



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CRIMINAL APPEAL NUMBER 238 OF 2009

BETWEEN

PAUL KARIUKI
KIARIE.....
..... APPELLANT

AND

THE REPUBLIC OF KENYA.....
.....RESPONDENT

[An Appeal from the Judgment of the Learned Chief Magistrate C.W. Meoli signed and dated 28th May 2009, and read on the same date by the Learned Principal Magistrate A.K.Kaniaru, in the Chief Magistrate's Court at Thika Criminal Case Number 4463 of 2007]

Appeal before Justices Monica Mbaru and James Rika

Paul Kariuki Kiarie the Appellant appearing person

Ms. Nyauncho Prosecuting Counsel appearing for the State

JUDGMENT

1. Paul Kariuki Kiarie was charged alongside six other persons, with the offence of robbery with violence contrary to Section 296 [2] of the Penal Code. He was convicted on all counts except the fifth one, and sentenced on the first count. Sentencing on the other counts was kept in abeyance. The details of the offence were as follows:-

Count 1

On the 29th August day of 2007 at Juja Farm in Thika District Central Province, jointly with others not before Court, while armed with dangerous weapons namely pistols and pangas, robbed Peter Kibathi Muthara one Television on the make Sharp, one mobile phone of the make Nokia 1100, assorted bottles of beer, one radio make of the LG and cash 9020 all valued at Kshs. 62,090/= and at or immediately after the time of such robbery used actual violence to the said Peter Kibathi Muthara.

Count 2

On the 29th day of August 2007 at Juja Farm in Thika District Central Province, jointly with others

not before Court, while armed with dangerous weapons namely pistols and pangas, robbed Stella Ndinda Kasinga one mobile phone of the make Nokia 1100 valued at 4,000/= and cash 200/= and at or immediately after the time of such robbery used actual violence to the said Stella Ndinda Kasinga

Count.3

On the 29th day of August 2007 at Juja Farm in Thika District Central Province, jointly with others not before Court, while armed with dangerous weapons namely pistols and pangas robbed Dancan Warui Mathenge his National Identification Card, a jacket, cash 700/= and one mobile phone of the make Ericson all valued at Kshs. 6,700/= and at or immediately after the time of such robbery used actual violence to the said Dancan Warui Mathenge.

Count 4

On the 29th day of August 2007 at Juja Farm in Thika District, Central Province, jointly with others not before Court while armed with dangerous weapons namely pistols and pangas, robbed Samuel Kiplimo Wiborine two mobile phones of the make Alcatel and Quick Tell, cash 1,500/= and motor vehicle KAS 503 C Mazda Station Wagon all valued at Kshs. 625,000 and at or immediately after the time of such robbery used actual violence to the said Samuel Kiplimo Wiborine.

Count 5

On the 29th day of August 2007 at Murera Village in Thika District, Central Province jointly with others not before Court while armed with dangerous weapons namely pistols and pangas robbed Sarah Wanjiru Ndung'u a mobile phone of the make Motorola 113 valued at Kshs. 2,000 and cash 7,000/= and at or immediately after the time of such robbery used actual violence to the said Sarah Wanjiru Ndung'u.

Count 6

On the 29th day of August 2007 at Murera Village in Thika District Central Province, jointly with others not before Court while armed with dangerous weapons namely pistols and pangas robbed Henry Kinyanjui Igecha one mobile phone of the make Motorola C216 valued at Kshs.5000 and cash 6,000 and at or immediately after the time of such robbery used actual violence to the said Henry Igecha.

