



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NUMBER 326 OF 2011

[Consolidated with Criminal Appeal Number 327 of 2011]

**BETWEEN**

PETER KIAMA KARIUKI ALIAS

ALIAS ALEX MAINA KARIUKI..... 1<sup>ST</sup> APPELLANT

GEOFFREY KINYANJUI MIRARA..... 2<sup>ND</sup> APPELLANT

**AND**

THE REPUBLIC OF KENYA.....RESPONDENT

[An Appeal from the Judgment of the Learned Principal Magistrate G.W.Ngenye Macharia dated 7<sup>th</sup> November 2011, in the Chief Magistrate's Court at Nairobi Criminal Case Number 922 of 2009]

Appeal before Justices Monica Mbaru and James Rika

1<sup>st</sup> Appellant Peter Kiama Kariuki alias Alex Maina Kariuki appearing in person

2<sup>nd</sup> Appellant Geoffrey Kinjanjui Mirara appearing in person

The State appearing through Prosecution Counsel Ms. Gichuhi

JUDGMENT

1. The two Appellants were charged with two counts of robbery with violence contrary to Section 296 [2] of the Penal Code. The 1<sup>st</sup> Appellant faced a third count of making a document without authority. It was not indicated in the charge sheet under what law the third count was framed. The 2<sup>nd</sup> Appellant faced a fourth count of handling stolen goods contrary to Section 322 [2] of the Penal Code. The Appellants were acquitted under the first count. They were convicted on the second count, and each Appellant convicted on the separate offences under count three and four. The details of the offences were given as follows:-

**Count 1 [Both Appellants]**

**On the night of 9<sup>th</sup> and 10<sup>th</sup> May 2009 along Mai Mahiu- Nairobi Highway, jointly with others not before Court, while armed with dangerous weapons namely a pistol, robbed Alex Mwangi Njama of a lorry registration KBA 898 H Mitsubishi FH, loaded with timber all valued at Kshs.3, 450,000/=**

**and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Alex Mwangi Njama.**

### **Count 2 Both Appellants]**

**On the night of 9<sup>th</sup> and 10<sup>th</sup> May 2009 along Mai Mahiu –Nairobi Highway jointly with others not before Court, while armed with dangerous weapons namely pistol, robbed Geoffrey Kinyua Wanjohi of a mobile phone make Nokia valued at Kshs. 6,000/= and cash of Kshs. 3,800 and immediately before or immediately after the time of such robbery threatened to use actual violence on the said Geoffrey Kinyua Wanjohi.**

### **Count 3 [1<sup>st</sup> Appellant]**

**On unknown date, at unknown place with intent to deceive or defraud, without lawful authority or excuse, made a certain document namely identity card number [particulars withheld] purporting it to be a identity card issued by the registrar of persons.**

### **Count 4 [2<sup>nd</sup> Appellant]**

**On the 10<sup>th</sup> day of May 2009 at Buru Buru Area in Nairobi within Nairobi Province, otherwise than in the course of stealing, dishonestly retained motor vehicle registration number KBA 898 Y Mitsubishi FH Lorry loaded with timber knowing or having reason to believe it to be stolen.**

2. The prosecution called a total of ten witnesses and sixteen exhibits. The Appellants gave unsworn statements in their defence and called no witnesses.

3. As stated at the outset, the Appellants were acquitted on the first count, which contained the principal offence. The evidence by the prosecution indicated the motor vehicle alleged to have been stolen during the aggravated robbery was KBA 898 Y. Count 1 described the motor vehicle as KBA 898 H. The trial Court concluded, and in our view correctly, that the charge sheet was defective on this count, as it was not supported by the evidence adduced by the prosecution. The prosecution had the opportunity all along, to apply to amend the charge sheet but did not do so. The evidence upon which the other counts were upheld may be summarized as follows-

