REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 44 OF 2013

STEPHEN GICHUGI GICHIGO…….....…….1ST APPELLANT

JOHN GATUTHA MURIITHI…….....…….2ND APPELLANT

ELIJAH WAITHAKA MUNDIA

***alias* TOP TALENT……..…3RD APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Mukurweini Senior Principal Magistrates' Court Criminal Case No. 518 of 2010 (Hon. W. Kagendo) on 27th March, 2013)

JUDGMENT

The appellants were charged with three counts of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of offence in the first count were that on 19th day of June, 2010 at Gitundu village in Nyeri South District within Nyeri County jointly with others not before court, while armed with offensive weapons namely, pangas, iron bars and rungus the appellants robbed Godfrey Ndungu Wang'ondu Kshs. 32,000/=, two laptops (make Acer), four LG flash disks, one mouse, two safaricom modems, computer , Panasonic calculator, laptop bag, music system woofer, LG DVD player, Samsung mobile phones and Bird wrist watch all valued at Kshs 190,500/= and immediately before or immediately after such robbery threatened to use personal violence to the said Godfrey Ndungu Wang'ondu.

In the second count it was alleged that on 19th day of June, 2010 at Gitundu village in Nyeri South District within Nyeri County jointly with others not before court, while armed with offensive weapons namely, pangas, iron bars and rungus the appellants robbed Jane Wangechi Ndungu of Kshs 104,000/= and a mobile phone make ZTE all totalling Kshs 114,000/= and immediately before or immediately after such robbery used personal violence to the said Jane Wangechi Ndungu.

In the third count it was alleged that on the 19th day of June, 2010 at Gitundu village in Nyeri South District within Nyeri County jointly with others not before court, while armed with offensive weapons namely, pangas, iron bars and rungus the appellants robbed John Kahui Ndungu of Kshs 1,800/= and a mobile phone of 'Dolado' make all totalling Kshs 5,500/= and immediately before or immediately after such robbery threatened to use personal violence to the said John Kahui Ndungu.

Besides the three counts, the 3rd appellant was also charged with the offence of handling stolen property

contrary to **section 322 (1) (2)** of the **Penal Code**. According to the particulars in that count, on 18th day of February, 2011 at Kiptangwany trading centre, Elementaita within Nakuru County, otherwise in the course of stealing, the appellant dishonestly received or retained one woofer music system and one laptop make Acer knowing or having reason to believe them to be stolen goods.

Two of the accused persons with whom the appellants were charged at the trial court were acquitted. According to the charge sheet, the appellants were respectively the 2nd, 3rd and 5th accused persons and were identified in the record as A2, A3 and A5 respectively.

As far as we can gather from the original hand written record, this is what the learned magistrate said of the appellant's conviction in her judgment:-

> *"As for A2, I find that the identification by the witnesses, the possession of the offending line, and the evidence by PW1 make the case against him. So I convict A2 for counts 1 and 2. The second complainant did not give evidence so he is acquitted in count 2.*
>
> *As for A3, I found PW11 credible. She said that A3 went to her home just after the robbery and told her policemen were chasing him. He was positively identified by the victims and so he is convicted in count 1 and 3 and acquitted in count 2.*
>
> *As for A5 there was adequate identification and other witnesses who testified bought some exhibits belonging to PW 1. Accordingly he is convicted under section 215 for counts 1 and 3."*

When it came to sentencing the learned magistrate had this to say:-

> *"A2, A3 and A5 are all sentenced to suffer death as by law provided and they are discharged in count 3."*

There are alterations or overwriting on some of the learned magistrate's hand written notes but what we have quoted above is the much we can gather from her judgment on conviction and sentence.

Be that as it may, the appellants appealed against both the conviction and sentence. They filed separate appeals which, with their consent, were consolidated when they all came up for hearing on 11th August, 2015.

The appellants have raised more or less the same grounds; they have alleged that:-

1. Their rights under **article 49 (1) (f)** of the **Constitution** were violated yet they were convicted all the same;

2. They were not accorded a fair hearing under **article 50(1)** and **(2)** of the **Constitution;**

3. They were tried and convicted in violation of **section 137(d)** of the **Criminal Procedure Code**;

4. They were tried and convicted in violation of **section 200** of the **Criminal Procedure Code**;

5. **Section 48** of the **Evidence Act** was violated;
6. They were not found with the exhibits the complainants are alleged to have been robbed of;

7. They were convicted in violation of **sections 169(1)** and **169(2)** of the **Criminal Procedure Code**; and

8. The case against them was not proved beyond reasonable doubt.

Our duty as the first appellate court is to evaluate and analyse the evidence at the trial afresh and come to

our own conclusions irrespective of the findings of fact by the learned magistrate. We are conscious, however, that much as we may deviate from the trial court's findings of fact, it is only that court that had the advantage of seeing and hearing the witnesses. The legal proposition in this regard is found in several decisions on of which is **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).***

The first complainant, **Godfrey Ndung'u Wangondu (PW1)** testified that on 19th June, 2010 at around 9.00 pm, he was in his house watching television. Together with him were his grandson and their house help. His wife too was there. At around that time she brought him tea and as she walked out of the house she was confronted with two men entering the house. They were both armed with pangas. One of them went straight to the complainant and demanded money while the other hit and broke the fluorescent bulb in the living room. There was electricity light in the house.