2. The complainant in count five, Sarah Wanjiru Ndung'u did not testify, and all the accused persons were acquitted on that count. All the Appellant's co-accused persons with the exception on one Nancy Wanjiru Wainaina were found to have no case to answer and were therefore not called upon to defend themselves. Nancy was called upon to defend count one and acquitted afterwards. The prosecution called a total of 10 witnesses whose evidence may be summarized in this way:-

- I. PW1 Stella Ndinda served as a waitress at Thome Bar. She was in the kitchen on 29th August 2007 at around 9.00 p.m., preparing food for customers. She saw three people armed with pistols enter the bar. They ordered everyone to lie down. One of the robbers took her Nokia 110 valued at Kshs. 2000 and scratch cards valued at about Kshs. 500. The robbers stole from other staff and customers. She was hit by the robbers on her back and buttocks. They herded their victims at the counter area in the bar and left. One customer who had hidden his phone during the ordeal, called the police. She was not able to identify the robbers at a subsequent identification parade, but identified several of the stolen items which were recovered, including her mobile phone.
- II. PW2 Dancan Warui Mathenge worked as a carpenter. He used to do carpentry work for the bar, and was in the company of Stella on 29th August 2007 in the kitchen, when the robbers struck. The robbers ordered everyone to lie down. They stole his Sony Ericson mobile phone valued at

Kshs. 4,500, a black jacket valued at Kshs. 700, wallet, identity card and voting card. He saw the robbers armed with a big gun and a small gun. The victims were then confined to the counter area in the bar, as the robbers fled in one of the customer's vehicle. Nothing stolen from him was recovered. PW2 was not able to identify anyone at the identification parade.

III.PW3 Francis Mungai Kamau operated the butchery that was an adjunct of Thome Bar. He had closed the butchery and was in the bar at around 9.00 p.m on 29th August 2007. He and the other patrons were suddenly invaded by robbers who were armed with G3 rifle and other type of weapons. They ordered everyone to lie down. He did not see what went on after this, but after the robbers left, he realized there was no radio or TV. He was able to identify the recovered items which included the radio and the TV. He was not able to identify any of the attackers at the identification parade.

IV.PW4 Samuel Kiplimo was a patron at Thome bar on 29th August 2007. At around 9.00 p.m. a group of assailants entered the bar and ordered everyone to lie down. They ransacked the customers. They took PW4's car keys, locked their victims at the counter, and disappeared using PW4's Mazda VY10 car, registration KAS 503 C. They stole his Alcatel and Quick Sell phones. He was not able to see if the robbers carried any weapons. His car was recovered with slight dents the following day. The Alcatel phone was recovered but not the Quick Sell. He was not able to identify the robbers.

V. PW5 Peter Kibathi was at Thome Bar on 29th August 2007. At 9.00 p.m. PW5 saw a group of people approach the bar. PW5 went forward to welcome them. The leading man in the group produced a gun, ordered PW5 back inside, and ordered other patrons to lie down. The robbers stole Kshs. 9,020 from PW5, an assortment of beers, Nokia 1100, TV and Radio. They also stole remote controls and radio speakers. PW5 was able to identify recovered items which included his phone, TV, radio and the remote controls. The robbers were armed with pistols. PW5 was not able to identify them at the subsequent identification parade.

VI.PW6 James Karanja Wanjiku is the witness whose evidence the Appellant's conviction was based on. He testified that he was a taxi driver, employed by one Simon Kamau, operating from Dandora in Nairobi. The car was registration KAS 312 Y Toyota Corolla. He was on 30th August 2007 approached by two customers at around 10.00 a.m. They told him they wished to collect a TV and radio from Juja Farm. He drove them to Juja Farm. They stopped at a homestead, where one of the customers, obtained the key to a house within the homestead. He opened the house and the two customers removed from therein a TV and radio. PW6 testified the person who opened the door was the Appellant. The Appellant locked the house and the group set off for Dandora. In the car, he heard the Appellant being asked by his colleague how much the items would fetch. The other man was not before the Court. They drove up to Phase V to the house of the presumed buyer. Four days later, police arrested PW6. He explained his role in the trip to Juja Farm. He was locked up at Ruiru Police Station. He led the Police to the house where he had dropped the items; there was no one there. After some days he led the police back to the house, only to find nursery school children in the house; he suspected the owners of the house had disappeared. PW6 testified they recovered the radio from there. It was taken to Kinyago Police Station. They then went back to Dandora looking for the TV. PW6 did not actively take part in this search, but after sometime, the Police Officers returned to the car with the TV and in the company of another lady who was not in Court. The man who was with the Appellant on the journey to Juja was not in Court.

