The officer who is alleged to have taken his confession was **Chief Inspector of Police Stephen Mutua (PW8)**. He stated that on 8th February, 2010 at around 10 am, **Sgt Wambua (PW13)** brought the 1st appellant to his office to make a confession. This witness cautioned the appellant that he was not under any obligation to make the confession but that if he did, the confession would be used against him. According to him, the appellant admitted having committed several crimes some of which were the basis of the charges against him and for which he was subsequently convicted. He is alleged to have thump-printed the confession.

Inspector of Police Hannington Mwazonga (PW9) conducted an identification parade in respect of the 2nd appellant at Othaya police station on 16th March, 2010. He was requested to do so by Constable Chimasya. The witness, **Simon Murithi (PW2)** was taken to the office of the Officer in Charge of the Station (OCS) as the officer organised the parade.

The officer picked eight members of the parade three of whom were members of the public while the rest were inmates from the police cells. The appellant was asked to choose a position and was also advised that he was at liberty to wear a clothing of his choice. The witness identified the appellant by touching him on the shoulder. The appellant even engaged the witness in a conversation and asked him where he had seen the appellant; he told him that he had seen him at Kairuthi. The appellant was satisfied with the parade. The officer could not, however, remember the suspect who was identified. He did not also produce the parade form which he testified that he had signed.

On the arrest of the 3rd appellant, it was the evidence of **Chief Inspector Phineas Mutwiri (PW10)** that an informer called him on 30th November, 2010 at around 5.40 am to tell him that there were four suspicious looking people at U-shop area in Thika town. He rushed to the scene accompanied by his colleagues whom he named as Mackenzie and Edapal. The suspects ran away when they arrived at the scene but the informer showed them the direction they had taken. One of his colleagues, Mackenzie, managed to arrest the 3rd appellant; he was led back to where they were initially seated and it is at this place that an assault rifle was recovered. The gun, whose correct serial number was indicated as No. 47515 had eighteen bullets. The appellant was charged with the offence of illegal possession of a firearm and preparation to commit a felony.

Police Constable Mackenzie (PW12) who is said to have arrested the 3rd appellant testified that on 30th November, 2010 he accompanied the Thika OCS to U-Shop in Thika where it had been reported that suspicious looking young men had been seen. They went to the scene and found the young men seated near a kiosk; however, they took to their heels when they saw the officers. The officers went after them but only managed to apprehend the 3rd appellant. They brought him back to where he was seated and recovered an AK 47 rifle loaded with eighteen bullets from that place. This was around 6 am. This

particular officer forwarded rifle to the ballistics expert for examination.

The last prosecution witness was **Sergeant Francis Wambua (PW13)** whose evidence was that on the night of 18th December, 2009 he was with corporal Chemasya when Inspector Omondi called and informed them that there had been a robbery at Kairuthi in a bar called 'Smart Point'. When they went at the scene, they found Inspector Omondi who had recovered two cartridges at the scene. They recovered one more cartridge at the same scene. These cartridges were taken for ballistics examination.

An informer led the officers to the 1st appellant's house where he was arrested as one of the suspects of the robbery; upon interrogation he confessed of having been involved in the robbery at Kairuthi. Despite the confession, the witness testified that the 1st appellant was subjected to an identification parade where he was picked by witnesses who had been attacked or robbed on the night of the robbery.

Similarly, acting on the information from an informer, this witness and his two colleagues arrested the 2nd appellant on 13th March, 2010. He too was identified by some of the witnesses who had been attacked at Kairuthi.

According to this witness, the 3rd accused person was arrested with a gun which, upon examination, was found to be the gun that was used by robbers at Kairuthi. He had already been charged in Thika Chief Magistrate's court with the offences related to illegal possession of a firearm but upon this revelation, he was charged together with the 1st and 3rd accused persons for the offences for which they were charged and convicted in trial whose judgment is the subject of this appeal.

