REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO 70B OF 2009
(BEING CONSOLIDATED OF APPEALS NOS. 70B, 61,87, 88 AND 89 OF 2009)

JARED OUKO ONYANGO
JARED OTIENO ONYANGO
ALI OWITI OKUMU
CALVINS ODHIAMBO OBUORO
STEVE ONYANGO BWANA…….....……...……..…….APPELLANTS
-VERSUS-
REPUBLIC……..……RESPONDENT

JUDGMENT

(Being an appeal from the original conviction and sentence in Migori Senior Principal Magistrate's Court(E. Awino) Criminal Case Number 109 of 2008 dated 26th June 2011)

Introduction
1. The appellants herein Jared Otieno Onyango (2nd appellant); Ali Owiti Okumu (3rd appellant) Steve Onyango Bwana (5th appellant) Jared Ouko Onyango (1st appellant) and Calvis Odhiambo Obuoro (4th appellant) were as Accused nos. 1 – 5, respectively, charged with counts of robbery with violence contrary to section 296(2) of the Penal Code before the Senior Principal Magistrate's Court at Migori in criminal case no. 109 of 2008. All the 5 appellants also faced an additional charge of being in possession of government stores contrary to section 324(3) of the Penal Code.
2. The particulars of the 1st count were that on the 26th day of March 2008, at Nyasoko sub location jointly with others not before court while armed with dangerous weapons namely pistols robbed Michal Odhiambo Okombo of his two mobile phones make Nokia 2600 and Nokia 3200 and cash Kshs15, 000/= all valued at Kshs.33,000 and at or immediately before or after the time of such robbery threatened to use personal violence against the said Michael Odhiambo Okombo.
3. The particulars of the 2nd count were that on the same date 26th day of March 2008 at Migori township, they jointly had in their possession government stores, namely one jungle jacket and one green rain coat the property of disciplined forces namely the Kenya police and Kenya prisons department respectively; such property being reasonably suspected to have been stolen or unlawfully obtained.
4. All the appellants denied the charges against them and the case went to trial. The prosecution called 6 witnesses and the appellant when put on their defence gave sworn and unsworn statements with the 1st accused (2nd appellant) calling two witnesses DW1 and DW2,being his wife and father, respectively. After an evaluation of the evidence, the trial court found the charges proved and convicted each of the appellants on the 1st charge of robbery with violence. However, the appellants were acquitted of the 2nd charge of being in possession of Government stores. The appellants were dissatisfied with the conviction and sentence hence the present appeal.
Grounds of the appeals

