



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL NO. 30 OF 2014

(Consolidated with Criminal Appeal Nos. 95 & 98 of 2013.)

PETER WAHIGA KABIRU.....1ST APPELLANT
SIMON MBAABU MWANGI.....2ND APPELLANT
ZACHARY SINDA KEROSIA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the Conviction and Sentence by the Ag. Senior Resident Magistrate Hon. C.

Wekesa at Nyeri Chief Magistrate's Court dated 25th July, 2013 in Criminal Case no. 68 of 2010.)

JUDGMENT

1. **PETER WAHIGA KABIRU, SIMON MBAABU MWANGI AND ZACHARY SINDA KEROSIA** hereinafter referred to as the 1st, 2nd and 3rd Appellants were charged with two offences.

Count 1:

Robbery with violence contrary to **Section 296 (2)** of the **Penal Code**.

Particulars being that the 1st, 2nd and 3rd Appellants; *“On the 16th day of November, 2009 at Kenol Nairobi stage in Muranga South District within Central Province jointly while armed with dangerous offensive weapons namely, pistols and handcuffs robbed Geoffrey Mwangi Issack of cash Kshs. 68,500 and a mobile phone make dawoo serial number 373,318,020.024.179 all valued at Kshs. 74,300 and at or immediately before or immediately after the time of such robbery actual violence to the said Geoffrey Mwangi Isaack.”*

Count 2:

Personating a Public Officer contrary to **Section 105 (b)** of the **Penal Code**.

Particulars being that the 1st, 2nd and 3rd Appellants; *“On the 16th day of November 2009 at Kenol Nairobi stage in Muranga South D within Central Province, jointly falsely presented themselves to be*

persons employed in the public service namely police officers and assumed to arrest Geoffrey Mwangi Isaack.”

2. The Appellants pleaded not guilty to the charges and the matter proceeded to full hearing, and they were found guilty and convicted on both counts. They were each sentenced to death on the 1st Count and three years’ imprisonment on the 2nd Count but which was held in abeyance.

3. Being aggrieved by the judgment the Appellants filed separate appeals namely **HCCRA NOS 95 of 2013, 98 of 2013 and 30 of 2014**. The three appeals were by the Order of this Court consolidated with **HCCRA No.30 of 2014** as the lead file.

4. The grounds of appeal raised by the 1st Appellant through his advocate Mr. Muhoho dated 15th May, 2014 were as follows;

a. The learned trial Magistrate erred in law and in fact in finding that the identification by PW1 of the Appellant was of recognition which was not the case whatsoever.

b. The learned trial Magistrate erred in law and in fact in relying solely on dock identification of the Appellant which was unsafe.

c. The learned trial Magistrate erred in law and in fact in failing to warn herself on the dangers of relying on a single identifying witness.

d. The learned trial Magistrate erred in law and in fact in making a totally wrong inference with regard to the purported culpability of the Appellant on the car hire of a vehicle that was not at all connected to the case herein.

e. The learned trial Magistrate erred in law and in fact in convicting the Appellant on the 2nd count without considering that the evidence brought forth with regard to the 2nd count fell way below the required standard of beyond reasonable doubt.

f. The learned trial Magistrate erred in law in finding the Appellant guilty of an offence for which the evidence adduced did not support.

g. The learned trial Magistrate erred in law and in act in casually dismissing and/or disregarding the Appellant's defence.

5. Those raised by the 2nd appellant through Kanyi, Koge advocates were as follows;

a. That the learned trial Magistrate erred in law to find that the appellant was not properly identified.

b. That the learned trial Magistrate erred in both points of law and fact by failing to find that crucial prosecution witnesses contradicted each other and were not reliable.

c. That the learned trial Magistrate erred in law by failing to find that material witnesses were not called to testify by the prosecution and this was prejudicial to the appellant's case.

d. That the learned trial Magistrate did not follow clear provisions of the law especially Section 200 of the Criminal Procedure Code.

e. That the learned trial Magistrate erred in law by failing to find the alibi of the Appellant/accused was not disproved by prosecution and further that defence of appellant was truthful, credible and watertight.