The witness testified that one of the witnesses, Joseph Kihara, the owner of the Smart Bar was short dead before he testified. A death certificate in respect of his death and the statement he recorded prior to his death were produced and admitted in evidence.

(b) The defence case:

All the appellants gave sworn statements in their defence.

The **1st appellant** testified that he was at his home the entire day of 18th December, 2009, and that he was never at the scene of crime. He also testified that he was arrested by five police officers at his home on 2nd February, 2010. He denied having confessed voluntarily to the crimes for which he was accused and convicted but that he was forced to thumb print the statement by the police.

The **2nd appellant** testified that he was at his place of employment on 18th December, 2009. He denied that he knew where Kairuthi is and neither did he know any of his co-accused. He contended that he was framed and that he knew nothing about the offences against him.

Finally, the **3rd appellant's** evidence in defence was that on 30th November, 2010, he arrived at Thika town from Gitingiri estate at 6.10 am. He then went to Biz Milal hotel where he used to ferry milk. He found one Humphrey Gaturu whom he enquired from the whereabouts of one Wamugo. He was told that someone else had been given the task to ferry the milk since he was late. He was then engaged by one Humphrey to go and buy cement for him but while on the way, he encountered highway patrol police officers who arrested him and took away his bicycle. On 1st December, 2010 he was charged in Thika law courts in Criminal Case No. 4908 of 2011 with the offence of preparation to commit a felony; as at the time he gave his testimony, he had been convicted of that offence and he was serving a prison sentence. On 4th March, 2011 he was arrested and charged with the offences for which he was convicted and sentenced; the conviction and sentence are the subject of this appeal. The appellant denied that he committed the offences.

The appellants filed written submissions which they adopted at the hearing of the appeal. Ms Maundu for the state opposed the appeal and submitted orally. From their respective submissions, several issues have

emerged which we propose to determine in the context of the evaluating the evidence at the trial and the law applicable.

3. Issues for determination:

It is incumbent upon this court to consider both the prosecution and the defence evidence in its entirety and resolve whether the offence of robbery with violence was committed as alleged and if so, whether it was perpetrated by the appellants. In considering whether the appellants were behind this crime we have, as a matter of necessity, to consider the element of identification which appears to be predominant in the evidence against the 1st and 2nd appellants and whether they were properly and positively identified or whether they were connected to the offences against them in any way other than that of identification. We shall also address the question whether the learned magistrate was correct to admit a retracted confession by the 1st appellant.

(a) Robbery with violence:

First, though we have to address the question whether it was established to the required standard that the offence of robbery with violence was committed. In answer to this question we have to remind ourselves of the law on this particular offence. It is defined in **section 296(2)** of the **Penal Code** under which the appellants were charged but to understand its roots it is important to consider a **section 295** of the same Code which defines simple robbery; that provision of the law provides as follows:-

> ***"295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."***

Section **296(2)** of the Code defines when robbery as defined under **section 295** graduates into robbery with violence; it says:-

> ***"296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

For one to be convicted of the offence of robbery with violence under this section the burden is on the prosecution to prove that the robbery victim was robbed and that all or any of the following circumstances obtained at the time of the robbery:-

a. The accused was armed with any weapon or instrument that may deemed to be dangerous or offensive;

b. The accused was in the company of one or more persons;

c. Immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to any person.

We have to consider the prosecution evidence in the context of the foregoing provision.

Four complainants testified that they were robbed on the night of 18th December, 2009 at Kairuthi centre. **Lewis Karunga Wachira (PW1)** testified that he was attacked at Joseph Kihara's bar by a number of armed robbers; at least one of them was armed with a gun. They ordered everybody to lie down and stole their valuables before they left. **Samuel Muriithi's (PW2's)** evidence was that on the material night and place he was confronted by one of the marauding gang members as he walked out of the hotel in which he had been employed as watchman. A shot was fired at him when hesitated to lie down as ordered. He also lost his property to the thugs. **Joseph Mwangi Kiragu (PW6)** was also a victim of this particular

robbery. He was assaulted by one of the robbers and he lost the sum of Kshs 3,000/= to him. Yet another complainant was **Peter Thuita Kihara (P11).** He was attacked while taking stock of the day's proceeds at Smart Point Bar. He was also assaulted by one of the attackers who also stole money from the bar and his cell phone.