5. In his amended petition filed on 11th March 2013 the (2nd appellant/1st accused) Jared Otieno Onyango has appealed against both conviction and sentence on the grounds interalia that the prosecution did not prove his case beyond reasonable doubt, evidence of his recognition by PW1 was not conclusive as he did not describe his physical appearance, PW1 did not adduce evidence on the light intensity to enable positive identification, there was no proof to link him to the said motor vehicle, the identification parade was conducted contrary to the forces standing orders and the evidence on the recovery of exhibits was shrouded by mystery.
6. The (3rd appellant/2nd accused) Ali Owiti Okumu in his amended petition filed on 11th March 2013 chose to rely on the above grounds as the 2nd appellant/1st accused.
7. The 5th appellant/3rd accused (Steve Onyango Bwana) petition is not on record but the said appellant made oral submissions as shown below.
8. The 1st appellant/4th accused (Jared Ooko Onyango) in his petition of appeal filed in court on 1st April 2009 has relied on grounds inter alia that the court erred in failing to treat the appellant's alibi evidence seriously, that the identification of the appellant in difficult circumstance was unreliable, that evidence led did not connect the appellant to the element of dangerous weapon and that the sentence imposed by the trial court was harsh.
9. The 4th appellant/5th accused Calvins Odhiambo Obuoro in his petition of appeal filed in court on 3rd April, 2009 has relied on grounds inter alia that there was no evidence proving he was involved in the case and that the complainant had a grudge against him as he owed him some money.
Submissions
10. When the appeal came for hearing, the appellants had handed in written submissions.
11. The 1st appellant/4th accused (Jared Ooko Onyango's) submissions dated 7th October 2011 filed by his advocates Otieno Yogo & Co. Advocates preferred 6 grounds. Ground one revolved around the issue of an alibi, that his testimony was also corroborated by the testimony of the 4th appellant/5th accused a conductor in the said motor vehicle. He further submits that the trial magistrate did not consider the evidence of the appellant before meting such a harsh sentence against him. He relied on Titus Brewer Otieno and another –versus- Republic(2006) eKLR where the court held that:
"he then in a terse sentence rejected the appellants alibi without even considering it and found them guilty and convicted them as charged. Again with due respect whatsoever for accepting the testimony of …..who was the main prosecution witness and the only eye witness called by the prosecution".
12. In ground two, he submits that identification of the appellant in this case was unsafe as it was left to only one witness PW1. He relied on Tony Ekuni Sirikwa –vs- Republic (2006) eKLR where Gacheche J. quoting a decision in Abdullah Bin Wendo –vs- Republic (1953) 20 EACA 66.
"….Subject to certain well known exceptions, it is trite that a fact may be proved by the testimony of a single witness but the rule does not lessen the need for testing with greatest care evidence of single witness respecting identification especially when it is known the conditions favouring a correct identification were difficult."
He further submits that it would have been difficult to properly identify the appellant if at all the appellant was involved in the robbery. He relied on Ntelego Lokwam –vs- Republic (2006) eKLR where the court referred to the case of Peter Kimani Maina –vs- Republic Court of Appeal No. 111 of 2003 (Nyeri) unreported at page 3 where it was held:
"Before the court can base a conviction on the evidence of identification at night such evidence must be completely watertight."
13. On ground 3 he submitted that the offence charged did not connect the appellant to the element of dangerous weapon. He relied on Johana Ndungu –vs- Republic Court of Appeal No. 116 of 1995 (unreported) quoted in Robert Mungai Nyambura –vs- Republic (2006) eKLR on the ingredient of robbery with violence it was held:-
"…the existence of the aforesaid described ingredients constituting robbery are presupposed in the three sets circumstances described in section 295(2) which we give below and any one of which is proved will constitute the offence under the subsection:
(1) If the offender is armed with dangerous or offensive weapons or instruments or;
(2) If he is in company of one or more other persons;
(3) If at or immediately before or immediately after the time of robbery he wounds, beats, strikes, or uses any other violence to any person.
He therefore submits that the ingredients of charge of robbery with violence were not proved beyond reasonable doubt.

14. On the 4th ground he submits that the identification of the appellant was wanting as the trial magistrate already admitted the identification process especially where 1st appellant was concerned was most wanting but nevertheless he proceeded to convict the appellant on the offence. He relied on Cleophas Otieno Wamunga –vs- Republic 1989 KLR 424 where it was held that:- "What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis of the conviction of the appellant. 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. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleged to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

15. On the 5th ground he submits that the conviction was against the weight of evidence and thus contrary to law as PW1 (who was the only witness) contradicted himself when he said the appellant remained in the motor vehicle and then again he was standing in the verandah. Secondly on the issue of the motor vehicle registration number KAJ 488X the prosecution did not bother to call the person who saw motor vehicle being used at the time of the robbery as PW2 only told the court that he was told motor vehicle registration no. KAJ 488X was found and people arrested while PW1 said that when he got out he did not see the motor vehicle registration no. KAJ 488X.In addition, the trial court also failed to consider the fact that the items found in the bonnet of motor vehicle registration no. KAJ 488X could have been put there by anyone including the police. On ground number 6 he submits that the sentence was against the law and too harsh as the prosecution did not prove their case against the appellant beyond reasonable doubt.

16. The 2nd appellant/1st accused (Jared Otieno Onyango) adduced 4 grounds in his submission. On the first ground he argues on the time the alleged offence took place. He submits that PW1 and PW5 stated in examination in chief that the offence took place at 8.30pm (on page 9 line 19 and page 15 line 20). However PW5 (the arresting officer) on page 28 line 6 alleged that he proceeded to the alleged scene of the crime at7.50pm. He therefore submits that the PW5 arrived at the scene before the alleged robbery took place.

17. On ground two he argues that since PW5 stated that he arrested all the five robbers together in a vehicle (page 28 line 12), the two mobile phones and other items could have been brought to court as exhibit to prove right the allegation. He further submitted that PW1 testimony that the attackers who had guns were not before the court had no basis in the report he stated that he was attacked by robbers.