VII.PW7 Henry Kinyanjui Igecha was in a bar within his home at Murera. The bar was named Kuonana. At around 9.00 p.m. a vehicle stopped outside the bar. Robbers emerged from the car, entered the bar, and ordered everyone to lie down. They robbed all the customers. PW7 lost Kshs. 2,000, identity card and shoes. People tried to run after the robbers after the act, but the robbers shot in the air and managed to escape. PW7 was not able to identify the robbers at an identification parade.

VIII.PW8 Cpl Alfred Kibet worked at the CID Special Crimes Office in Nairobi Area. On 11th September 2007, he was called by one Katola and told to meet some Officers from the CID at Dandora. They proceeded to the house of Gibson Mutota alias Muthembwa. They found a lady Nancy Wanjiru who was the 2nd accused in the Lower Court. They searched the house and recovered a Sharp make TV. They also recovered the remote control. PW8 identified the items in Court. The 2nd accused Nancy Wanjiru alleged the items were bought for her by her husband a few days before, but was unable to produce the receipts. No other woman was arrested during the recovery apart from Nancy.

IX.PW9 PC Patrick Makau was attached to the Special Crime Prevention Unit of the CID in Nairobi. He was on 11th September 2007, asked by his boss to join in the recovery of the items stolen from Thome Bar. He joined his colleagues who were together with the Appellant at Pangani Police Station. They were led by the Appellant to a house in Dandora. The house belonged to Gilbert Mutwota who was not in. They found his wife Nancy Wanjiru in. They recovered the TV and the remote control. PW9 was able to identify the items in Court. He insisted the Appellant led the search party to the house in Dandora. He also testified that the Police did not record anything to confirm recovery, and rather confusingly, stated that “ there was no such recovery.”

X. The last prosecution witness PW10 was the Investigating Officer Cpl Richard Simiyu. He worked at the CID Office in Ruiru on 30th August 2007. His Office received a report that a violent robbery had taken place at Juja Farm. He visited the scene in the company of other Officers. They interviewed the patrons who were robbed at Thome Bar. The patrons confirmed there were about 8 robbers, armed with pistols and pangas. They gave the police a list of the stolen items. He testified the Police Officers were able to ‘initially’ arrest the Appellant before apprehending the other accused persons. He was able to record witness statements and eventually brought the accused persons to Court. The accused persons were connected to the case because they were caught in possession of the stolen items. Cross-examined by the Appellant, the Investigating Officer stated that the Appellant was arrested on 12th September 2007, and led the Officers in making recoveries on 13th September 2007. Nobody told the Police that the Appellant had sold to them any of the stolen items. The owner of the taxi car told the Investigating Officer his car was in the hands of Sebastian K. Wanjiru, not James Karanja. He was categorical that if James Karanja a witness, stated he had the car, PW10 would not agree with such evidence.

3. The Appellant gave sworn evidence in his defence, on 2nd April 2009. He testified he worked as clothes ‘seller at Kariobangi’s Korogoco market. On 29th August 2007, he was at Kariobangi in his house. He stayed there overnight. On 30th August 2007, he went to his business at the market as was his routine. On 11th September 2007 he was on his way home from work. Police Officers arrested him. There were five other suspects in the vehicle. He was kept in custody at Shauri Moyo Police Station overnight. He was transferred to Ruiru Police Station the following day. An identification parade was conducted. Later he was charged with the offence. The owner of the taxi KAS 312 was not called as a witness. The Appellant however had the owner’s statement. The owner stated his car was in the hands of one Sebastian Karanja Wanjiru at the material time. On cross-examination, he stated he was in the company of other colleagues at the market on 30th August 2007. He named these as Njeri, Wanjiku and Kinuthia. He could not name his customers. He had a wife and two children. His wife could confirm he was home on the night on 29th August 2007. He had not called her as a witness. His landlord was one Wambui. He was arrested by the police at Kariobangi, at around 8.00 p.m. He was alone at the place of arrest.