4. PW1 Alex Mwangi Njama testified he was employed by one Mugo, as a lorry driver. The employer operated transport business from Mombasa to various Towns within Kenya. On 9<sup>th</sup> May 2009, PW1 was driving his employer's lorry registration KBA 898 Y, ferrying timber for a customer named Makori. PW1 was in the company of PW2, a turn boy. The vehicle had some mechanical problems around Nakuru which slowed down PW1 on his journey back to Mombasa. The permit for dealing in, and transport of timber, expired on 9<sup>th</sup> May 2009 before the lorry could deliver its cargo. The employer and the customer advised PW1 and his turn boy [PW2] to lodge at Mai Mahiu until the following day when they would sort out the issue. While lodged in a nightclub called Mugithi Bar and Restaurant, PW1 was woken up by knocks on his room's door and window. A tall man flashed a card at PW1. The stranger alleged he was a CID Officer from the CID headquarters in Nairobi. The card bore a passport size photo. The person in the photo wore a jungle jacket, and PW1 was persuaded the man before him was a real officer of the law.

5. PW1 opened the door. The tall man told him he was now under arrest for engaging in illegal business. The man wore a jacket which had a gun inside. PW1 dressed, and with the 'Officer' walked downstairs. The turn boy was sleeping in the lorry. PW1, the 'Officer' and a colleague of the 'Officer' approached the turn boy. PW1 asked his turn boy to show the permit for the timber to the 'Officers'. One of the Officers started reading the permit by use of light from a mobile phone. When PW1 attempted to call his employer, the tall 'Officer' grabbed the phone away from PW1. The turn boy then asked the 'Officers' to identify themselves. The tall 'Officer' asked the turn boy if he had ever heard the sound of a gun. The turn boy's phone was also snatched from him. Three minutes later a small grey car drove and stopped in

front of the lorry. PW1 and PW2 were put in the small car. The two vehicles were driven to Nairobi Central Business District, then to Githurai 45 in the outskirts. They turned back and headed for Mwiki where another four men joined the 'Officers.' PW1 and PW2 were slapped by their attackers and ordered to lie down. The robbers drove PW1 and PW2 to a forest and asked them to alight, so as to be shot dead. The victims pleaded to be spared. The robbers bound PW1 and PW2 with ropes and abandoned them.

6. PW1 used his teeth to undo the knots. He untied himself and PW2. They proceeded to a nearby Petrol Station. The guard informed them they were at an area called Githurai 44. The guard assisted PW1 and PW2 with a phone. They contacted their employer Mugo. The employer asked them to hold on for a short while. They received a call from car track, a company dealing in retracing stolen vehicles. The caller asked them to report to the police. PW1 and PW2 reported at Kasarani Police Station. PW1 testified he was robbed of a mobile phone make Tornado 2626 and cash of Kshs. 600. PW1 recorded a statement at the Police Station at 4.45 a.m. He was briefly locked in. At 6.00 a.m. he was taken to Buru Buru Police Station. He was informed the lorry had been recovered and was at the Buru Buru Police Station. His driving licence was in the lorry. He later on identified the two Appellants at an identification parade.

7. PW2 confirmed the itinerary of 9<sup>th</sup> May 2009. PW1 knocked on the lorry window while accompanied by two other persons. PW2 was informed he, and PW1, were under arrest for conducting illegal business. PW2 lost a mobile phone make Torando, Kshs. 800 from his shirt pocket and Kshs. 3000 in a wallet. On the way to Nairobi, they encountered Police Officers with whom the robbers exchanged pleasantries. PW2 confirmed they were driven to Mwiki and Githurai. They were bound in ropes and abandoned. They freed themselves, reported at Kasarani Police and were later in the morning called to Buru Buru Police Station after the lorry was recovered. PW2 attended identification parade at Kilimani Police Station and was able to identify the 1<sup>st</sup> Appellant. He attended a second parade at Shauri Moyo Police Station but identified no one. PW3 Moses Njoroge Honge testified he runs a car hire business at Cargen House in Nairobi. On 9<sup>th</sup> May 2009, a long-time customer Peter Kiama hired Nissan Sunny Registration KBF 973 S. PW3 already had Peter Kiama's identification documents which had been used in previous hire transactions. These documents were his National Identity Card Number [particulars withheld] and an Armed Forces Identity Card Number [particulars withheld]. The parties executed a car hire contract. Kiama would have the car for two days and paid Kshs. 6,000. Kiama did not return the car on 11<sup>th</sup> May 2009 because he alleged to have had a stomach operation. PW3 was later directed to Mesora shopping centre within Buru Buru where his car had been abandoned. He informed the Police who took his statement.