6. The 3rd Appellant listed the following grounds of appeal;

a. That the learned trial Magistrate gravely erred in both law and facts while relying on dock identification while the above evidence by PW4 on the occurrence book disregarded the whole issue.

b. That the learned trial Magistrate gravely erred in both law and facts while holding that the prosecution witnesses proved their case in court (i) and (ii) without considering that the evidence did not fully incriminate me with the alleged offence as it was wholly deserved.

c. That the learned trial Magistrate gravely erred in both law and facts basing sentence and conviction on the alleged exhibits while advanced evidence adduced by PW2 and PW3 contradicted the same (contravention of section 65.)

d. That the learned trial Magistrate gravely erred in both law and facts when failed to note that essential witnesses were not called to clear gray areas of the prosecution case thus contravened section 150 of the criminal procedure code.

e. That the learned trial Magistrate gravely erred in both law and facts failed to see that the evidence before her was not founded on any credible, cogent and consistent ground to base conviction.

f. That the learned trial Magistrate gravely erred in both law and facts while disregarding his alibi defence that was never challenged or questioned by prosecution thus contravened section 169 of the c.p.c (no cogent reason was given for denial.)

7. The Prosecution called a total of seven (7) witnesses.

The Complainant **Geoffrey Issack Mwangi** (PW1) testified that on 11th November, 2009 at around 11.00am he was at Equity Bank, Kenol where he withdrew Kshs.70,000 and deposited Kshs.3,000 in his Mpesa Account. He is an Electrical Contractor. Before the withdrawal he had Kshs.2, 400 with him. He produced EXB1-4 to show the transactions and the business registration. He wanted to go to the Nairobi stage and he found a motor vehicle which had three (3) people in it.

8. One of the three called him saying “Mzee Simama”. PW1 ignored him and the person removed a pistol and he got scared. The person was in the co-driver's seat inside the motor vehicle. Then one person got out of the motor vehicle and told him he was under arrest. The people told him they were officers from the Flying Squad and even showed him a photo. He was ordered to board the vehicle as one slapped him.

9. Inside the motor vehicle he was told to lie down and he was then robbed of his mobile phone and all the money he had on himself. He identified the walkie talkie (EXB5) handcuffs (EXB6) as what these people had. He was left on the way and upon rescue by two people he learnt that he was in Githunguri. He produced a receipt (EXB7) for his stolen phone.

10. He did not see the registration number of the motor vehicle. He reported the matter to Kabathi Police Station where he recorded a statement. On 16th January, 2010 he was called by the D.C.I.O Kikuyu and told to go to Nyeri Police Station for an identification parade. Apparently no identification took place.

11. He had this to say of the Appellants;

- One of the persons was slim and tall.

- The other was medium height dark and fat.

- The 4th accused person (now 3rd Appellant) showed him the photo, handcuffed him and removed money from his pocket. He really beat the witness and told him he was an officer from the flying squad.

- The 2nd Appellant was the one who called him as he sat in the co-driver's seat. He also told him never to report to the Police otherwise he would be killed. He hit him on the chest as he ordered him to surrender the phone.

- The 1st Appellant was the one driving the motor vehicle.

He was with the thieves for 20-30 minutes.

12. PW2 **No. 553191 PC Gilbert Munene** based at Kitale C.I.D then, was with others instructed by the DCIO on 8th January, 2010 to track a motor vehicle registration no. KBK 280A Toyota Harrier cream in colour. The said motor vehicle was believed to be carrying four (4) armed men and headed to Kitale.

13. They kept moving depending on the instructions received. About a hundred metres (100m) from the suspect motor vehicle the same made a sudden U-turn but the police followed and cornered them and blocked them. Police fired and the driver stopped and four men alighted. The men and motor vehicle were searched but nothing was recovered save for a brief case with clothes.