The complainant was then forced to his bedroom where he was asked to sit on the floor by the person who first confronted him. While there, his wife was brought in by two other people. His Son John Kahuhi was also frogmarched to the same bedroom by yet two other men.

While three of the intruders guarded the complainant, his wife and his son in the bedroom, three others went about ransacking the house. One of those who guarded them demanded for valuables; the complainant gave him his wallet together with the Kshs. 32,000/= in it. He also gave him his mobile phone. They broke the drawers and took all the money in them. They left after about one and half hours but before they did, one of them hit the complainant's wife on the forehead with a metal bar. Since she was badly injured and was bleeding profusely, the complainant took her to hospital and made a report of the robbery to the Othaya police station. The witness testified that with the help of a sniffer dog, the police were able to arrest one of the appellant's co-accused (the 4th accused person) that night. The witness told the police that he could identify the suspects if he saw them and in fact he gave them their descriptions.

The complainant identified in court some of the items that had been stolen from his house that night; these were the woofer, an Acer Net Book, a safaricom modem and his wallet. He had also identified these items at the police station on 20th August, 2010.

At the identification parade organised by the police, the witness testified that he was able to identify the 1st appellant and two of his accomplices (that is, the 1st and 4th accused persons in the trial court) since he could remember their faces. Although the 3rd appellant was not in the identification parade, the witness identified him in the dock as one of the persons who attacked and robbed them on the material night.

The 1st complainant's son **John Ndungu Kahuhi (PW2)** testified that on the material day he had travelled to Othaya from Nairobi where he worked. He arrived at night and as he entered the compound, a stranger armed with a metal bar suddenly emerged from his father's vehicle and confronted him. He remembered that he was frogmarched into his father's house by the 1st appellant and one of his co-accused. He found other strangers ransacking the house. He gave them his M-pesa Pin Number after the 1st co-accused demanded for it. They also took his Kshs 1,800/=, a mobile phone and the pair of shoes he was wearing. There was Kshs 2000/= in his M-pesa account.

The witness identified the appellants' 1st co-accused, the 1st appellant and the 2nd appellants in the identification parades organised for that purpose. He testified that there were four different parades and

that he identified the 1st co-accused in the second parade.

According to the evidence of this witness, the money in his M-pesa account was transferred to one James Maina; he obtained this information from the statement of his account from Safaricom mobile phone company, the M-pesa service provider.

Although one of the bulbs in the living room was broken, the witness testified that there was light in the living room and that in his statement to the police, he stated that he could identify the suspects if he saw them. In fact in the statement which he recorded on 23rd June, 2010, he gave the description of the 1st co-accused, the 1st and the 2nd, appellants.

One of the officers who conducted the identification parades was **Hannington Mwaringa (PW3)**, who was then based at Chinga police station as the deputy officer in charge of the station. He testified that on 25th August, 2010, he was requested by the investigations officer, police Constable Nicholas Macharia to assist him conduct an identification parade at Othaya police station. The officer identified eight members to be included in the parade. He informed John Gathuka Muriithi, the 2nd appellant and advised him to take a position of his choice in the parade. The 1st complainant identified the 2nd appellant by touching him. The 2nd appellant even asked the witness why he touched him and the witness responded that it was because he had robbed him. This appellant then signed the identification parade form.

Corporal David Macharia (PW4) of Kiptangwany police station mobilised other officers and arrested the 5th accused person. In his evidence, he recalled that on 17th February, 2011, the District Criminal Investigations Officer (DCIO), Othaya police station, informed him that he was looking for a particular person who lived in his neighbourhood and whose photograph he carried. When the witness saw the photograph he quickly recognised the picture as that of his neighbour. He was informed by the DCIO that this particular person was to be arrested because of the offences he had committed in Othaya.

On 18th February, 2011, the witness accompanied by his fellow officers, constable Mutunga and constable Rotich, proceeded to the 5th accused person's house. They arrested him and informed the DCIO accordingly. Upon conducting a search in his house they recovered several items including a woofer which was one of the items that are alleged to have been robbed from the 1st complainant.

Amongst other items stolen from the 1st complainant was a laptop. According to **David Kamau Ngugi (PW5)**, his friend **Elijah Kamau (PW6)** telephoned him while at Pan African Secondary school where he was a student and told him that the 3rd appellant was selling a laptop at **Kshs. 8,000/=.** He sent him the money to purchase the laptop and when he closed school for mid-term holidays he collected it from **Elijah Kamau (PW6)**. He in turn sold the same laptop to one **Diana Nyambura** who lived in Nairobi. The witness identified the laptop in court as the one he had purchased and later sold to **Diana Nyambura**. Upon cross-examination by the 3rd appellant, the witness testified that the appellant ran a salon and a barber shop at Kiptangwany area of Elementaita. It is at the same place that he lived.

Elijah Kamau (PW6) testified that sometimes in September, 2010 he visited a barber shop at Kiptangwany where he learnt that a laptop was on sale. He informed his friend **David Kamau Ngugi (PW5)** who sent him Kshs 10,000/= to purchase the laptop. He then bought the laptop from the 3rd appellant at Kshs 8,000/=. **David Kamau Ngugi (PW5)** later collected the laptop from him; however, on 18th February, 2011 he was arrested for offences connected with the loss or theft of this particular laptop.