8. PW4 IP Francis Njeru Nyamu conducted the identification parade at Kilimani Police Station on 11<sup>th</sup> May 2009. The first complainant PW1 identified the two Appellants, while PW2 only identified the 1<sup>st</sup> Appellant. PW5 PC Kirama Timothy Gathiari was on foot patrol with PC Mungai on 9<sup>th</sup> May 2009 at around 2.30 a.m. They came across a Mitsubishi Canter offloading timber at a dark corner within Umoja Inner Core. There were four men offloading this cargo. The Police Officers asked for the timber permit. One of the four men who described himself as the owner of the timber produced the permit. The permit indicated the timber was destined for Mombasa and expired on 9<sup>th</sup> May 2009. The two Officers were joined by Sergeant Muchoma who was the Duty Officer, arrested three of the suspects and towed the vehicle to Buru Buru Police Station. Before the Officers reached Buru Buru Police Station, a radio call came, stating that PW1 and PW2 had reported at Kasarani Police Station that they had been carjacked at Mai Mahiu. The Officers from Buru Buru Police Station confirmed they already had recovered the stolen vehicle and had suspects in custody PW6 confirmed he was the Duty Officer at Buru Buru Police Station on the night of 9<sup>th</sup> May 2009 going into the morning of 10<sup>th</sup> May 2009. At around 3.45 a.m. he joined his Officers who were on foot patrol within Umoja Inner Core Estate. A yellow Mitsubishi Canter KBA 898 y was off-loading timber at a dark corner. His two Officers informed him they had found four men offloading the timber. The suspects were arrested and while on the way to Buru Buru Police Station, a radio call from Kasarani Police Station confirmed the Mitsubishi Canter to have been stolen with its cargo of timber at Mai Mahiu. PW6 testified he was informed the car had been stolen at Mai Mahiu by a gang of four robbers who were armed with AK 47 rifle and pistol. The 1<sup>st</sup> Appellant was not arrested at the scene in Umoja, but was arrested at Buru Buru Police Station when he went there claiming to own the

lorry. PW6 recognized the 1<sup>st</sup> Appellant as a suspect who had been investigated previously at the Station over an offence of kidnapping. Other Police Officers at the Station appeared to be familiar with him and called him by his name. A search made on the 1<sup>st</sup> Appellant revealed he was carrying an armed forces identity card, a national identity card Number [particulars withheld] in the name Peter Kiama Kariuki, and a second national identity card Number [particulars withheld] in the name Alex Maina Kariuki. PW6 handed over the investigations to Corporal Njoroge of the Crime Prevention Unit. PW7 Police Superintendent George Ojuka's evidence that he recorded a confession from the 1<sup>st</sup> Appellant was rejected by the trial Court under 25 A of the Evidence Act Cap 80 the laws of Kenya.

9. PW8 PC Edward Muhia took the photographs of the stolen car, which he produced in Court together with the accompanying report. PW9 John Nyumu told the Court he worked as the Principal Registration Officer in the Ministry of Immigration. He confirmed that identity card number [particulars withheld], in the name Peter Kiama Kariuki, was issued by the Registrar of Persons. The second identity card number [particulars withheld] in the name Alex Maina Kariuki was not issued by the Registrar of Persons. The number had been allocated to another person Juma Mwansia Njonjo of Kwale District. The last witness PW10 Sergeant Nathan Njoroge informed the Court he worked for the Special Crime Prevention Unit in Nairobi. He was assigned investigation of the robbery in the morning of 10<sup>th</sup> May 2009. He went to Kasarani Police Station and interrogated PW1 and PW2. He got the call that the stolen lorry had been recovered by the Buru Buru Police, and three suspects arrested. Two of the suspects were arrested at the scene in Umoja, while a third was arrested when he went to the Police Station claiming to be the lorry owner. PW10 then asked Inspector Njeru to conduct identification parade. The suspects were positively identified by the complainants. The small salon car registration KBF 958 S had been hired by the 1<sup>st</sup> Appellant and was found abandoned at Buru Buru. This was the car which ferried the complainants from Mai Mahiu to Nairobi. PW10 was able to retrieve the hire documents from the relevant car hire business.