14. The suspects and their motor vehicle were driven to the Kitale Police Station. The motor vehicle was photographed (EXB5a-e.) PW3 **Cpl Kodhek Omari** gave similar evidence to that of PW2. He however added that a search on the Appellants at the station caused the recovery of eight (8) mobile phones, a school uniform for a pupil in Molo. He could not remember the name of the school.

15. On 9th January, 2010 him and other officers escorted the Appellants and their motor vehicle to Nakuru where they handed them to C.I. Maina who left for Nairobi with them.

16. PW4 **No. 34671 Sgt. Alphonse Mbulu** was in his office on 30th December, 2009 at 9.00am when he received a report in respect of one Mungai Kibora who had been seen by members of the public screaming while being pushed into a motor vehicle KBB 653F saloon blue in colour. He rushed to the scene but did not trace the vehicle or victim.

17. At around midday the same day Mungai Kibura came to PW4's office and reported how he had withdrawn Kshs.60, 000 from Equity Bank, Muranga and had another Kshs.5, 000 on himself. As he moved in the streets a motor vehicle with four occupants blocked him. One person came out holding a certificate of police appointment and told him they were looking for him. He screamed but was pushed into the vehicle, handcuffed and driven away and robbed of the Kshs.65, 000 he had.

18. PW4 then embarked on investigations. At the Registrar of Motor Vehicles he found out that the motor vehicle KBB 653F belonged to Rachel Ngesa Maina whom he traced on 7th January, 2010, Rachel confirmed to him that she had given the motor vehicle to Kennedy Wambugu who ran a car hire business. She took PW4 to him and they found the motor vehicle at the parking yard. Kennedy informed him that KBB 653F had been hired by **Peter Kabiro Wahiga** (1st Appellant) who had returned it and hired another motor vehicle KBK 280A Toyota Harrier.

19. On 8th January, 2010 the said motor vehicle was tracked to Kitale. The DCIO Mr. Lenny Gisaka informed the DCIO Kitale about the case and asked him to arrest the armed occupants and detain the vehicle. At 10.30am they received a report of the arrest and detention of the motor vehicle and that nothing had been recovered from them.

20. On 12th January, 2010 PW4 on receipt of instructions proceeded to their official Nairobi Special Crime Prevention Unit offices where C.I.Maina handed over the Appellants and the motor vehicle to

him. He placed them in the Police Land Rover which he had come with. The suspect motor vehicle followed them as they proceeded to Muranga Police Station where the vehicles were parked.

21. He then searched the suspect motor vehicle in the presence of the Appellants. He was assisted by Cpl John Okoth. He recovered handcuffs and the key, and three certificates of appointments from the space for the CD player in the vehicle.

22. He also recovered a pocket phone and one (1) fired cartridge under the front passenger seat. An inventory was taken by the witness and signed by him and the Appellants (EXB11.)

23. The certificates of appointment were taken to the photographic section C.I.D headquarters for analysis. The report dated 2nd July, 2010 showed they were not genuine (EXB12). He also produced the hire agreement between the 1st Appellant and Kennedy Wambugu by PW1, which agreement was given to him (EXB13). The document examiner in his report confirmed that the signatures on the agreement were similar to those ones of the 1st Appellant (EXB14 & 15). The spent cartridge was analysed and was found to be a genuine fired bullet. (EXB16).

24. PW5 **PC Mohamed Mchani** was the 1st person that PW1 reported this incident to at the Kabati police station. He referred him to crime office. He said PW1 had told him he could be able to identify the attackers if he saw them.

25. PW6 **CIP David Otieno** who was to conduct identification parades in respect of the Appellants testified that all the Appellants declined to appear on identification parades claiming that photos of them had been taken. Their comments were noted and the parade forms duly signed and produced as EXB19-21.

26. PW7 **I.P Jacob Mureithi** was the Investigating Officer. He produced the exhibits herein. He further stated that a pistol had been recovered on the Appellants at the time of their arrest. He denied that the Appellants had been photographed before the identification parade could be conducted.