18. On ground 3 he submits that from the words of the trial magistrate in his judgment on page 52 line 5-9 he faulted the identification parade by which he himself and 1st appellant were identified and therefore he deserved an acquittal. Lastly, he submits that the source of light surrounding the alleged scene of crime was not sufficient to enable PW1 to identify him.

19. The 3rd appellant/2nd accused (Ali Omiti Okumu) in his written submission took issue with the fact that PW1 did not tell the court how bright the robbers torches were when he was robbed (page 7 lines 21 and 22) and the fact that the trial magistrate (page 52 line 5 to 9) openly admitted the fact that the identification parade was not proper and there was therefore possibility of the appellants being prejudiced like the 2nd appellant. Secondly, he pointed out that the time at which the alleged crime occurred was given by PW1 as 8.30pm (page 9 line 13) which was confirmed by PW2 (on page 15 line 20) but according to PW5 (on page 28 line 6) he got a report of an alleged robbery at 7.50pm and reiterated (page 29 line 13) the same. Thirdly, like the 2nd appellant he raised the issue to do with the items allegedly stolen were not recovered and the fact that the police failed to take a photo of him as he took the photo of the vehicle to prove that indeed he was the one in the car.

20. The 4th appellant/5th accused (Calvis Odhiambo Obuoro) in his written submissions first took issue with the charge sheet on the basis that it ought to have been brought under section 295 of the Penal Code as read with section 296(2) of the Penal Code". He relied on Oluoch –vs- Republic (1985) KLR 549 Secondly, he submitted that there was no evidence of a report by PW1 detailing how his attackers were dressed thus facilitating the arrest of such accuseds by identification and that PW1 only knew a vehicle

similar to the one which he was arrested in. Thirdly he took issue with the fact that the identification parade carried out involved the same people, PW1's evidence lacked corroboration and PW1 did not testify on the intensity of the moon on the material night.

21. The 5th appellant/3rd accused Steve Onyango Bwana in his oral submissions in court took issue with the fact that on the material day he did not board any vehicle, he did not know any of his co-appellants, he was not found in possession of exhibits, PW6 did not produce his picture as exhibit, the identification parade was conducted contrary to the police forces standing orders and he was convicted on evidence of only one witness.

The Respondent's Submissions

22. The appeal was opposed by the State. Mr. Imbali, learned counsel for the state submitted that PW1 clearly stated all the 5 men were in jungle jackets, one in police uniform and 2 rain coats and all these were Government stores. Secondly that there was close proximity as the 2nd appellant ransacked the pockets of PW1 and there was no evidence by the appellants that they had covered their faces. PW1 was also able to identify the 5th appellant and the 4th appellant. Still on identification, Mr. Imbali submitted that the appellants were in PW1's house for close to 20 minutes: they led him out of the house and he was able to identify the 3rd appellant and the 1st appellant and that there was sufficient time and moon light for PW1 to identify all the appellants.

23. In addition, that at the shop, PW1 was able to see motor vehicle KAJ 488X parked at the shop and that there were more than 5 attackers but it was only the 5 appellants who managed to escape in the motor vehicle. PW2's testimony was crucial as it corroborated PW1's testimony to the effect that motor vehicle KAJ 488X was parked outside PW1's shop. Thirdly that PW3 and PW4 clearly stated that the time the 2nd appellant and 4th appellant took the motor vehicle it did not have government stores in the boot and PW5 stated clearly that at the time of arrest the 5 appellants were all in the vehicle. He therefore submitted that the evidence on record showed that the 2nd appellant and 4th appellant got the vehicle for their own purpose and were therefore bound to explain what they were doing with it.

24. In reference to the grounds of appeal, on alibi he submitted that the trial magistrate considered their alibi defence (on page 55) and they were all given a chance to explain where they were. Secondly, on identification parade, he referred to pages 50-52 of the trial court's judgment where the learned magistrate found that such identification parade was not conducted in a scrupulous manner but however submitted that conviction of appellants was not based on identification parade but on the evidence placed before the court.