10. The 1<sup>st</sup> Appellant in his unsworn statement testified he was second hand clothes dealer, and resident of Umoja Inner Core. On 10<sup>th</sup> May 2009, he was at a nightclub called Wallet in Nairobi. A friend of his called him from Isiolo. He said his brother Jackson Matete had been arrested over drunk and disorderly conduct. Police Officers were demanding that Matete pays to them Kshs. 10,000 to bail him out. The 1<sup>st</sup> Appellant withdrew Kshs. 20,000 from his Bank, and went to Buru Buru Police Station at 5.30 a.m. by a Matatu vehicle. He met two Officers at the reception. One demanded to be paid the Kshs. 10,000. Later another Officer came and took the 1<sup>st</sup> Appellant to the Office of the OCS who in turn demanded to be paid the Kshs. 10,000. An effort to retrieve the money from the first Officer ended up in an altercation between the 1<sup>st</sup> Appellant and this Officer. Later on the 1<sup>st</sup> Appellant was arrested, taken for a search in his house which yielded nothing. The Officers took his civilian and military identity cards, and thereafter booked him at Kilimani Police Station. He was identified by PW1 and PW2. He was the only participant who was paraded in short trousers. He was only charged because of the disagreement with the Police over the Kshs. 10,000. The 2<sup>nd</sup> Appellant likewise gave unsworn evidence. He testified he is a driver. On 10<sup>th</sup> May 2009, he worked up to 4.30 a.m. On his way to the bus stage, he encountered two Police Officers. He was asked for his identity card, which he had forgotten at home. He gave them his driving licence, and pleaded to be released. He was handcuffed along with another man. A Police Land Rover came. He was put in the police car. The other prisoner was also put inside the Land Rover. This other man was asked who was the owner of the vehicle and said it was his. He was booked at Shauri Moyo Police Station. Two witnesses came and identified nobody. He was charged with the offence whose commission he knew nothing about. He was surprised to be charged alongside the 1<sup>st</sup> Appellant, a man who was a complete stranger to the 2<sup>nd</sup> Appellant.

11. The trial Court was satisfied that the Appellants were positively identified by PW1 and PW2. PW1 saw a tall person who persistently knocked on his door and window at Mai Mahiu. He saw the photo of the man wearing a jungle outfit. There were security lights outside the lodging. PW2 was able to identify the attackers through the strong security lights within the premises. He described one attacker as tall, the other as dark and short. The two assailants accompanied the complainants in the small car from Mai Mahiu to Nairobi. The long time taken in the company of the assailants, coupled with the security lights at Mai Mahiu, provided the ideal circumstances for positive identification. The trial Court found police