27. The 1st Appellant in his sworn defence stated that he runs lorries for transporting goods. He also owns a car hire business. He registered Jungle Car Hire and Tows in 2008 vide certificate no.515189 (DEXB1). He produced a receipt for the place he rents for the business at Ambempu House, Ngara road, Nairobi (DEXB2); Black car hire agreement (DEXB3); unfilled receipt for use for customers (DEXB4).

28. He could not remember where exactly he was on 16th November, 2009 but he knew he was in Nairobi. He denied stealing from anyone or stopping in Kabati. On 6th January, 2010 he was called by one of his employees transporting second hand clothes from Nairobi to Kisumu. He told him that the lorry had problems and he wanted spare parts. He promised to deliver them in Kisumu on 7th January, 2010 as he would be going to Kitale the following day.

29. He called his friend Ken Wambugu of Joy Car Agency asking him to get him a four wheel drive vehicle for hire. He got it and left for Kisumu on 7th January, 2010. He met his people and left the motor vehicle being repaired as he went to Kitale with two friends of his. He spent the night in Eldoret. On 8th January, 2010 he proceeded to Kitale and met his customer. His lorry from Kisumu also arrived and together they saw the maize load. He had been informed by Ken Wambugu that there was a person who was interested in the car he had hired.

30. In Kitale on their way to see the maize their vehicle was blocked by a pick up with a private number plate. Those who blocked them came out with guns shooting and ordering them out of the vehicle. He came out and lay down. He was searched as well as the motor vehicle. Nothing was recovered from him. They were taken to Kitale Police Station where the motor vehicle was thoroughly searched in the presence of the OCPD and DCIO Kitale.

31. On 9th January, 2010 they were transported to Nakuru in their motor vehicle and police vehicle. At Nakuru they were again searched. They then left for Nairobi where they stayed for three (3) days at Parklands Police Station without knowing where the motor vehicle was. On 12th January, 2010 they were taken to Special Crimes Prevention Unit Headquarters. They were again searched together with the vehicle. Two (2) hours later officers from Muranga came and took them all in a police land rover. They arrived in Muranga at 3.00pm and were taken to the CID office.

32. Later their motor vehicle appeared, and they were taken out and informed that certain things were found in their vehicle. An inventory form was brought and he was forced to sign it. At Nyeri photos of him were taken.

33. He refused to appear in an identification parade on 17th January, 2010 because of having been photographed with no explanation being given. He denied the charges. He added that the 2nd appellant was the customer who had called him to Kitale.

34. The 2nd appellant in his sworn defence stated that he brokers maize in Kitale. On 4th January, 2010 a customer from Nairobi called him inquiring about maize. Later on 8th January, 2010 he met the buyer of maize who was 3rd accused (acquitted), the transporter was the 1st Appellant while his boy of works was 3rd Appellant. The person selling maize was Anthony Maina. They used the 1st Appellant's vehicle to go see the maize. On the way to cereals board they were blocked by a double cabin vehicle (KAM).

35. Eight (8) police officers alighted from therein and shot in the air as they ordered them out of the vehicle. The rest of the evidence is similar to that of the 1st Appellant.

36. The 3rd appellant in his sworn defence denied the charge. He said he deals in second hand clothes at Gikomba Nairobi, and he supervises transport services for 1st Appellant. He said on 16th November, 2009 he had gone to collect goods in Naivasha town from one Nganga vide a lorry registration no. KAD 283S Mitsubishi Canter. He collected the goods. He produced an invoice (DEXB6) and a delivery noted (DEXB7). He denied being at the scene on that day.

37. He stated that from occurrence book number 22 of 16th November, 2009 Kabati Police Station PW1 who reported the robbery gave no descriptions of his attackers (DEXB8). On 6th January, 2010 with permission of the 1st Appellant he transported goods (mitumba) to Kisumu. Reaching Nakuru the motor vehicle developed mechanical problems, but they proceeded on arriving at Kisumu at 5.00pm.