Stanley Njoroge Mungai (PW7) testified that he bought the complainant's woofer from the 3rd appellant whom he always knew as a businessman. He identified the woofer in court.

The identification parade in respect of the 1st appellant was conducted by Chief Inspector of Police **Stephen Muthoka (PW8).** He testified that on 25th August, 2010 he conducted an identification parade at Othaya police station. The investigations officer introduced the parade to three witnesses who were

Godfrey Ndung'u Wangondu (PW1), John Ndungu Kahuhi (PW2) and **Jane Wangechi Ndungu.**

In his evidence, this witness testified that the investigations officer introduced him to the 1st appellant who was then in police cells. The witness informed this appellant that he wished to conduct an identification parade and that he had a right not to participate in the parade. He also informed him that he had a right to call witnesses. The appellant, according to this witness, chose to participate in the parade and not to call any witnesses.

The witness picked eight members from the cells who were almost of the same height, apparent age and complexion as the appellant. He advised the appellant that he could conceal his appearance by changing his clothing and taking a position of his choice in the parade. The accused person chose to occupy the fifth position in the parade.

The witness advised **Godfrey Ndung'u Wangondu (PW1)** that the parade comprised nine people and the person who had robbed him and his family may or may not be among them; however, if he found that person, he was to identify him by touching him on the shoulder but if, on the other hand, he could not find him in the parade, then he was to inform the witness accordingly.

Acting as advised, PW1 picked out the 1st appellant; when he was asked if he had any comment, the 1st appellant said that he was not happy because the complainant had identified him as the person who had robbed them.

Before the second witness was called, PW1 was asked to wait in the cells so that he could not have chance to talk to other witnesses. Both the accused and this witness **(PW7)** signed the parade form after **(PW1)** was through with the identification process.

John Ndungu Kahuhi (PW2) and **Jane Wangechi Ndungu** were taken through the same process and they severally picked out the 1st appellant as the person who had robbed them; this, they did despite the 1st appellant's efforts to conceal his appearance by changing clothes and altering his position in the parade. The accused person complained that he was not satisfied with the parade because he had been identified. He, however, said that he was satisfied with the way the parade was conducted. The witness prepared an entry form which he and the accused person signed. He then dismissed the parade.

Upon cross examination, the witness said that the appellant requested that the parade be conducted when its members were seated apparently because his leg was swollen and was therefore unable to stand upright. The entire exercise was therefore conducted when everybody including the appellant was seated on a bench, in the same sitting position.

Chief Inspector of Police **Jacob Kioi (PW9)** conducted the identification parade in respect of the 4th co-accused person on 25th August, 2010 upon the request of the DCIO Othaya.

The witness organised eight members of the parade and called the suspect; he informed the suspect the purpose of the parade. He signed the consent form. The 4th co-accused said that he did not have any witness to call. According to the officer who conducted the parade, the eight members were of similar age, height and complexion as the accused person.

He testified that **PW1** identified him by a touch on his shoulder. PW2 also identified him by touching his shoulder. Jane Wangechi did not identify him, though. The 4th co-accused said that he was satisfied with the parade.

During cross-examination the witness conceded that there were discrepancies in the parade form he signed; for instance, in its copy, the 2nd witness was indicated as being absent. Again, though the witness indicated that the 3rd witness identified the 4th co-accused by touching him, the form did not indicate which part of the body the witness touched. The witness also testified that he could not recall whether any

member of parade had a broken tooth which happened to be a unique feature on the accused person's appearance.

Chief Inspector of Police **Stephen Mutua (PW10)** testified that on 9th August, 2010 at around 10.30 pm he received a report to the effect that the residence of **Godfrey Ndungu (PW1)** had been attacked by robbers. He and the officer in charge of the station together with other officers from the same station went to **PW1's** home; they found **PW1**, his wife who had sustained a head injury and his son **(PW2);** the officers established that indeed a robbery had taken place and amongst the items stolen from the compliant were electronic goods. It was his evidence that they did not succeed in arresting anybody immediately and that the matter was left for investigations.

According to this witness, sometimes after the robbery, and in particular on 10th August, 2010 **John Ndungu Kahuhi (PW2)** availed some data from Safaricom Company in respect of his M-pesa account. According to this data, an amount of Kshs 1,450/= had been transferred from his cell phone number 0723865208 and credited to number 0719586430 which was registered in the name of James Maina.

The witness obtained orders from the Chief Magistrates' Court to enable him extract from Safaricom company information relating to transactions in respect of the cell phone number 0719586430. He established from Safaricom Company that indeed the number was registered in the name of James Maina and that on 19th June, 2010 the sum of Kshs. 1450/= was transferred from PW2's M-pesa account to that of James Maina.

Amongst the information that the witness obtained from the mobile phone service provider was the national identification number of **James Maina**; with this information, he was able to obtain from the registrar of persons the full particulars of the bearer of that identification card including his photograph and finger prints. The witness testified that the photograph was that of someone he knew at a personal level.

It was this officer's evidence that while they were still investigating this robbery, another robbery took place at the same place and this time round two ladies were raped. The rape victims were able to identify their assailants from photographs in the "criminal profile album" which this particular witness kept at the station. They also identified the 3rd appellant.