4. The trial Court found that there was no dispute that the robbery occurred at Thome on the night of 29th August 2007. None of the witnesses was able to identify the robbers at subsequent identification parades. The Court concluded that the Appellant was linked to the offence by the evidence of PW6 the taxi driver. He drove the Appellant and another man who was at large, to a house in Juja Farm. The two transported a TV and a radio from that house, to Dandora. Four days after the trip to Juja, PW6 was arrested. He led the Officers in recovering the radio from a deserted home at Dandora. They also recovered the TV although PW6 did not participate in this recovery. The Appellant did not raise other issues relating to 30th August 2007, instead concentrating on the names of PW6. PW6 was arrested by the police, but there was nothing to suggest he was an accomplice, the Court found. PW6 drove the two passengers to Juja in the day; he was paid Kshs. 2,000 for the hire; and readily led the police to the house where the items were taken. The failure to call the taxi cab owner did not have any effect on the evidence of PW6. The Court stated it had warned itself in respect of the evidence of PW6; it was satisfied this evidence was corroborated by the recovery of the stolen TV and radio, the existence of the second man Gibson Mutwota Muthembwa and the possession by the Appellant of the TV and radio in the day after the robbery. The fact that the Appellant spent the night in his house on 29th August 2007 did not mean he could not have participated in the robbery earlier in the night. His defence was displaced by the evidence given by the prosecution. The Court found that the Appellant did not dispute the ownership of the recovered items at all. He was part of the gang that executed the robbery. The Court therefore convicted the Appellant on count one, two, three, four, and six.

5. The Appellant lodged this Appeal relying on the following grounds:-

- a. **The trial Magistrate erred by convicting the Appellant on unsatisfactory prosecution evidence and in particular, the existence of the taxi car KAS 312 Y was not established;**
- b. **No caution was shown to have been administered on the Appellant when he allegedly led police to recovery of the TV;**
- c. **There was no evidence that the Appellant had possession of the TV and the radio on 30th August 2007;**
- d. **The trial Magistrate erred in accepting PW6 as a credible witness; and,**
- e. **The trial Magistrates did not give the defence of the Appellant adequate consideration.**

6. The Appeal was heard on 22nd October 2013. The Appellant submitted that none of the victims was able to identify the robbers. The Court relied on circumstantial evidence, but failed to observe the principle that there must be no other co-existing circumstances, which would tend to weaken or destroy the prosecution's case. The Court failed to caution itself that PW6 was a suspect and would likely desire to exonerate himself, by linking the Appellant to the crime. The existence and ownership of the taxi cab was not shown. The Appellant urged the Court to adopt the decision in *Bukenya v. Uganda [1972] E.A. 549* where it was held that, "an adverse inference may be drawn in favour of the appellant in a situation where the prosecution did not call or summon an essential witness." The Appellant argued that he never led the police to the recovery of the stolen items in Dandora. No caution was in any event administered on the Appellant from the Pangani Police Station before the alleged journey to Dandora. The process of removal of a suspect from police custody was not made clear to the Court, and was not observed. The officer who arrested him did not testify. The Occurrence Book from Pangani Police Station was availed to the Court on the hearing on the Appeal, upon a request made by the Appellant. It was confirmed there was no entry relating to the Appellant, with regard to the 11th September 2007. The Appellant urged the Court to allow his Appeal.

7. Ms. Nyauncho replied that the decision of the trial Court was proper. The Appeal should be rejected. The offence took place at a bar in Juja. The Appellant and others were armed with pistols. There were six witnesses who all narrated they were robbed. They did not identify the Appellant. He was identified by PW6. He hired PW6's car the day after the robbery. He retrieved the TV and radio from Juja and together with another man who was not arrested, transported the items to Dandora. PW6 helped the police to trace the 2nd accused person's house and the TV was recovered. The Appellant was implicated in the Offence.