38. On 7th January, 2010 the 1st appellant arrived in Kisumu with the spares. He left for Kitale and called him (3rd appellant) in the evening asking him to go to Kitale but without the vehicle. He arrived on 8th January, 2009 and met the 1st Appellant with the 2nd appellant and another whom he introduced as customers. As they went to the maize store in the 1st appellant's vehicle they were blocked by a police land rover.

39. The rest is as stated by the 1st and 2nd appellants. He said he was beaten to sign the inventory prepared by Cpl Okoth (DEXB9). On 16th January, 2010 he was video recorded by Mr. Onchiri. He produced a statement Mr. Onchiri recorded from him (DEXB10.)

40. He stated that he refused to participate in the identification parade because of the video recording. On 17th January, 2009 PW1 recorded a further statement (DEXB11). He produced a delivery note (DEXB12) for the goods he had taken to Kisumu.

41. When the appeal came before us for hearing Mr. Muhoho for the 1st appellant took us through their grounds of appeal. The main issue he was challenging is the identification of the 1st appellant. He submitted that there was a difference between identification and recognition. That at no time did PW1

give the description of the 1st appellant to the police. Further no identification parade was conducted in respect of the 1st appellant. Still on identification he submitted that there had been no identifying witness.

42. He further submitted that though the learned trial Magistrate referred to circumstantial evidence there were indeed no circumstances herein. That the hiring of motor vehicle registration no. KBK 280A had no connection with the 1st appellant. He said the evidence adduced did not support the charge and the learned trial Magistrate relied on the evidence of PW4 which was hearsay evidence to convict the 1st appellant. Finally, he submitted that since no identification was proved then the 2nd count should not have been sustained.

43. Mr. Wahome for the 2nd appellant submitted that identification was not satisfactory as no identification parade was held. He referred the court to the cases of;

(i) Kiarie V R (1984) KLR 739.

(ii) Charles Bowen Too & Another V R Court of Appeal Nakuru CRA No.146 of 2011 among others.

He further submitted that no descriptions were given, as those given were vague.

44. On the 2nd appellants defence he submitted that there was no reason why the same was rejected and he had raised an alibi. He still referred us to the case of;

(i) Kiarie Vs. R (supra) and

(ii) John Wandati & Anor. Vs. R Court of Appeal Kisumu- Criminal Appeal No.49 of 1999.

45. He raised issue with witnesses who were not availed. He mentioned Cpl John Okoth and Mr. Gisaka and referred to the case of **Juma Ngodia V R 1 KAR 454** and **Nguku Vs R (1985) KLR 812.**

46. He questioned the search that was conducted in Muranga in the absence of the Appellants. He submitted that earlier searches of the motor vehicle done had not yielded anything. The motor vehicle had not been secured to avoid tampering.

47. The 3rd appellant who appeared in person said he adopted the submissions by both Counsel. He said the learned trial Magistrate relied on descriptions given a month after the incident. He even challenged the charge sheet saying it was defective without explaining the defect. He wondered why his defence was rejected yet he was not cross-examined on it.

48. In reply Mr. Njue for the State submitted that **Section 200 (2)** of the **Criminal Procedure Code** had been complied with before the learned trial Magistrate proceeded with the case. The Appellants were ready to proceed with the case, after **Section 200 (3)** of the **Criminal Procedure Code** had been complied with.

49. It was his submission that though the identification was by a single witness it was safe as occurrence was during daytime and PW1 had enough time to make his observations. He was covered after he had identified them. To him the conditions for identification were favourable.

50. He distinguished the facts in the Maitanyi case with the present case. He also admitted that there was no identification parade conducted. This evidence of identification parade is considered alongside other evidence in the matter he said. He referred to the case of **CALVIN PETER OMONDI OWAYO V R CRA No.322 of 2008 Kisumu Court of Appeal.**

51. He contended that failure to give initial descriptions is not fatal. What is important is the credibility of the evidence given and cross-examination. See **Nathan Kamau Mugure V R 2009 eKLR and Abdallah**

Bin Wendoh (1953)20 EACA 166.