Sometimes later another robbery was committed at the house of one Peter Thaurus Kanyoru; the caretaker was murdered and a mobile phone stolen. This phone was later recovered and was a subject of criminal proceedings against the 3rd appellant in a different criminal case in Othaya.

The 3rd appellant was later arrested in Kiptangwany in Elementaita.

Elizabeth Nyambura (PW11) testified that on 19th June, 2010 at around 10.30 pm the 2nd appellant called her from outside her house; he informed her that he was being chased by police officers. As they were talking the officers arrived with sniffer dogs and arrested him from this witness' house.

PW 12, **James Waithaka Nyaguthi**, testified that on 14th June, 2010 Gichuki, the 1st appellant sent Kshs 500/= to his M-pesa account so that he could withdraw it on his behalf. According to him, Gichuki had forgotten his national identity card number at home and was unable to withdraw the money directly from his account. The money was therefore forwarded to his account but when they both attempted to withdraw it from a safaricom agent they entered the wrong agent number. They therefore asked safaricom to reverse the transaction but somehow, it could not be reversed immediately. It was after two days that the transaction was reversed and the witness was able to withdraw the money. According to this witness, he was summoned by the police in respect of these transactions.

Johnson Muhira Ngugi (PW13) testified that on 18th February, 2011 he was informed by his mother that his younger brother **David Kamau (PW5)** had been arrested over a loss of a lap top that he **(PW5)** had purchased. He found out from PW5 that the laptop had been sold to Nyambura. He picked it from her

and handed it over to the police. He was able to identify the laptop in court as the one he had picked from Nyambura.

Chief Inspector of Police Jackson Kiema (PW14) conducted an identification parade on 25th August, 2010 in respect of the 1st co-accused, James Maina Wairungu. He had three witnesses to identify him. This particular co-accused agreed to participate in the parade and informed the police officer that he had no witnesses to call.

The officer picked eight members of the parade from different cells at the police station; according to him they were of the same age, complexion and appearance as the accused person.

The co-accused chose his position in the parade every time each of the three witnesses came to identify the person alleged to have robbed them. He also changed his clothing to conceal his appearance. When the 1st witness came he was advised that the parade may or may not have the suspect. Before he identified his assailant, the witness asked the officer to tell the parade members to open their mouths. He identified the 1st co-accused person by touching him. His mobile phone was withdrawn and he was kept waiting in the cell as the rest of the other witness went through the identification process.

The parade was reorganised for the second witness; this time round the accused changed his position and clothing. The witness settled on him as one of the persons who had robbed them. The witness' phone was withdrawn as she waited in the cell. Just like the first two witnesses, the third witness also identified the 1st co-accused person as one of the persons who attacked and robbed them. The accused commended that he was not satisfied with the parade but he did not say why he was not satisfied.

The investigations officer corporal Chemasie died before he could testify; however, one of the police officers who assisted him in the investigations **Sergeant Francis Wambua (PW15)** testified that he was at the station when the report concerning the robbery was received on 19th June, 2010 at 9.30 pm. In the course of the investigations, the police recovered a sim card and a mobile phone from the 1st appellant's house. It was established that it was this particular sim card through which money was received from one of the victims of the robbery.

Besides the mobile phone, the witness produced an inventory of items that were recovered and the exhibits themselves. He also produced the statement of his deceased colleague.

In his defence, the 1st co-accused person gave a sworn statement and denied the charges against him. He testified that on 19th September, 2010, between 7 pm and 10 pm he assisted his sister, **Salome Wangui Wairungu (DW1),** offload maize that was being delivered at her cereals shop which was located near his timber yard. Thereafter he went to his home where he reached at around 10.30 pm.

The 1st co-accused testified that he was arrested on 11th August, 2010 but that it was not until after two weeks that he was charged. He denied that he was the registered owner of a cell phone line No. **0719586430.** His number was **0725210992.** Although line number **0719586430** was registered in his names, the accused testified that at one point his identity card was lost thereby implying that somebody else could possibly have used his lost identity to register that line.

The 1st co-accused discredited the identification parade and testified that members of the parade were persons of varied physique and appearances. He alleged that he was known to the witnesses who picked him out of the parade since he had worked for them before and that they lived close by. He admitted that he had known the 1st appellant for five years.

The 1st appellant testified that he was a farmer and that on the material day, on 19th June, 2010 he was at his farm the whole day.

On 14th August, 2010, he was arrested and tortured. He said that he participated in an identification

parade on 25th August, 2010. Since he was unwell, the parade was conducted while members of the parade were seated on a bench.

The 2nd appellant testified that on the night of 19th June, 2010, he had been watching football at Heritage Club at Othaya. He left for his home at 9 pm but that he was arrested by the police before he reached home. He, however, admitted that he was arrested at **Elizabeth Nyambura's (PW11's)** home. He testified that he saw PW11 only after he had been arrested.

The 4th co-accused person testified that on 19th June, 2010 he travelled to Kinangop and only came back home the following day. He said that he was arrested on 14th august, 2010. The accused also denied that the members of the parade in which he participated were of the same appearance, complexion and size. He said that he was arrested simply because he had been charged with similar offences in a previous case.