The Investigating Officer visited the scene and recovered spent cartridges. The OB from Pangani confirmed the Appellant was not entered there. He however had nothing to do with Pangani; he was arrested at Dandora. PW9 stated he joined his boss at Pangani. He just joined. Pangani had nothing to do with the investigations.

8. The High Court as the first Court to which this Appeal has been submitted, has a duty to re-evaluate the totality of the evidence on record as established in ***Okena v.R [1972] and Shantilal M. Ruwala v. the Republic [1975] E.A. 570***. The duty goes beyond rehashing the findings and conclusions of the trial Court; we must re-evaluate the evidence and draw our own conclusions. In doing so, the High Court must nonetheless not lose sight of the fact that the trial Court had the advantage of hearing and seeing witnesses. This cautionary principle is remarkably endorsed in the case of ***Peters v. Sunday Post [1958] E.A. 424***.

9. The uncontroverted evidence before the Lower Court was that about 8 armed men attacked the patrons and employees of Thome Bar around 9.00 p.m. on 29th August 2007. The robbers stole assortment of goods belonging to the business as well as goods which belonged to the patrons. It is not disputed that after investigations, police arrested 8 persons. These included the Appellant and PW6, the taxi driver who implicated the Appellant. 7 persons were charged excluding PW6 who was treated as a prosecution witness. It is common evidence that 5 of the witnesses, who were present at Thome Bar during the attack, were unable to identify any of their attackers from identification parades organized in the course of the investigations. 6 of the accused persons were acquitted for want of evidence, the Appellant being the single convict in the trial.

10. Before we go into the issues raised by the Appellant, we would wish to look into the Appellant's conviction and sentencing on count six. The charge sheet states the Appellant, Co-accused persons and others not in Court, violently robbed Henry Kinyanjui Igecha one mobile phone make Motorola C126 valued at Kshs. 5,000 and cash of Kshs. 6,000. The robbery took place at another location called Murera Village, in a bar called Kuonana. There was no evidence given by any other witness, except Kinyanjui, with regard to this robbery that took place at Kuonana. The police witnesses PW8, PW9 and in particular PW10 the Investigating Officer said nothing about Kuonana. PW9 stated he went to Thome Bar to investigate the robbery, and did not mention Kuonana Bar in Murera. The trial Court did not discuss the robbery at Kuonana. The name Murera or Kuonana is not in the Judgment. PW7 Henry Kinyanjui Igecha testified the robbery at Kuonana took place at the same time 9.00 p.m. and on the same day 28th August 2007, when Thome Bar was raided. There was no evidence given to the Court relating the two robberies. PW7 testified he was robbed of Kshs. 2,000, identity card and shoes. The charge sheet disagreed with him completely, and maintained he was robbed of Kshs. 6,000, and one Motorola C216 valued at Kshs. 5,000. On what was the conviction of the Appellant on count six based? We find the conviction of the Appellant on this count illegal and unconstitutional. ***Conviction and sentence on count six is hereby quashed from the outset.***

11. PW6 linked the Appellant to the offence, and his evidence is the foundation upon which conviction and sentencing to death of the Appellant rested. The trial Court stated of PW6: *“ The Court has considered the fact that PW6 was himself placed in custody as suspect. However, there is no evidence that he was an accomplice. He travelled in day time to collect goods and charged for the service. He readily led the police to the home where the goods were taken.”* The Court also proceeded to warn itself on the evidence of this witness, which would suggest that the Court had no conclusive view on whether PW6 was an accomplice or not. There would be no reason for the trial Court to say, after making the categorical statement that the witness was not an accomplice, that *“ Having warned my mind accordingly in respect of the evidence of PW6, I think that it is plausible and believable and that it is well corroborated.”* PW6 was either an accomplice or an accessory, having moved in his own evidence, stolen goods from Juja to Dandora the day after the robbery. He was the first suspect to be arrested. He, without the participation of the Appellant led the Police to the house of Nancy Wanjiru the 2nd accused, where the TV was said to have been recovered from. We think the trial Court should have unequivocally treated the evidence of PW6 as the evidence of an accomplice, and evaluated that evidence in accordance with the principles governing the evidence of accomplices.