standing orders regulating identification parades were not flouted. None of the Appellants raised any objection when identification parades took place. The two Appellants signed the identification forms stating they were satisfied with the process. There was a direct link between the Appellants and the exhibits produced before the Court. The 2<sup>nd</sup> Appellant was arrested at the scene while offloading the timber, while the 1<sup>st</sup> Appellant was arrested at Buru Buru Police Station when he went to claim ownership of the stolen lorry. The first Appellant had been arrested earlier and was not a stranger to the Officers at Buru Buru Police Station. Both Appellants were directly linked to the stolen lorry. An armed forces identification card was recovered from the 1<sup>st</sup> Appellant at Buru Buru Police Station. PW1 and PW2 stated in their evidence that the 1<sup>st</sup> Appellant had flashed an identity card where he was adorned in jungle attire. This was not, in the finding of the Lower Court mere coincidence. PW1 and PW2 gave descriptions in their first reports to the Police, of their attackers. One attacker was described as tall brown man, the other as short dark man. The Court found these descriptions to fit the two Appellants. The ignition keys of the stolen lorry had been recovered from the 2<sup>nd</sup> Appellant. The 2<sup>nd</sup> Appellant retained a motor vehicle that did not belong to him. He did not give an explanation how he came upon the ignition keys, and was therefore guilty of handling stolen property. The 1<sup>st</sup> Appellant did not explain why the second identity card, which was not issued by the Registrar of Persons, bore his image. It could only have been a document made with intent to deceive or defraud. The ingredients of the offence of robbery with violence were established through the prosecution evidence. The Appellant's statements in defence relating to second, third and fourth charges were not credible, and were completely displaced by the prosecution evidence. The Court convicted the Appellants on the second count, 1<sup>st</sup> Appellant on the third count and 2<sup>nd</sup> Appellant on the fourth count. Sentencing on third and fourth count was kept in abeyance in light of the death sentence applied to the second count.

12. The Appellants filed the following grounds of Appeal:-

- a. **The Learned Trial Magistrate erred by accepting the identification evidence given by PW1 and PW2;**
- b. **The Learned Trial Magistrate erred by relying on a defective charge sheet in convicting the Appellants;**
- c. **The Learned Trial Magistrate erred in failing to find the Section 200 [3] of the Criminal Procedure Code was not complied with;**
- d. **The Learned Trial Magistrate relied on inconsistent and contradictory evidence of prosecution, in convicting the Appellants; and,**
- e. **The respective statements made by the Appellants in their defence were not given adequate consideration in the Judgment of the Lower Court.**

13. The Appeal was heard on 17<sup>th</sup> October 2013. The Appellants argued that the circumstances at Mai Mahiu, in the car on the journey from Mai Mahiu to Nairobi, and at Mwiki, were not shown to be such as to favour a positive identification. No evidence was led on the intensity and quality of the light in any of the scenes of the crime. There was doubt in the complainants' evidence as to whether they saw and registered the Appellant's physical appearances. PW1 described the person who knocked on his door and window as tall and dark. This did not fit the appearance of either of the Appellants. The Appellants relied on the case of *Terekali and Another v. the Republic [1952] E.A.* where it was ruled that, "*evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provide safeguard against later embellishment or made up case. Truth will always come in the first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others.....*" The assailant allegedly used a mobile phone torch to read the timber permit according to the evidence of the complainants. There was no sufficient light at Mai Mahiu. PW1 and PW2 were guarded in the small car while on the journey to Nairobi. They could not see well from their back seat. At the last scene at Mwiki, they were allegedly beaten, bound and forced to lie with their faces to the ground. The conditions did not favour positive identification by the complainants of their attackers. The Appellants submitted that the prosecution witnesses were contradictory and inconsistent. PW1 alleged two persons entered his room at Mai Mahiu, while on other occasions he mentioned one person entered. PW2 testified at page 14 that there was lighting, but he was not able to identify the two attackers. Yet at page 52 of the same

proceedings, he alleged the man he identified wore shorts. PW6 mentioned he was told the attackers were armed with a pistol and AK47 rifle. There is no AK47 mentioned in the charge sheet. PW1 at one time says he never saw a gun; on other occasion, he saw a pistol. The armed forces identity card recovered from the 1<sup>st</sup> Appellant was stated to be number 74949 by PW6 while PW10 gave the number as N952336. With regard to Section 200 [3] of the Criminal Procedure Code, the Appellants submitted they were not read and explained to the provisions of Section 200 [3] by the succeeding Trial Magistrate after the original presiding officer disqualified herself. They were not told of their right to recall and re-cross – examine witnesses. They faulted the charge sheet further saying the complainant under count two was named as Geoffrey Kinyua Wanjohi, while in the evidence he was also named as Geoffrey Kinyanjui Wanjohi and Godfrey Kinyua.