The complainants' testimony was corroborated by **Corporal Nicholas Chimasya (PW3)**, who was informed of the robbery incident at Kairuthi. He went to scene and found two of his colleagues already there. They had collected some cartridges of the bullets fired at the scene.

Sergeant Francis Wambua (PW13) also testified he was with Corporal Nicholas Chimasya (PW3) on the night of 18th December, 2009 when Inspector Omondi called and informed them that there had been a robbery at Kairuthi in a bar called 'Smart Point'. They went at the scene and established Inspector Omondi had recovered some cartridges at the scene.

This evidence was, in our humble view consistent and unshaken. It was not displaced and we see no reason to doubt its credibility. It is apparent from that evidence that at least, two of the three ingredients that constitute the offence of robbery with violence as prescribed in section **296(2)** of the **Penal Code** were established to the required standard.

In the face of this evidence, we agree that the learned magistrate was correct in her finding that the offence of robbery with violence was proved to have been committed beyond any shadow of doubt.

Our next concern is whether it was equally proved that the appellants were the perpetrators of this heinous crime.

It is not in dispute that the offence was committed at night; it is also not in dispute that none of the alleged stolen items was recovered from any of the appellants. It follows that apart from the retracted confession against the 1st appellant and the evidence of the link between the weapon used in the robbery and the 3rd appellant, the only other evidence against the appellants, in our humble view, is that of identification. It is this evidence that we shall now turn to.

(b) Identification:

As far as the 1st appellant is concerned, the only witness who testified that he saw him was **Peter Thuita Kihara (PW11).** It was his evidence the 1st appellant was the person who attacked him. He picked him out in an identification parade that was conducted on 10th February, 2010. However, in cross-examination, the witness contradicted himself and said that he could not identify his assailant because it was dark. He also admitted that he did not give the description of his attacker to the police.

In his evidence in chief **Samuel Muriithi (PW2)** testified he was able to see the person who stole from him because according to him, there was sufficient electricity light. He singled out the 2nd appellant as the culprit in an identification parade conducted on 18th March, 2010. He said that he had given his description to the police.

The identification parade in which this witness picked out the 2nd appellant was conducted by **Inspector of Police Hannington Mwazonga (PW9)** on 16th March, 2010. However, the record shows that the parade form in respect of the 2nd appellant's parade was not produced in evidence.

Besides this omission, the investigations officer **Corporal Nicholas Chimasya (PW3)**, testified in answer to questions put to him during cross-examination that although **Samuel Muriithi (PW2)** had testified that he was able to see his attacker and indeed he picked him out in an identification parade, this testimony contradicted his statement to the police in which he indicated he could not identify the attackers because it was dark.

It is clear that the 1st and 2nd appellants were identified by single identifying witnesses and their evidence is anything but consistent.

Although **Peter Thuita Kihara (PW11)** is purported to have identified the 1st appellant in an identification parade, he conceded that he could not identify his assailant because it was dark and neither did he give his description to the police.

Similarly, although **Samuel Muriithi (PW2),** testified that he identified the 2nd appellant in an identification parade he also admitted that he could not identify his assailant on the night of the robbery because it was dark. He also admitted that he did not give the description of his assailant to the police.

In the face of these admissions, it is not plausible that the witnesses could have positively identified the 1st and 2nd appellants in an identification parade. As a matter of fact, there was no basis for conducting such parades since neither did the witnesses give their assailants' description nor did they intimate in their statements that they could pick them out if they saw them. More importantly, they could identify their attackers because, as much as we can gather, the conditions for such identification were unfavourable. We think that the learned magistrate misdirected herself in this respect when she held the conditions for identification were favourable and that the appellants were positively identified.