12. In the Mombasa C.A. decision of **Rashid Thomas v. the Republic [2008] e-KLR**, the Court ruled that, “it is a firm rule of practice that the evidence of an accomplice witness requires corroboration. The Court may only and in appropriate circumstances convict without corroboration if satisfied the accomplice is telling the truth, upon the Court warning itself on the dangers of doing so.” This is the same position adopted by the South African Court in the case of **R v. Ncanana [1948] SA 399 [A]** where the Court stated, “an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused person, but is such a witness particularly equipped by reason of his knowledge of the crime to convince the unwary that his lies are truth.” The Court should always weigh the credibility and reliability of an accomplice’s evidence before convicting. There are various reasons which inform this cautious approach in embracing the evidence of accomplices. When a man is fixed and knows his guilt is exposed, he may desperately try to purchase his immunity by falsely accusing others. He may suggest his innocence by transferring blame to others. It may also be that the accomplice knows the finer details of the crime, and may wish to assist his friends who are the principal actors in the planning and execution of the crime, by fixing an innocent man. It is always important for the Court to remember that an accomplice is essentially a confessed criminal who should not readily be believed.

13. PW6 was not a believable witness. He testified he asked the men who approached him on 30th August 2007 if they possessed the documents for the items to be ferried. They answered in the affirmative. He did not reveal to the Court whether he actually saw the documents. Why would he be asking for the documents and agree to drive the strangers to pick the items, if they had not shown him the documents? Not even the identity of PW6 was clear. He is named as James Karanja Wanjiku in his evidence in chief. On cross-examination, he revealed he was also known as Sebastian Karanja Wanjiku. According to the Investigating Officer, the owner of the taxi car told him his car was in the hands of Sebastian K. Wanjiru. PW10, while answering questions from the 6th accused person also alluded to the taxi driver going by the name of James Karanja Wanjunu. PW10 completely obliterated the credibility of PW6. On cross-examination by the Appellant PW10 conceded that if James Karanja testified he had the taxi car on the material day, James Karanja would not be telling the truth. So who was the taxi driver who drove to Juja on the 30th August 2007? More than four possible full names are on record. PW6 was a shadowy character, whose evidence deconstructed, rather than assisted in the recreation of, the crime scene. The Appellant submitted, and we think correctly, that the evidence of the owner of the taxi should have been sought. The Investigating Officers suggested in his evidence on cross-examination that PW6 was not a truthful witness. Without the evidence of the person who owned the taxi car, the identity of PW6 and his claim that he drove the Appellant and another man to Juja, the existence of the taxi car that conveyed the stolen goods, remained blanketed in very thick fog. It was important for the Court to establish the bona fides of PW6, particularly because the evidence of his own arrest and that of the Appellant is not part of the evidence availed by the police. No arresting officer gave evidence, and the circumstances through which PW6 was arrested, leading to arrest of the Appellant and recovery of the items, remained in the realm of speculation.

14. The trial Court stated that there was “*proven possessions by the 1st accused [Appellant] of the T.V. Set and radio on the morning following the robbery at Thome Bar [which] steadily points to his involvement notwithstanding the fact that he was not identified during the robbery.*” The evidence of PW6 was again the sole proof leading the Court to justify its decision on the doctrine of recent possession. We do not think that this was a correct application of the doctrine. There was no item recovered in the possession of the Appellant. The T.V set was recovered in the possession of the 2nd accused person Nancy Wanjiru who was acquitted by the Court because the Court found her explanation that her husband “*brought these common utility goods home*” a reasonable explanation. The other item, the radio, was said to have been recovered from a deserted home. There was no evidence which positively placed possession of any stolen item on the Appellant. In **Court of Appeal of Kenya Criminal Appeal Number 272 of 2005 between Isaac Ng’ang’a Kahiga alias Peter Kahiga v. the Republic [Unreported]** possession must be positively proved. It must be shown that the property was found with the accused person; the property positively identified to belong to the complainant; and the property to be shown to have been recently stolen from the complainant. There was no evidence that would conclusively place either the T.V or the radio, in the possession of the Appellant. It was even doubtful in our view whether PW5 established that the T.V. and the radio belonged to him. There were no papers on ownership, purchase or licensing given in Court with respect to the two items, which would have assisted in