25. On ingredients of the offence under section 296(2) of the Criminal Procedure Code he submitted that there was evidence that there were guns during the robbery, PW1 was threatened to be killed and there were items that were stolen. On sentencing he submitted that the sentence prescribed was in accordance with the law. In conclusion he urged the court to dismiss the appeals. Mr. Otieno for the 1st appellant/4th accused in reply submitted that on the basis of alibi (section 169 of the Criminal Procedure Code) was not complied with at page 49 and 53 and that PW1 in his testimony stated that the 1st appellant never entered his house which contradicts statement that he saw the appellants using a hurricane lamp. Further, that the trial court having rubbished the identification parade no other evidence was available to support the charge and that the recoveries made during the day was so unsafe to use.

Reply by the Appellants

26. The 2nd appellant/1st accused in reply submitted that there was no light in the complainants house to enable him to see him (a person who was a stranger to him), the prosecution did not adduce any evidence on the torches and how they were directed, prosecution's case that he was arrested with government stores was incorrect as PW5 told the court that he was not arrested with anything and as to his whereabouts he had gone to the chemist, he was not found inside the motor vehicle but was put there after his arrest.

27. The 3rd appellant/2nd accused submitted in reply that pw4 and the prosecution did not illustrate how they identified him without any light, he was not arrested at the motor vehicle but at a chang'aa den.

28. The 4th appellant/5th accused in reply admitted that he was known to PW3 and PW4, PW3 gave him the motor vehicle, the motor vehicle had a mechanical problem and for that reason they did not return the vehicle in time. That at the time of arrest there was no government stores found in the vehicle and the police only found government stores the following day. In conclusion he submitted that there was no light in the house to see them and there could not have been moonlight because it was raining.

29. The 5th appellant/3rd accused in reply submitted that the evidence on record showed that he did not enter PW1's house and PW1's testimony that he saw motor vehicle with the help of moonlight at 8.30p.m. is not true as at page 40 the motor vehicle was said to be in Wuodh Ogik.

Revaluation of evidence and issues
30. As a first appellate court, the court is under a duty to subject the evidence tendered before the trial court to fresh and exhaustive evaluation so as to reach an independent verdict mindful of the fact that unlike the trial court we have not seen or heard the witnesses to benefit from observing their demeanor. See Pandya -vs- R (1957) E.A 336, Okeno -vs- Republic (1972) E.A and more recently Muthoko and Anor vs. Republic (2008) KLR 297. In reconsidering the evidence presented before the court, 4 issues arise for determination based on the petitions of appeal, the record and submissions by counsel for the 1st appellant and each of the four other appellants. These are:
1. Whether or not the charge sheet was defective?
2. Whether or not there was proper identification of the appellants by the complainant?
3. Whether or not the identification parade conducted by the prosecution was defective?
4. Whether the dismissal by the trial court of 1st appellants/4th accused evidence on alibi was justified?
31. The first issue was raised by the 4th appellant /5th accused submitting that the charge sheet was defective as it ought to have been brought under section 295 which defines what robbery with violence is as read with section 296(2) of the Penal Code which in turn prescribes the punishment for robbery with violence. In Cosmaso Nyadago vs. Republic (1955) 22 EACA 450 it was held that the proper procedure is to specify in the statement of the offence not the section that defines the offence, but the one that prescribes the punishment thereof. The Court of Appeal for Eastern Africa was considering an appeal from Tanganyika involving the charge of robbery with violence under sections 285 and 286 of that country's Penal Code similar to our sections 295 and 296 of the Penal Code holding at p.451 - "Section 285 is the definition section covering both what may be termed 'simple robbery' and 'robbery with actual violence'. We think it would be better in such cases to specify in the count the punishment section rather than the definition section and further, in appropriate cases, to specify the case as punishable under the second paragraph of the punishment section." Indeed, the authority of Oluoch vs. Republic, supra, does not support the proposition by the 4th appellant.In addition, no failure of justice in terms of section 382 of the Criminal procedure Code has been occasioned to the appellants by this format of the charge sheet.