While the Court of Appeal in O**geto versus Republic (2004) KLR 19** acknowledged that a fact can be proved by a single identification witness, it cautioned that such evidence must be admitted with care where circumstances of identification are found to be difficult; the court said:-

> "…**it is trite law that a fact can be proved by evidence of a single witness although there is need to test with greatest care the identification evidence of such a witness especially when it shown that conditions favouring a correct identification were difficult".**

This point is emphasised in **Wamunga versus Republic (1989) KLR 424 where** the Court of Appeal, held at page 426 that:-

> ***"…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 a conviction."***

In the instance case it is doubtful that the conditions for positive identification were favourable or even existed considering the evidence of the identification witnesses. At best their evidence in this regard was contradictory and inconsistent and thereby creating doubt as to whether any of these witnesses identified the appellants.

One other issue that the learned magistrate seems to have not considered was the omission to produce the parade form in respect of the identification parade for the 2nd appellant. We cannot see how the learned magistrate could possibly come to the conclusion that the Police Force Standing Orders with regard to identification parades had been complied with without considering that Form P156 had not been admitted in evidence.

(c)<u>Retracted confession:</u>

In convicting the 2nd appellant the learned magistrate held that she had considered the **Evidence (Out of Court Confessions) Rules, 2009** and found that the 2nd appellant's confession had been taken within the rules and the Evidence Act. She admitted the confession and dismissed the appellant's contention that he was forced to sign the confession as a mere denial.

The confession in issue was taken by **Chief Inspector of Police Stephen Mutua (PW8)**. He testified that Sgt **Wambua (PW13)** brought the 1st appellant to his office to make a confession. This witness cautioned

the appellant that he was not under any obligation to make the confession but that if he did, the confession would be used in evidence. According to him, the appellant admitted having committed several crimes some of which he was charged and convicted in the trial which is the subject of this appeal. He is alleged to have thump-printed the confession.

The appellant himself admitted in his evidence that he wrote his name and thumb printed the statement of confession. He also confirmed that he understood English language which is the language in which the confession was written. He, however, testified that he did not know the contents of the statement and that he only appended his thumbprint and name because he was compelled by the recording officer to do so. He denied having committed any offence.

In essence the appellant retracted his statement. Such statement was defined in **Tuwamoi versus Uganda (1967) EA 84** at page **88** where the Court of Appeal For Eastern Africa said:-

> ***"… a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to retract, to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that statement was not a voluntary one."***

The court also stated the legal implications of such a statement and said:-

> ***"We would summarise the position thus-a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."***

The same court was of the view in **Toyi versus R (1960) EA 760** that there is no rule of law or practice requiring corroboration of a retracted statement or confession before it can be acted upon. It was held that it is, however, dangerous to act upon it in the absence of corroboration in material particular or unless the court after a full consideration of the circumstances, is satisfied of its truth.

When the appellant retracted his confession, the learned magistrate dismissed him, casually in our view, and admitted the retracted statement without any sort of caution convicting the appellant based on such statement. Going by the pronouncements of law in the decisions that have been cited it was incumbent upon the learned magistrate to be satisfied that in all circumstances of the case that either the confession was true or that there was corroboration of it in material particular. There is nothing in the learned magistrate's judgment to suggest that she took any precautionary steps to satisfy herself of the truth of the confession in issue; neither is there anything on record to suggest that she took note of any corroborative evidence in some material particular. In any event we find no such evidence available as the only other evidence against the appellant is that of identification which, for reasons we have given, is discredited.

We are also unable to agree with the learned magistrate that in taking the confession the **Evidence (Out of Court Confessions) Rules, 2009** were strictly complied with. For instance, **rule 4(1) (a)** states that the accused must state his preferred language of communication; **rule 4(1)(d)** requires the accused to be informed of his right to have legal representation; and **rule 4(1)(f)** requires his duration, including the date and time of arrest and detention in police custody be established and recorded. We find no evidence in the copy of the statement on record that these rules were complied with.