52. Mr. Njue was not satisfied with the recoveries. He however added that even without the evidence of recoveries, the evidence of identification was sufficient as the two events were done in the same transaction.

53. On the defences he said the 1st and 3rd appellants raised a defence of alibi which raised no issues while the defence of the 2nd Appellant was a general one. It was his submission that for the evidence adduced to be considered it must be credible and raise a doubt in the prosecution case. He dismissed the 1st and 3rd Appellant as witnesses who were not credible as their evidence was at variance.

54. It was Mr. Njue's submission that the motor vehicles KBB 653F and KBK 280A were very relevant as per the evidence of PW4. The 1st Appellant used to hire vehicles from Kennedy and KBB 653F had been hired and returned, and KBK 280A taken. The Appellant's were arrested in KBK 280A. The kidnappings had a similar pattern.

55. The failure to call Kennedy and Gisaka was not fatal, as there is no set number of witnesses who should prove a fact. He referred to the cases of **Michael Kinuthia Muturi V R Nairobi C.A. CRA No.51 of 2008** and **Bukenya & Others Vs. Uganda 1972 E.A 49** where the issue of witnesses was discussed.

56. This is a first appeal and we are reminding ourselves of the duty to re-evaluate and reconsider the evidence afresh and come to our own conclusion. We are alive to the fact that we did not see nor hear the witnesses. The Court of Appeal gave these guidelines in the cases of **Okeno Vs. R 1972 E.A 32; Kiilu V R (2005)1 KLR 174; Simiyu & Anor. V R (2005)1KLR 192.**

57. We have applied our minds to the above and considered the evidence on record and the grounds of appeal together with submissions of all the Counsel and the 3rd Appellant. From the evidence adduced and the documents produced by PW1 we are satisfied that he withdrew Kshs.70, 000 from Equity Bank, Kenol. He lost this money to people who kidnapped him and took him away in their motor vehicle. These people were three (3) in number and one of them had a pistol. Violence was used on him. All these facts satisfy and prove the offence of Robbery with violence and we so find.

58. Before we get into analyzing the evidence we have an observation to make on this matter.

- It was handled by four (4) magistrates at various stages.

- Hon. Ole Keiwa took plea and heard the evidence of PW1.

- Hon. D.O. Ogembo heard the evidence of PW2-PW7. He also took the defence of 1st and 2nd Appellants.

- The late Hon. S.A.Okato took the defence of the 3rd appellant and another and the submissions and reserved judgment for 11th April, 2013 which was never to be as he passed on before the date.

- Hon. C. Wekesa took over the matter from where it had reached wrote and delivered the judgment the subject of this appeal.

59. **Section 200 (3)** of the **Criminal Procedure Code** makes provision for part-heard matters to be taken over by other judicial officers and proceeded with. Hon. D.O.Ogembo who heard the evidence of six out of the seven prosecution witnesses plus the defence of two out of the four accused persons should have been given an opportunity to finalize the matter. This is because of the seriousness of the charge that faced the Appellants. We are not however saying that the Appellants were prejudiced in any way, since **Section 200 (3)** of the **Criminal Procedure Code** was at every stage explained to them and they elected

to proceed with the case from where it had reached.

60. After evaluating the evidence on record we find the issues cutting across this appeal and lending themselves to us for determination to be;

(i) Whether the Appellants were sufficiently identified at the scene of crime as members of the gang that kidnapped PW1 and robbed him of his money.

(ii) Whether the motor vehicle registration no. KBK 280A was used in the commission of the robbery against PW1.

61. The Appellants in this appeal are challenging the correctness of the said identification. The evidence of identification that was relied on by the prosecution in this case was that of a single identifying witness (PW1). He told the Court that he had not seen the attackers prior to the attack and that's why the police had arranged for an identification parade only for the appellants to refuse to appear on the said parades.