32. It is clear that a robbery with violence within the meaning of section 296 (2) of the Penal Code was committed on the night of 26thMarch 2008. The Court of Appeal has in Ganzi vs. Republic (2005) KLR 52 laid down the ingredients of the offence of robbery with violence under section 296 (2) of Penal Code as follows:
a) The offender is armed with any dangerous or offensive weapon or instrument; or
b) The offender is in company [of] one or more other person or persons; or
c) At or immediately before or immediately after the time of the robbery the offender wounds, beat, strikes or uses other personal violence to any person.
33. According to the complainant, (PW1) there were 7 attackers who stole from him Ksh.15000/- and at least one of whom was armed with a pistol. He said in his evidence-in-chief that:
'I was at home having closed shop ….. I had light of hurricane lamp in the house…..five people entered after one in uniform of police, jungle jacket, two others in rain coats as the door was still open .....one of them placed a gun on my head. It was a pistol. That person is not in court. I had kshs.10,000 and 2 mobile in the pocket. The 2nd appellant/1st accused took the money and the phones to the one with the gun. Then they decided that we got o the shop. I had light of hurricane in the house. We were in the house for 20 minutes. They switched off the light and we remained with torches. Also in the house were2nd accused and 5th accused. Two of those who entered are not in court. The 1st, 2nd and 5th entered the house and are in court. The 2nd and 5th just did search. While out, I met with the 3rd and 4th accused.

There was moonlight. We found where they had parked motor vehicle KAJ 488X Saloon. Two remained at the Motor Vehicle, these are 3rd accused and 4thand we went with 5 of them to the shop… the 2nd accused went to the drawer took kshs.5,000 and gave it to one with gun." [emphasis added]

34. On the issue of identification, it is now settled law that identification evidence including recognition evidence must be treated with the greatest caution particularly where it is based on the evidence of a single witness and where the circumstances favouring correct identification do not exist. Courts have therefore quashed convictions based solely on a single identification witness or in circumstances where the source and intensity of the lighting and the length of period of interaction with persons to be identified do not favour positive identification and the identification could not therefore be shown to be free from possibility of error. See for example Abdalla Bin Wendo & Anor vs. R (1953) 20 EACA166; Roria v. Republic 1967) EA 583; R v. Turnbull 1976) 3 All ER 549; Cleophas Otieno Wamunga –vs- R (1989) KLR 424 and Karanja & Anor vs. R 2004) 2 KLR 140.

35. The sources of lighting by which the single eye witness (PWI) alleged to have been able to identify the appellants were torches and strong moon light, the hurricane lamp having been put off by the attackers when they entered the house. During cross-examination by the 4th accused, PW1 admitted that the attackers entered the house and switched off the lamp. He claimed to have been with the attackers for 20 minutes in those circumstances. PW5 stated that it was rainy night – "On 26/3/08 I was on crime standby. We received a report from telephone call that a robbery had taken place at Masara from a good Samaritan. We proceeded there at about 7.50pm. While on the way we met a group of people in a Canter motor vehicle. And they informed us of the robbery. That motor vehicle KAJ488X Saloon white was involved in the robbery and that the motor vehicle drove towards Migori. It was raining and we turned to look for the motor vehicle at Migori - Apida Estate. We stopped the motor vehicle as it moved towards Nyasare. We found five occupants. We conducted quick search at the scene as it was raining. We took them and motor vehicle to station. In the morning we conducted thorough search."[emphasis added]

36. According to the eye witness PW1, only accused 1, 2 and 5 went to his house and shop where he could only use torch light to identify them. Using the moonlight in the rainy night he purported to identify the 3rd and 4th accused (5th and 1st appellants) who remained outside as well as the registration number of the motor vehicle. It is not clear for how long the witness saw the accused 3 and 4 as he went from the house to the shop: it could be as slight as a "fleeting glimpse of him in torch light which momentarily fell on him" as in the case of Njagi vs. R, supra.

37. We do not accept that torch light for 20 minutes and moon light in the circumstances of a rainy night for an undisclosed period of time was favourable circumstances for the positive identification of the appellants. In accordance with authorities, the learned magistrate was obliged to warn himself of the danger of convicting on such evidence and to look for other evidence, circumstantial or direct, pointing to the guilt of the appellants. See Abdalla Bin Wendo case, supra.