The 3rd appellant, **Elijah Waithaka Mundia,** gave evidence that he was arrested at Kiptangwany on 18th February, 2011. Apart from his arrest, the arresting officers collected several items from his house. He said the case against him was fabricated. He agreed that he operated a salon and a barber shop at Kiptangwany. He denied having ever sold a laptop to anybody.

Salome Wangui Wairungu (DW1) testified on behalf of the 1st co-accused; she testified that he was her elder brother and that on the night of 19th June, 2010, he had been at her shop assisting her to offload maize from a lorry. They both left and went home at 10.30 pm. She testified that they lived in the same house.

Also testifying for the 1st co-accused was one **Samuel Makanga Ritho (DW2)**, whose evidence was that he was with the accused person offloading maize for his sister on the night of 19th June, 2010. He, however, said that he did not know where the 1st co-accused went after they parted ways that night.

At the hearing of the appeal the first and third appellants relied on written submissions which they had filed while counsel for the second appellant made oral submissions on his behalf. We have duly considered these submissions in this judgment.

From the evidence tendered by both the prosecution and the defence, it is apparent that those aspects of the evidence relating to the identification of the appellants and recovery of the items robbed from the 1st and 2nd complainants were crucial, if not the only determining factor, in the conviction of the appellants. In determining this appeal, therefore, it is necessary to consider whether the appellants or any of them were either properly identified or were found in possession of any of the items allegedly stolen from the complainants at the time of the robbery. Before addressing these two issues, however, it is necessary to consider whether it was proved, in the first place, that the offence of robbery with violence was committed.

The substantive law on this kind of offence is found in **sections 295** and **296 (2)** of the **Penal Code** under which the appellants were charged and subsequently convicted.

The offence of robbery or what is commonly referred to as simple robbery is defined in **section 295** of the **Penal Code; section 296(2) of** the same Code more or less prescribes what constitutes the offence of robbery with violence and the punishment thereof.

Section 295 of the **Penal Code** states;

> ***"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."***

It is clear from this provision of the law that an accused person will be convicted of the offence of robbery with violence if the prosecution will prove that the robbery victim was not only robbed but also that either of the following circumstances obtained at the time of robbery; these are that:-

a. The accused was armed with any weapon or instrument that may be 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.

Godfrey Ndung'u Wangondu (PW1) testified that his wife and himself were confronted at night with two men armed with pangas; one of them demanded money from him. He gave out his wallet which contained the sum of Kshs. 32,000/=. His son **John Ndungu Kahuhi (PW2)** was ambushed on the material night as he entered the compound. He lost the sum of Kshs. 1,800/=, a phone and a pair of shoes to the thugs two of whom frogmarched him to his father's house. Both the complainants testified that apart from losing money and other personal items to the robbers, the latter also ransacked the house and stole electronic appliances. It was also their testimony that the 1st complainant's wife **Jane Wangechi Ndungu** was assaulted and seriously injured either in the course of or immediately after the robbery and had to be taken to hospital for treatment. The said Jane Wangechi Ndungu, however, did not testify. It was mentioned that she may have died but there was no proof of such death and neither was there any evidence of injury to her person.

Nevertheless, the evidence that the complaints' property was stolen by attackers who were armed and that they were many was not controverted. It is noted also that Chief Inspector of Police **Stephen Mutua (PW10)** testified that on 9th August, 2010 at around 10.30 pm he received a report to the effect that the residence of **Godfrey Ndungu (PW1)** had been attacked by robbers and acting on that report the police visited the scene of crime and arrested one of the suspects the same night.

Even without the evidence of assault on one of the alleged victims, we find that two of the three components of the offence of robbery with violence either of which is sufficient to prove the commission of this offence were established. There was consistent evidence, and we would agree with the learned magistrate's finding in this respect, that the offence of robbery with violence as understood under section **296(2)** of the **Penal Code** was committed on the night of 9th August, 2010 at the 1st complainant's house.

The next question for determination is whether the appellants or any of them was behind the armed robbery. As earlier noted, the resolution of this question largely revolves around either on the sufficiency or lack thereof of the evidence of identification of the appellants or the recovery or possession of the items alleged to have been stolen from the complainants.

On the question of identification, evidence was led to demonstrate that at least four identification parades were conducted for purposes of identifying the suspects who are alleged to have violently robbed the complainants. For purposes of determination of this appeal, we opine that it is appropriate to focus on the evidence of identification of the appellants who were obviously convicted mainly because the trial court established that they were properly identified.

Both the 1st and 2nd complainants testified there was sufficient light in their house. Although one of the attackers is said to have deliberately broken a fluorescent bulb in the living room, the second complainant testified that the broken bulb was not the only bulb in that room. In any event, the two complainants

together with Jane Wangechi Ndungu were all huddled into the 1st complainant's bedroom where there was lighting throughout the robbery episode. Again, it was the evidence of the 1st complainant that they were with the armed robbers for close to one and a half hours. When the complainants reported the robbery to the police, they stated that they could remember the appearance of their attackers and that they could identify them if they had a chance to see them. Infact, they gave their descriptions to the police.

