REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

(CORAM: KIMONDO & NGENYE-MACHARIA JJ)

CONSOLIDATED CRIMINAL APPEALS NOS. 6 & 7 OF 2010

JOSEPH MUKOYA……..……1ST APPELLANT

EDWIN AZUNGANI……..2ND APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 3928 of 2009 Republic vs Joseph Mukoya and Edwin Azungani in the Senior Resident Magistrate's Court at Eldoret by G. Mmasi, Senior Resident Magistrate dated 28th December 2009)

JUDGMENT

1. The appellants were convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. They were sentenced to death. The appellants have appealed against the conviction and sentence. They filed separate appeals. On 26th June 2014 we consolidated the two appeals.
2. The primary grounds in the appeals can be condensed into five. First, that the charge was not proved beyond reasonable doubt; secondly, that there was no positive identification of the appellants; thirdly, that the procedures adopted at the identification parade contravened the Force Standing Orders; fourthly, that section 151 of the Criminal Procedure Code was not complied with; and, fifthly, that a material witness in whose house the stolen goods were found was not called by the prosecution.
3. At the hearing of the appeals, learned State counsel, Mr. Omwega, conceded the appeals. These are first appeals to the High Court. We are required to re-evaluate all the evidence on record and to draw our own conclusions. In doing so, we have been careful because we have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
4. The appellants were convicted primarily on the discovery of a *play station* found in the house of one Peter Maina. The 2nd appellant had led the police to the house. Peter Maina was not called to testify at the trial. In our view, it was vital to establish the circumstances under which the goods were found in Maina's house and the link with the appellants. We remain alive that under section 143 of the Evidence Act, no particular number of witnesses is necessary to establish a fact. See *Bernard Kiprotich Kamama v Republic*, High Court, Eldoret, Criminal Appeal 123 of 2010 [2013] eKLR. But in the circumstances of the present case, it was difficult to establish that fact without Maina's evidence.

5. The rules reproduced at chapter 46 of the Force Standing Orders of the Kenya Police contain an elaborate procedure of conducting identification parades. PW5, a police officer, conducted the parade. At page 11 of the record, he testified as follows-

> *"I got 8 parade members. The witness was PW1. The suspect was Joseph Mugoya. The parade was conducted in an open space at the station. The accused stood between parade members 2 and 3. I called PW1; I told him there were parade members. I told him to identify the suspect who robbed him, he went and identified Joseph Mugoya by touching him"*

6. There were some glaring errors in the procedure adopted at the parade. The complainant should not have been informed that the suspect was one of the people in the parade; he should have been advised that the suspect may or may not be in the parade. The members of the parade should be at least eight and as far as practicable of similar height, age, general appearance and class of life of the suspect. See Rule 6(iv)(d). The police officer in charge of the case may be present but should not conduct the parade. Under Rule 6(v), the parade should be conducted in private and out of the view of the public. In a nutshell, the identification parade should be conducted with scrupulous fairness or its value will be lost. In the present case, the parade was conducted in an open space in the full glare of the public. From the testimony of PW5 that we set out above, important rules were disregarded. As the identification of the 1st appellant hinged largely on that parade, we agree with the learned State counsel that the convictions were unsafe.
7. There was a single identifying witness on the material night. PW1 had not met the appellants before. He said he identified one of the attackers when he lit a corridor light and as the attacker was walking away. The robbery took place at night. His wife, who was with him, never identified the appellants. There were other assailants besides the two appellants. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal had this to say-

> *"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."*

8. We are of the opinion that considering the conditions of identification by a single witness at night and the botched identification parade, it was unsafe to convict the appellants. The charges preferred against the appellants were thus not proved beyond reasonable doubt. The learned State counsel was thus right in conceding the appeals.
9. That finding is sufficient to dispose of these appeals. But we are minded to comment on two other grounds. Section 151 of the Criminal Procedure Code requires witnesses to be sworn or affirmed before giving evidence save for the few exceptions in the rule. Although the appellants contended that PW1 was not sworn, we have noted that pages 4 to 6 of the handwritten transcript of the trial court are missing. The result is that the typed record at page 3 gives the impression that PW1 was not sworn. It is also clear that a substantial part of his testimony was omitted from the typed record. We are accordingly unable to state categorically that the witness was not sworn or that there was a breach of section 151 of the Code.
10. For all of those reasons, these consolidated appeals are allowed. The convictions and sentences against both appellants are hereby quashed and set aside. The appellants shall be set free forthwith unless held for some other lawful cause.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 31st day of July 2014

GEORGE KANYI KIMONDO **G.W. NGENYE-MACHARIA**

JUDGE **JUDGE**

Judgment read in open court in the presence of-

Both appellants.

Ms. Mumu for the State.

Mr Kemboi Court clerk.