38. We have not been able to find other evidence pointing to guilt of the appellants because questions abound as to the circumstances of the arrest of the 5 appellants in the motor vehicle KAJ 488X alleged to have been used in the robbery and the recovery the following day of a jungle jacket and 2 rain coats in the motor vehicle's bonnet in the presence only of the 4th accused/4th accused/1st appellant:

a. Why did it take 4 hours (according to PW5) to catch up with the motor vehicle after the robbery and arrest the appellants?

b. In the 4 hours that the police were looking for the vehicle could its occupants have changed?

c. Where were the other appellants when the recovery of jungle jacket and rain coats was done only in the presence of the 4th accused/1st appellant?

d. What is the probability that the jungle jackets and rain coats were planted in the motor vehicle by unknown persons while the vehicle was in police custody before the alleged recovery?

e. How could the arresting police officer (PW5) have received a report on the robbery at 7.50pm for the incident which the two eye-witnesses PW1 and PW2 confirm took place at 8.30pm?

We think that these questions should have put the learned magistrate on inquiry as to the truth of the prosecution's case before concluding, in accordance with the decision in Muiruri vs. R, supra, that despite lack of proper identification of the appellants, the evidence must be true.

39. The Learned Magistrate accepted the identification evidence of the single prosecution witness PW1 and said:
"I am satisfied that the people the complainant saw in house with the hurricane lamp and the people who led him in moon light to the shop and those whom he stayed with inside the shop until they fled were the same people arrested in Migori while inside the same motor vehicle. He described those who entered into his house as the 1st 2nd and 5th accused and that the 3rd and 4th accused remained where the motor vehicle KAJ488X was parked. That the 1st accused pleaded with him to cooperate while they were at the store and that the 5th accused came to the store and ordered that he be killed…. The complainant had sufficient time with the accused persons at the house outside the house and inside the shops and these are the accused persons found with the vehicle 2-3 hours after the robbery."
40. With respect to the learned magistrate, the hurricane lamp was according to PW1 in cross-examination by the 4th accused (p.12) switched off by the attackers when they entered into the house. The witness did not indicate how much time he was with the attackers at the shop before they had to run away after hearing screams outside. The finding that the complainant was able to see his attackers by use of hurricane lamp and that he had sufficient time to do this is not backed by evidence. The Magistrate also failed to warn himself of the danger of convicting on the evidence of a single identification witness, apart from the question whether he could accept dock identification after dismissing the identification parades for the 1 - 4 accused persons.

41. The Magistrate found comfort in the decision of the Court of Appeal in Muiruri vs. Republic (2002) 1 KLR 274where it was held that-
"It cannot be said that all dock identification is worthless. The Court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case that the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identity."
What facts and circumstances of the case did the learned Magistrate consider in arriving at a conclusion that the evidence of identification must be true? He said:

"Having said that on the issue of the parades, it is not right to say that there is absolutely no evidence that connects the accused persons with the robbery at Masara. There is evidence that this motor vehicle KAJ488Xwas given to the 4th and 5th accused at about 6.00pm and they were to use the vehicle very briefly and cash 200/-, this vehicle was seen at Masara market several Kilometers from the Township Migori. It is unbelievable that this motor vehicle broke down within Migori township as the 4th and 5thaccused want this court to believe. This motor vehicle was seen at Masara Market at around 8.30pm. The Complainant who is PW1 saw it and it was also seen by Charles Ajwang Hussein who is PW2 in this case and this vehicle was under the control of 4th and 5th accused persons. The 4th accused was the driver and the 5th accused was the conductor, they were the managers of this vehicle which took the robbers to Masara and sped away with the robbers after the robbery. "

42. The learned Magistrate said that it was unbelievable that the motor vehicle had broken down as stated by the 4th and 5th accused persons because the vehicle was seen several kilometres away by PW1 and PW2. In fact, PW2 did not identify the vehicle as having been seen at the scene of the crime; he did not report the vehicle in reference to its registration number, Make, model or colour. He said:
"I was coming from work at Masara primary school. I found a motor vehicle and we passed to the centre which is near home. We heard screams at the shops of Odhiambo Okombo, then I saw the motor vehicle we passed come to the door of the shop and people ran from the shop and enter the motor vehicle. Some people entered a corridor. We followed the motor vehicle up to Arombe and we met police and police followed them. We were later told that motor vehicle KAJ 488X was found and people arrested."[emphasis added]

PW1 who is supposed to have identified the motor vehicle said in that regard that:
"There was moon light. We left for the shop. We found where they had parked motor vehicle KAJ488X Saloon. Two remained at the motor vehicle, these are 3rd and 4th [accused] and we went with 5 of them to the shop….I did not see the motor vehicle KAJ 488X when I came out."