62. It is our duty to thoroughly test and examine the evidence of PW1 to be able to satisfy ourselves of the safety of the conviction herein. In the case of **Abdullah Bin Wendo and Anor. V R (1953) 20 EACA 166** which was subsequently followed in **Roria V R (1967) E.A 583**. The Court stated thus;

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that conditions favouring a correct identification were difficult. In such circumstances or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

63. In **Karanja & Anor. V R (2004)2 KLR 140** the court while dealing with the issue of identification and recognition had this to say;

“1. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.

2. Whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.

3. Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made.”

64. This was also followed in **Kiilu & Anor. V R (2005)1 KLR 174**.

65. PW1 was the only identifying witness in this matter. He reported the incident at Kabati Police Station on 16th November, 2009 at 4.45am. PW5, who received this report, only made an entry in the occurrence book and referred him to the crime office. He told him he could identify the thieves if he saw them but he did not record this anywhere.

66. PW1 recorded a statement at Muranga Police Station but he gave no description of the thieves. He recorded another statement at Nyeri on 17th January, 2010. It was at Nyeri Police Station on the date of the identification parade and after the appellants declined to appear on the identification parade that PW1 was giving descriptions of the thieves. Was it a coincidence that descriptions were being given on the date of the identification parade?

67. Still on the identification parade, the blatant refusal by the Appellants to participate in the identification parade on flimsy unsupported allegations was uncalled for. An identification parade gives a witness an opportunity to confirm that indeed he/she is able to pick the culprit from a crowd. Its not always the case that a suspect is picked. In fact some end up being exonerated.

68. Despite their refusal to attend to the identification parade the court will not dismiss, PW1's evidence just because it was not backed by an identification parade. We have a duty to analyse that evidence, as a whole.

69. The earlier position as stated in **Gabriel Kamau Njoroge V R (1982-1988)1 KAR 1134** was that;

“dock identification is generally worthless and the court should not place much reliance on it, unless it had 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.”

In **Muiruri & 2 Others V R (2002) 1KLR 27**, paragraphs 25-40 Court stated thus;

“But the holding in Gabriel Njoroge case (supra) appears to us to be too broadly couched. We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo V Rep (1953) 20 EACA 166, Roria v Republic (1967) EA 583, and Charles Maitanyi v Republic (1986) 2 KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case of the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”

70. The bottom line is that all the circumstances of each case must be taken into account for the court to satisfy itself that on the facts and circumstances of the case the evidence must be true.

71. We have considered the evidence of PW1 and how his report and statements were recorded. He did not know the thieves prior to the incident. It was therefore an error for the learned trial Magistrate to find that the identification was that of recognition. Those he reported to did not bother to take down his alleged description of witnesses until 17th January, 2010 at Nyeri Police Station when he may have likely seen the suspects.

72. Besides their word of mouth it was nowhere recorded that PW1 said he would be able to identify the thieves if he saw them. Even without giving descriptions, a statement of that nature that would have had some weight.

73. In the circumstances of this case, we find that the evidence of PW1 on identification on its own cannot be the basis of a conviction. It would require other evidence whether direct or circumstantial to corroborate it.

This now brings us to the second issue for determination.

ISSUE NO. (II) WHETHER THE MOTOR VEHICLE REGISTRATION NO. KBK 280A WAS USED IN THE COMMISSION OF THE ROBBERY AGAINST PW1.

74. What triggered the arrest of the Appellants was the robbery that occurred on 30th December, 2009 in Muranga. In that particular robbery there were members of the public who witnessed the kidnapping and noted the registration number of the vehicle which they gave to the police. It was motor vehicle registration no. KBB 653F Saloon blue in colour. Investigations led the officers to the car hire business of

Kennedy Wambugu, and they even found the motor vehicle there.

75. It was Mr. Wambugu who told them that the said motor vehicle had been hired by the 1st Appellant who had returned it and hired another one KBK 280A Toyota Harrier in which the Appellants were arrested. The visit to Mr. Wambugu's business was on 7th January, 2010.