The 1st complainant identified the 1st co-accused, the 1st appellant and 4th co-accused while the 2nd complainant was able to identify the 1st co-accused, 1st and 2nd appellants in the identification parades. The identification of the 1st and 2nd appellants is of most concern to us in seeking a resolution of the question of the identity of the appellants in so far as it was pivotal in their conviction.

Chief Inspector of Police **Stephen Muthoka (PW8)** conducted the identification parade in respect of the 1st appellant; this, he did on 25th August, 2010 at Othaya police station. The officer was introduced to the appellant by the investigations officer. He informed the 1st appellant that he wished to conduct an identification parade in which he had a right not to participate. He also informed him that he reserved the right to call witnesses. The appellant chose to participate in the parade and not to call any witnesses.

With that, the officer picked eight members from the cells who were apparently of the same height, age and complexion as the appellant. He advised the latter that he could conceal his appearance by changing his clothing and taking a position of his choice in the parade. The appellant person chose to occupy the fifth position in the parade.

Godfrey Ndung'u Wangondu (PW1) was advised that the parade comprised nine people and his assailant may or may not be among them. He was also informed that if he found the suspect, he was to pick him out by touching him on the shoulder and if he was not among them he was to inform the officer conducting the parade accordingly.

Acting as advised, **Godfrey Ndung'u Wangondu (PW1)** picked out the 1st appellant who when asked if he had any comment, responded that he was not happy because he had been identified as the person who had robbed the complainant and his family. According to police officer, the appellant did not ask the parade members to do any other act such as moving or talking.

Before the second witness was called, PW1 was asked to wait in the cells to avoid any contact with the other witnesses. Both the appellant and the officer in charge of the parade signed the parade form after **PW1** was through with the identification process.

John Ndungu Kahuhi (PW2) and **Jane Wangechi Ndungu** were taken through the same process and they severally picked out the 1st appellant as the person who had robbed them. The appellant exercised his right to change his position in the parade and also attempted to conceal his appearance by changing his clothes but still both **John Ndungu Kahuhi (PW2)** and Jane Wangechi Ndungu picked him out as one of the people who had attacked and robbed them. Again the appellant complained that he was not satisfied with the parade merely because he had been identified as one of the culprits but was satisfied with the manner the parade was conducted in any event. The appellant signed the parade form and the parade was dismissed.

The parade form which the 1st appellant signed and was duly admitted in evidence in respect of the identification of the 1st appellant shows that he consented to participate in the parade and that he chose not to call any witness. The form also shows that the appellant had no objection to the conduct of the parade but was in fact satisfied with the way it was conducted. The witnesses identified him by touch.

The identification parade in respect of the 2nd appellant was conducted by **Hannington Mwaringa (PW3)**, the deputy officer in charge of Chinga police station. He conducted the parade on 25th August, 2010, at Othaya police station. The officer identified eight members of the parade and advised the 2nd appellant to take a position of his choice in the parade. The 1st complainant identified him by touching

him on the shoulder. The 2nd appellant signed the parade form. The form was, however, not produced in evidence.

The 1st and the 2nd complainants had a personal encounter with the 1st and 2nd appellants. The latter accosted the complainants and spent a considerable time with them; for all the time they were together in the course of the robbery there was sufficient electricity lighting. The conditions for identification were thus favourable. When the complainants made their statements to the police they were clear that they could identify the appellants if they saw them and thus they were expected to identify them at the identification parades.

The appellants complained, however, that the Force Standing Orders in respect of identification parades were breached. While there is nothing on record to suggest such a breach in respect of the identification of the 1st appellant, it is doubtful whether those Orders were complied with in respect of the 2nd appellant. The reason for our doubt is that the parade form in respect of the identification parade for the 2nd appellant was not produced. No reason whatsoever was given for its non-production and without it, this court cannot satisfy itself that the Standing Orders were strictly complied with in identification of this particular appellant. In the absence of the parade form, we hold that the learned magistrate erred in finding that the 2nd appellant was positively identified in an identification parade.

We cannot say the same for the 1st appellant; going by the evidence on record, including the parade form which he signed and was duly admitted in evidence, the Orders were substantially complied with and we see nothing doubtful about the credibility of his identification parade. In his case, we agree with the learned magistrate that he was positively identified as one of the people who attacked and robbed the complainants.

In coming to this conclusion, we are conscious that if the only evidence upon which a conviction revolves is that of identification, then the trial court must be careful to satisfy itself that the conditions for identification were conducive and free from the possibility of error. In the case of **Wamunga versus Republic (1989) KLR 424** the Court of Appeal, while addressing the question of identification, 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."***

As we have noted, considering the condition of lighting at the time of robbery and the time the complainants' assailants spent with them, the circumstances of identification of the 1st appellant were favourable and free from the possibility of any error. We are satisfied that the prosecution met the threshold of the standard of proof of the offences against the 1st appellant. The conviction of the 2nd appellant on the basis of identification cannot be sustained because of the uncertainty surrounding the credibility of the parade in the absence of the parade form.

The only other evidence against the 2nd appellant was that of **Elizabeth Nyambura (PW11)** whose evidence was that on 19th June, 2010 at around 10.30 pm the 2nd appellant called her outside her house and informed her that he was being chased by police officers. The officers arrived as they were talking and arrested him.