43. Properly analyzed, there was no evidence that the motor vehicle KAJ 488X which the PW1 allegedly identified using the moonlight on a night said by PW5 to have been rainy was the same vehicle in which

PW2 saw the attackers flee. PW1 did not see the attackers flee in motor vehicle KAJ 488X and PW2 who saw the attackers flee in a motor vehicle did identify the motor vehicle as KAJ 488X; he was only "later told that motor vehicle KAJ 488X was found and people arrested"!

44. Moreover, the possibility of mistake in identifying the motor vehicle in view of the difficult circumstances makes it unsafe for the magistrate to conclude that the motor vehicle was seen at the scene and that 'it is unbelievable that this motor vehicle broke down within Migori township as the 4th and 5th accused want this court to believe.'Furthermore, if it is accepted that the jungle jacket and rain coats were found in the joint possession of the appellants, on what basis were they acquitted of the 2nd count of being in possession of government stores? The court simply states "I would acquit them of the offence in Count II."

45. The third issue of appeal regarding the mounting of identification parades is governed by the authority of Muiruri vs. Republic, supra, and the parades should not have been held so closely together in terms of time and consisting of the same members with regard to parades 2 and 3 and part-membership of the earlier parades in the 4th and 5th Parades. Moreover, parades nos. 3,4 and 5 are shown to have been conducted simultaneously between 3.00 – 3.30pm on 27/3/08 despite having in common the same members in different permutations and parade No. 2 appears to have been conducted after all the other parades at 3.45 - 4.00pm.We find the identification parades unreliable, save for the parade No. 1. The trial magistrate rightly found that the identification parades were erroneous stating on pages (50-52) of the Judgment that:-
"The members of the parade No. 1 does not seem to appear in any other parade. However, the parade no. 4 and 5 seem to have 4 members also appearing in parade 2 and 6 members appearing in parade no. 2 and 4 respectively. Otherwise other than the 1st parade the rest of the parade was not done with scrupulous fairness".
However, in view of our holding with regard to the identification of the appellants, nothing turns on the improper identification parades, which we find to have been unreliable.

46. Lastly, the 2nd appellant/1st accused took issue with the fact that the trial magistrate did not consider his alibi testimony. The Court of Appeal in Karanja –vs- Republic Criminal Appeal No. 65 of 1983 ((1983) KLR 501), held that it was improper to treat the prosecution and defence cases in isolation and in Njagi & Anor vs. Republic 1988) KLR 258 that a trial court must weigh up an alibi defence before reaching a decision as to whether the recognition of the accused who raised the alibi was proper. In establishing an alibi, the Court of Appeal in Kiarie vs. Republic 1984) KLR 739 held that – "An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is reasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi."

47. In this case, against the evidence of identification of the accused persons and their arrest in the motor vehicle used in the robbery and the recovery in their possession of costumes used during the robbery must be weighted against the alibi defences of the appellants. The 2nd appellant's alibi were DW1 and DW2 (the 2nd appellant's wife and father, respectively) both of whom attest to the fact that the 2nd appellant was unwell that day, he returned home at 6.00pm only to leave the house again and not to return. The two witnesses therefore are not alibi as they only account for the 2nd appellant's activities during the day but not between the material hours of 7.00pm to 12 midnight on the night and morning of the robbery occasioned to the complainant. The alibi defences by the 4th accused (1st appellant) driver of the motor vehicle KAJ 488X supported by his conductor 5th accused (4th appellant) was that the motor vehicle broke down while taking a client to Wuoth Ogik and they repaired it near Ombo Junction up to 8.30pm when they met police officers including one Kubumba (PW5) who arrested them and took them and the motor vehicle to the police station. The two appellants did not disclose on what charges they were allegedly arrested and taken to the Police station and the statements by the two appellants as well as those of the accused 1 and 2 (2nd and 3rd appellants) were unsworn and, as held in Amber May v. Republic (1979) KLR 38, (1976-80) KLR 1118, an unsworn statement of no probative value. The only sworn

statement was that of 3rd accused (5th appellant) who claimed simply to have been arrested while coming from football. However, in accordance with Kiarie vs. R, supra, the appellant need not prove the alibi as the burden of proof remains with the prosecution even in cases where alibi defence is raised. The prosecution case ought to have upset the alibi set up by the 4th and 5th accused (1st and 4th appellants) but as we have held above the prosecution did not prove its case based on identification of the accused persons.