Again under **rule 7** where the confession is to be recorded in writing, the recording officer must inform the accused person of his option to write his statement in his preferred language or to have the recording officer record it. Under rule 9 there must be a certificate of confirmation in particular words to the effect that the accused person has read the statement and that he has been told that he can correct, alter or add

anything that he wishes. He must certify the statement to be true and that he has made it if his own free will.

These rules were not complied with and it is no wonder that the appellant recanted or retracted his statement as a statement he was forced to sign and whose contents he did not know.

We are inclined to conclude that the conviction of the 2nd appellant based on the retracted confession was, for the reasons we have given, unsafe.

(d) Possession of the assault rifle:

We are left with the 3rd appellant.

From what we can gather, this particular appellant was convicted because he was found in possession of the gun that was used in the robbery at Smart Point bar on the night of 18th December, 2009.

According to the evidence of **Chief Inspector Phineas Mutwiri (PW10)** the appellant was arrested with the assault weapon on 30th November, 2010 at around 5.40 am at Thika. He identified the serial number of the weapon as No. No. 47515. The appellant was subsequently charged in Thika magistrate's court with the offence of illegal possession of a firearm and preparation to commit a felony.

In his defence the appellant himself testified indeed he had been not only charged in **Thika Criminal Case No. No. 4908 of 2011** but that he had also been convicted of the charges against him; as a matter of fact, he was serving a prison sentence in respect of that offence for which he had been convicted at the time he testified.

The evidence that the assault weapon recovered from the appellant had been used in the robbery at Kairuthi on 18th December, 2009 was linked to the cartridges that were recovered at the scene of crime by the police officers who visited the scene after the robbery. The cartridges and the assault rifle were taken for ballistics examination and in his evidence **Chief Inspector of Police Emmanuel Lagat (PW5)** examined the weapon and the cartridges confirmed that it was this particular gun that the shots were fired from during the robbery at Kairuthi. His evidence was not displaced or controverted.

According to **Corporal Mutwiri (PW10)** there was an attempt to interfere and conceal the gun's serial number but what came out clearly from the evidence of the ballistics expert was that the shots fired at Kairuthi on the night of the robbery were fired from this particular gun, its serial number notwithstanding.

We agree with the learned magistrate that it was circumstantial evidence that linked the 3rd appellant to the armed robbery at Kairuthi. We are satisfied that the appellant's possession of the offensive gun and the expert's uncontroverted evidence that the shots fired during the robbery at Kairuthi were fired from this particular weapon are inculpatory facts that were incompatible with the innocence of the appellant and which could not be explained upon any other reasonable hypothesis other than that of his guilt. Our opinion in this regard is drawn from the Court of Appeal decision of **Simon Musoke versus Republic (1958) EA page 715** at page 718 where the court said of circumstantial evidence;

> "… ***in a case depending exclusively upon circumstantial evidence he(the trial judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."***

This decision was followed in the case of **Okeno versus Republic (1972) EA 32 at page 35** where the Court of Appeal said;

> ***"In our view the magistrate clearly appreciated that a conviction based on circumstantial evidence can only be had where the inculpatory facts are incompatible with the innocence of***

the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

We think the learned magistrate was justified to infer guilt and convict the appellant, accordingly; we agree that the available circumstantial evidence was sufficient to sustain a safe conviction.

In the final analysis we are of the humble view that the 1st and 2nd appellants’ appeal is merited and we hereby allow it accordingly. Their conviction is quashed and sentence set aside and they are set at liberty unless they are lawfully held. The 3rd appellant’s appeal is dismissed and we uphold his conviction and sentence. It is so ordered.

Signed, dated and delivered in open court this 15th day of December, 2015

H.I. Ong’udi	Ngaah Jairus
JUDGE	**JUDGE**