76. From the evidence of PW4 it's not clear between what period the appellant hired the motor vehicle KBB 653F, and when he had returned it. This was very material evidence because it could have assisted the court establish whether the robbery herein occurred when the 1st appellant was in possession of the motor vehicle KBB 653F. The only person who could have availed to the court the movement record of this vehicle was Kennedy Wambugu. This witness was not called.

77. It is true that there is no stated number of witnesses who should prove a fact as stated in **Section 143** of the **Evidence Act**;

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

This was also stated in the case of **Bukenya & Others Vs. Uganda 1972 E.A.49**.

78. In the matter at hand the issue is not about the number of witnesses who should have been called but vital witnesses who should have been called. There is no witness who testified on the kind of the vital evidence Mr. Wambugu would have given. The inference from the failure to call him is found in the case of **Juma Ngodia V R (1982-88)1 KAR** where it was stated;

“The prosecutor has, in general, a discretion whether to call or not call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation he runs the risk of the court presuming that his evidence which could be and is not produced would, if produced, have been infavourable to the prosecution.”

79. This was also followed in **Nguku V R (1985) KLR 812**. We do not see any good reason as to why Kennedy Wambugu was not called as a witness and we presume that his evidence may not have favoured the prosecution.

80. The prosecution seemed to attach so much weight to items allegedly recovered in the motor vehicle KBK 280A as connecting the Appellants to this robbery. Several searches were conducted on the Appellants and on this particular vehicle. It's clear from the evidence that two searches were conducted in Kitale and they did not yield anything material to the Robbery in issue.

81. PW3 and others left Kitale with the Appellants on 9th January, 2010. PW3 handed over the Appellants to one C.I.Maina in Nakuru. C.I.Maina then left with them for Nairobi. It is therefore assumed that the Appellants were in Nairobi on 9th January, 2010.

82. PW4 received a call from Nairobi Special Crime Prevention Unit office on 12th January, 2010. He left Muranga with others to go and pick them. We have noted that the record is very silent on what the Appellants were doing in Nairobi from 9th January, 2010 to 12th January, 2010 when PW4 and his team came for them. It is obvious that they were not in possession of the motor vehicle KBK 280A for these three (3) clear days.

83. It was upon their arrival in Muranga on 12th January, 2010 that the said motor vehicle was re-inspected and police certificates, walkie talkie, handcuffs were found therein. Even PW7 (Investigating Officer) said a gun was recovered from the said vehicle. How come these things were never recovered while the motor vehicle was in Kitale, Nakuru and Nairobi? There is no evidence that this vehicle was preserved.

84. The Appellants denied the possession of these items in the said vehicle. They even questioned the alleged recoveries. Had the learned trial Magistrate analysed the evidence well, she would not have given credence to the recoveries. Mr. Njue for the State in his submissions also doubted the recoveries.

85. We find that the alleged recovered items were not in the motor vehicle KBK 280A at the point of arrest of the Appellants on 8th January, 2010 up to the time they were handed over to C.I.Maina who did not also testify. Since the vehicle was in police custody thereafter it is them who could explain how those items landed in the said vehicle.

86. Our finding is that the prosecution failed to link the motor vehicle KBK 280A, motor vehicle KBB 653 to the robbery the subject of this appeal. The evidence linking the appellants to the robbery through these vehicles was mere suspicion. In the case of Sawe V R (2003) KLR 364 the Court of Appeal said this of such evidence;

“7.Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

87. The alibi defence raised by the Appellants should have been considered alongside the evidence by the prosecution. Had the learned trial Magistrate done so she could not have arrived at the conclusion that she did.

88. We are therefore satisfied that the appeal has merit and we allow it. The convictions on both counts in respect of all the appellants are quashed and all the sentences set aside.

89. Each appellant to be released unless lawfully held under a separate warrant.

Orders accordingly.

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

Hedwig Imbosa Ong’udi

Ngaah Jairus

JUDGE

JUDGE