48. It appears from the Judgment of the trial court that the learned Senior Principal Magistrate only casually considered and dismissed the appellant's defences and alibi on the ground that 'there is absolutely no bad blood, no good reason nor basis for Corporal Kabumba who arrested the accused persons to frame up the accused persons with such heinous charge.'In holding that there was no good reason or basis to frame up the appellants, the learned magistrate in effect required the appellants to demonstrate that the police, in charging them, had a grudge against them, which is tantamount to asking the appellant to prove their innocence. He said – "Evidence shows that it was a rainy night, two or three hours after the incident at Masara the vehicle was identified and captured at the area called Apida as it headed towards Nyasare. The 4th and 5th accused deny being seized and arrested at Apida and the rest of the accused deny being inside this motor vehicle. That the 1st accused was sick and going to buy medicine, that the 2nd accused was drunk and was just looking for bodaboda to take him home and that the 3rd accused had just come from watching football on TV. There is absolutely no bad blood, no good reason nor basis for Corporal Kabumba who arrested the accused persons to frame up the accused persons with such heinous charge. I am satisfied that the people the complainant saw in house with the hurricane lamp and the people who led him in moon light to the shop and those whom he stayed with inside the shop until they fled were the same people arrested in Migori while inside the same motor vehicle. He described those who entered into his house as the 1st 2nd and 5th accused and that the 3rd and 4th accused remained where the motor vehicle KAJ488X was parked. That the 1st accused pleaded with him to cooperate while they were at the store and that the 5th accused came to the store and ordered that he be killed…. The complainant had sufficient time with the accused persons at the house outside the house and inside the shops and these are the accused persons found with the vehicle 2-3 hours after the robbery. They need to explain to the satisfaction of this court how they came to be in the motor vehicle which had just been involved in a robbery…. The complainant in his evidence stated that the robbers wore jungle jackets and rain coats and that they introduced themselves as police officers and it is significant to note that a jungle jacket and two rain coats were found in the bonnet of the motor vehicle herein. Even though the jungle jacket was not found in their individual possession, it was in their constructive possession and recovery forms reasonable nexus with the robbers at Masara. I would now dismiss the alibi and defence of the accused persons and find each one of them guilty of the offence leveled against them in Count I and enter a conviction."

49. Clearly, the learned Magistrate did not seriously consider the appellant's alibi defences against the prosecution evidence before accepting the identification evidence and in the result dismissing the defences and convicting the appellants. It would appear the learned Magistrate only considered the strength of the prosecution case in isolation, accepting it and then dismissing the appellants defences thereafter. We think, with respect, that this was the wrong procedure of considering the evidence for the prosecution and the defence, one after another, and more significantly that the learned Magistrate was wrong on the issue of identification of the appellants and in the other evidence he thought pointed to the accused's guilt.

50. Finally, we observe obiter that the 2nd appellant had, in his withdrawn appeal, purported to confess the crime and to implicate his co-appellants.Such a confession could only have been effective if it had been recorded in accordance with section 25A of the Evidence Act and proved before the trial court, giving the co-accused an opportunity to challenge confession by an accomplice and the court giving the only weight due to it being cognizant of the dangers of accomplice evidence. Before this appellate court, such a confession is worthless and of no effect to the appeal findings.

51. For the reasons set out above, the appellants' consolidated appeals must succeed, and we therefore quash the convictions and set aside the sentences passed by the Senior Principal Magistrate's Court, Migori in Criminal Case No. 109 of 2008 by its judgment made on 23rd March 2009. Unless otherwise

lawfully held each of the appellants is to be released from prison custody forthwith.

Dated, Signed and Delivered in open court at Kisii this 23rd day of May 2013.

..……
RUTH N. SITATI

JUDGE

.....

EDWARD M. MURIITHI
JUDGE

In the presence of: -
……..... for the 1st Appellant
……..... for the 2nd, 3rd and 4th Appellants
.....for the Respondent
..... Court Clerk

....……
RUTH N. SITATI

JUDGE

.....

EDWARD M. MURIITHI
JUDGE