establishing to whom the items belonged. It was not for the Appellant to dispute ownership; it was for the prosecution to positively show ownership. PW5 gave a receipt showing purchase of his mobile phone, but there appears to have been no attempt to prove the T.V and radio belonged to him. PW5 testified that “*they [robbers] took my phone. They also took the T.V. and the radio..... they took our T.V.*” This was not positive evidence identifying the T.V. and the radio to belong to PW5. This witness testified in a way that suggested communal ownership of the items, without making it clear he was speaking as a community spokesperson.

15. The point taken by the Appellant that he should have been cautioned by the time police allegedly took him to show them where the radio was hidden resonates. It was not clear in the first place, what date the Appellant was arrested, where he was held, or when the items were recovered, and the manner of their recovery. PW6 the first person to be arrested for the offence, was arrested four days after 30th August 2007, which would be 3rd September 2007. He testified he took police to the house where the goods were kept. His evidence suggested he led police to the house where the goods were hidden on the first day of his arrest and on several other occasions subsequently. There were conflicting dates given on the date of the Appellant’s arrest. The Investigating Officer testified he was arrested on 12th September 2007, and led the Officers to where the stolen items were hidden, on 13th September 2007. Other police witnesses testified recoveries were made on 11th September 2007. PW8 mentioned that the TV was recovered from the house of the 2nd accused and did not in any way mention the Appellant. PW9 who was indeed with PW8 on the recovery mission was the Officer who alleged that the Appellant led the police to the house of the 2nd accused person. Strangely PW8 does not mention that the Appellant was present on this mission. The evidence of PW9 was that the mission originated from Pangani Police Station. The O.B. does not place the Appellant at Pangani Police Station on 11th September 2007. There was no record of the removal of the Appellant from any police station. Why would the Appellant be leading the police to recovery of the stolen items on 13th of September 2007 or 11th September 2007, if PW6 had done the same as early as 3rd September 2007? Not even PW6 and the 2nd accused placed the Appellant at the place on recovery of either item in their respective testimonies to the Court. There is weight in the submission by the Appellant that in any event, he should have been cautioned before being led, or before leading the police to the houses where the items were hidden. Once he stated he knew where the items were, the police should have taken this as a confession by word or conduct, and comply with the provisions of Section 25 and 25A, of the Evidence Act Cap 80 the Laws of Kenya.

16. It is our finding that the trial Court did not consider the defence of the Appellant fully. The Court off-handedly dismissed the Appellant’s contention that he was in his house on the night of the robbery while saying nothing of his evidence that he was at his business at Korogoco market on 30th August 2007. This date was the pivotal date in linking the Appellant to the offence, and as shown in our findings above, the evidence marshaled by the prosecution was not so overwhelming as to displace the defence by the Appellant. In acquitting the other accused persons who were actually arrested while in possession of stolen items, the Court had this to say: “*the accused persons were not identified by any of the robbery victims to have participated in the robbery. The prosecution however made a fatal omission by failing to call the police officers who arrested these accused persons in possession of admittedly stolen items.*” The Appellant was not arrested in possession of any stolen item. His arresting officer did not testify. Ultimately, we find the Appellant was convicted on unreliable and inconsistent evidence. The trial Court failed to exercise adequate degree of care in evaluating and accepting the evidence, in a trial involving a capital offence.

[a] We allow the Appeal, quash the conviction on all counts and set aside the sentence.

[b] The Appellant shall forthwith be set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 22nd day of November 2013

Monica Mbaru

Judge

James Rika

Judge