This evidence appears to be inconsistent with that of Chief Inspector of Police **Stephen Mutua (PW10)** testified he responded to the report that the complaints had been attacked by mobilising his colleagues and going to their home the same night they were attacked. According to this witness, they did not succeed in arresting anybody immediately and that the matter was left for investigations.

Our understanding of this witness' testimony is that nobody was arrested on the material night in connection with the robbery at the complainant's home.

This contradiction in evidence would create reasonable doubt as to whether the 2nd appellant was arrested that night and if so whether he was arrested in connection with the robbery at the complainants' home. Contrary to the learned magistrate's finding, we shall on our part give him the benefit of doubt. We hold that it was not safe to convict the 2nd appellant on the basis that he had been arrested on the material night while on the run when there is no clear evidence in this regard.

We now come to the 3rd appellant's case.

According to trial court's judgment, the 3rd appellant was convicted for having been positively identified and for having been in possession of the property alleged to have been stolen from the complainants. It is necessary that we examine here these two aspects of the evidence against the 3rd appellant.

Corporal David Macharia (PW4) mobilised his colleagues on 18th February, 2011 and proceeded to the 3rd appellant's house where they conducted and recovered several electronic items including the woofer that had been stolen from the 1st complainant's house on the night of the robbery. They arrested the appellant and carted away the recovered items.

Stanley Njoroge Mungai (PW7) testified that he bought the complainant's woofer from the 3rd appellant whom he always knew as a businessman. He identified the woofer in court.

Apart from the woofer, the other item stolen from the 1st complainant on the material night was a laptop; this particular laptop was again traced to the 3rd appellant. The laptop was offered for sale at the appellant's salon or barber shop at Kiptangwany in Elementaita. **Elijah Kamau (PW6)** purchased it on behalf of **David Kamau Ngugi (PW5)** and both testified of this transaction.

The 1st complainant identified the woofer and the laptop at the police station and in court as some of the properties that had been stolen from him on the night of the robbery. The complainant's ownership documents of these items were also exhibited in court.

It is not clear, however, where the complainant's woofer was found. We find the evidence on recovery of this particular item doubtful because while **Stanley Njoroge Mungai (PW7)** gave evidence that he had purchased the woofer from the appellant and that it was recovered from his house, **Corporal David Macharia (PW4)**, on the other hand, said that this particular item was recovered from the appellant's house. Indeed the inventory of items recovered from the appellant's house and which was admitted in evidence shows that the woofer was one of those items.

With this inconsistency, the evidence of possession or recovery of the woofer could not sustain a safe conviction. However, the woofer was not the only item which linked the appellant to the offences with which he was charged and convicted; as noted there was a laptop which the complainant identified in court as his and produced documentary evidence to prove ownership.

In our humble view, the evidence linking the appellant with the possession and disposal of the complaint's lap top was consistent and we do not find any reason why the learned magistrate should have discredited it.

The only question to consider is whether this was a proper case to apply the doctrine of recent possession. This doctrine was explained in **Chaama Hassan Hasa versus Republic (1976) KLR at page 10** where the High Court **(Trevelyan and Hancox JJ) stated as follows:**

> ***"Where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, a presumption arises that he was either the thief or a handler by way of receiving (though not by way of retaining)."***

Although the laptop had exchanged several hands and it took some considerable amount of time before it

was recovered, it was last traced to the appellant after it had been stolen from its owner. The appellant may not have been in physical possession of the laptop at the time of its recovery but for purposes of prosecution of any offence where "possession" has to be proved, lack of physical possession does not make one any less culpable if it can be demonstrated that he was aware that the thing in issue is in actual possession or custody of another person for use or benefit of that other person at his instance. **Section 4** of the **Penal Code** explains this term better; it defines "possession" as follows:-

> ***"possession"—***
>
> ***(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;***
>
> ***(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them***;

Thus liability under the doctrine of recent possession is not restricted merely to physical possession of an item or anything capable of being stolen and it does not matter that the thing stolen has exchanged several hands as appears to have been the case in the trial against the appellant; once it was established that he was in custody of this item at some point in time, the appellant still retained its possession for all intents and purposes and more particularly as understood in law for purposes of prosecution of an offence or offences in which "possession" is a necessary ingredient.

According to the doctrine of recent possession, the burden was upon the appellant to account for his possession of the laptop once it was traced to him after it had been stolen from the 1st complainant. Under this doctrine, the presumption is that the appellant was either the thief or was a handler in the absence of any explanation of how he came into possession of the laptop.

We are conscious that possession *per se* may not be sufficient to sustain a conviction; at least this is what was stated in the case of **Chaama Hassan Hasa versus Republic** (supra), where the court said:-

> ***"Whether the accused should or should not be convicted, depends not simply on his possession, but on all the facts since such possession is but one aspect of the circumstantial evidence the sum total of which must be unexplainable upon any reasonable hypothesis other than that of guilt of the person charged, before a conviction can be recorded."***

Besides being in possession of the laptop, the 1st complainant testified that that he saw the appellant on the night of attack and he remembered his face because, of the two armed robbers who first entered his house on the night of the robbery, it was this particular appellant who confronted him and demanded money from him. The complainant gave his description to the police when he reported the robbery; he also told them that he could pick him out if he saw him. Indeed the complainant raised the issue of the absence of the appellant from the identification parades with the police. It later emerged that the appellant had declined to participate in an identification parade.

The refusal of the appellant not to participate in an identification parade is not anything that can be taken against him; it is a suspect's right to participate or not to participate in an identification parade and his choice must be respected without any prejudice to him.

Equally important is the appreciation that dock identification is not necessarily valueless as long as the court is cautious that there is no possibility of mistaken identity. It is evidence that can be taken on board and upon which a conviction can be based if the court is satisfied of its veracity and sufficiency. This question was addressed by the Court of Appeal in **Muiruri & Others versus Republic (2002) 1KLR 274** where it held:

> ***"It is believed because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of…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 versus Republic (1953) 20 EACA 166, Roria versus Republic (1967) EA 583 and Charles Maitanyi versus Republic (1986) 2KLR 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 the courts have emphasised the need to test with 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 the evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if it is satisfied on facts and circumstances of the case the evidence must be true and if prior thereto the court warns itself of the possible danger of mistaken identification."(Underlining mine).***

Again in the case of **Bernard Mutuku Munyao & Another versus Republic, Nairobi Criminal Appeal No. 222 of 2004 (2008 eKLR)** the Court of Appeal held that a conviction based on dock evidence is safe and that failure to hold an identification parade is not always fatal. At page 3 of the judgment, the Court said:-

> ***"Evidence of identification parade is part of the whole process of subjecting the evidence on record to careful scrutiny and considering the surrounding circumstances as stated in R v Turnbull (1976) 63 Cr. App. R. 132.The absence or presence of it goes to the weight to be placed on the available evidence and does not make such evidence inadmissible or of no probative value. One would think of circumstances where lack of an identification parade would seriously weaken the evidence of visual identification where there is a solitary witness or it is the only evidence available and the identification was made in difficult circumstances. We have no reason to doubt that the findings of the two courts below that the two witnesses positively identified the two appellants at the scene in circumstances that were conducive to such identification."***

We are persuaded that considering the evidence available, the inculpatory facts are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis that of his guilt. We have not found anything in the evidence of both the prosecution and the defence that would suggest other co-existing circumstances which would destroy or weaken the inference that the appellant was one of the robbers who violently robbed the complainants. We are inclined to conclude the appellant was one the thieves rather than a mere handler.

Ultimately, we have come to the conclusion that there is no merit in any of the grounds of the 1st and 3rd appellants' appeal. If there was any delay in the arraignment of any of the appellants in court in breach of **article 49(1) (f)** of the Constitution as alleged, the remedy for such breach lies in damages in a civil action and not in an acquittal of the charges. See the cases of **Julius Kamau Mbugua versus Republic 2010 eKLR** and **Criminal Appeal No. 482 of 2007, Peter Sabem Leitu versus Republic (2013) eKLR 6.**

As for the allegations of breach of **article 50(1)** and **(2)** it has not been demonstrated how those particular provisions were breached to the detriment of the 1st and 3rd appellants or any of them. Again there is no evidence to support the allegation that the appellants were not properly described in the charge or information as to contravene **section 137(d)** of the **Criminal Procedure Code**.

As far as **section 200** of the **Criminal Procedure Code** is concerned, it is true that the appellants' trial was presided over by two different magistrates but the record shows when the magistrate who wrote and delivered the judgment took over the matter on 18th April, 2012, **section 200(3**) of the **Code** was

complied with and the appellants opted to have the trial proceed from where the previous magistrate left.

Section 48 of the **Evidence Act** deals with experts' opinion and after reading the appellants' submissions it has not be demonstrated how this particular provision was flouted.

On the question of exhibits we have dealt with this issue at length in this judgment and the extent to which it was relevant to the conviction of the 3rd appellant in particular.

And finally as for the question of compliance with **section 169 (1) and (2)** of the Criminal Procedure Code, we appreciate there appears to be some inconsistencies in the judgment as to whether the 1st appellant was convicted on count 2 apart from having been convicted of count1. We do not think this should be a source of contention because although the learned magistrate initially indicated that she is convicting the 1st appellant on counts 1 and 2, she later stated that the appellant was acquitted of count 2. The 2nd and 3rd appellants were convicted of counts 1 and 3.

The fourth count with which the 3rd appellant was charged ought to have been an alternative count to the principal count of robbery violence. The learned magistrate did not make any mention of it but it is just appropriate to clarify here that since the 3rd appellant was convicted of the principal count, the alternative count was thereby rendered inconsequential.

We hold that the learned magistrate gave her reasons for the appellants' convictions and we think she substantially complied with **section 169 (1)** and **(2)** of the **Criminal Procedure Code** and that in any event no prejudice at all was caused to the appellants.

For the reasons we have given we are inclined to dismiss the 1st and 3rd appellants' appeal; for avoidance of doubt, the conviction of the 1st and 3rd appellants on counts 1 and 3 is upheld; they will suffer death as by law provided on the 1st account and for that reason the sentence on the 3rd count will be suspended.

As for the 2nd appellant, we hold that there was no sufficient evidence to convict him; his conviction is quashed and sentence set aside. Unless he is lawfully held on any other order, he is set at liberty. Orders accordingly.

Dated, signed and delivered in open court this 15th day of December, 2015

H.I. Ong'udi Ngaah Jairus

JUDGE **JUDGE**