14. The State responded that the Appeal has no merit. It ought to be dismissed and the decision of the Lower Court sustained. There was no doubt a robbery took place on the night of 9<sup>th</sup> May 2009 and the day of 10<sup>th</sup> May 2009. The Appellants robbed a mobile phone and cash from Geoffrey Wanjohi. They stole money and mobile phone, lorry and timber from PW1. They were armed with a pistol. The Appellants approached the complainants pretending to be CID Officers. They carjacked the Appellants and drove them to Nairobi. They were both positively identified by PW1. The 1<sup>st</sup> Appellant was also identified by PW2. The evidence of PW1 was corroborated by that of PW2. The ingredients of the offence of robbery were shown to be present. They were in possession of dangerous weapons. The Trial Court gave the right Judgment. They were properly convicted on credible and consistent evidence.

15. The function of the first Appellate Court is not merely to scrutinize evidence, to see if there was some evidence to support the Lower Court's decision, as established in ***Okena v. the Republic [1972]*** and firmly restated in ***Shantilal M. Ruwala v. the Republic [1975] E.A. 570***. We should in re-evaluating the evidence however, exercise care, taking into account that the Trial Court had the advantage of hearing and observing witnesses. The need for exercise of such care was discussed in the case of ***Peters v. Sunday Post [1958] E.A. 434***.

16. There is little challenge to the evidence by PW1 and PW2 that they were employed by one Mr. Mugo, as driver and turn boy respectively. Their employer was based at Mombasa, with transport business operating in different areas with the country. On 9<sup>th</sup> May 2009, they were travelling from Kisii destined for Mombasa to deliver a consignment of timber. They were in their employer's Mitsubishi Canter, KBA 898 Y. The timber movement permit was expiring on 9<sup>th</sup> May 2009. They were advised by the owner of the consignment and the employer, to sleep over at Mai Mahiu along Nakuru- Nairobi Highway, so that they would sort the problem out the following day 10<sup>th</sup> May 2009, before going on with their journey to Mombasa.

17. We do not think there was any material recorded by the Lower Court to doubt that PW1 took that advice. The driver booked himself in a room at Mugithi Bar and Restaurant, while the turn boy slept in the lorry. There was reliable evidence that at around 12.15 a.m. there were knocks on PW1's lodging door and window. A tall gentleman stood outside the room knocking, and showed PW1 an identity card with the photo of the man adorned in a jungle jacket. PW1 was consistent and unshaken when he testified that this man alleged he and his colleague, were CID Officers from the CID headquarters in Nairobi. There was sufficient and persuasive evidence given by the prosecution that the two Police Impersonators took PW1 to where the Lorry was; woke up the turn boy; alleged PW1 and PW2 were involved in illegal business; and then arrested the two complainants and drove them to Mwiki and eventually to Githurai where they abandoned the complainants bound in ropes. There was no controversy that the two complainants freed themselves and reported the matter to their employer, and to the police at Kasarani. The employer alerted car track. Fortunately the tracking was really not necessary because the eagle-eyed Officers from Buru Buru Police Station had already arrested the 2<sup>nd</sup> Appellant at the a dark corner within Umoja Inner Core while in the company of three other suspects, offloading timber from the Mitsubishi Canter. The 1<sup>st</sup> Appellant was arrested at Buru Buru Police Station when he went to claim ownership of the stolen lorry.

18. In the ***Court of Appeal Criminal Case Number 51 of 2004 between Elizabeth Gitiri Gachanja and 7***

***Others v. the Republic [2011] e-KLR***, the Court set the standards for the quality of evidence necessary in convicting accused persons on capital offences, stating, “ *evidence relied upon to convict in capital offences must be of high quality, credible and beyond reasonable doubt. If evidence is on identification of a person who says he was not properly identified, the Court must examine such evidence with greatest of care before relying on it to convict.*” PW1 testified he saw the person who knocked on his window and door at the lodging in Mai Mahiu. The man was tall and flashed an identification card with a passport photo size. The person in that photo wore jungle outfit. PW1 walked in the company of this man on the way out of the room. When the two approached where the lorry was parked, one of the attackers read the timber movement permit, using the light from a mobile phone. There is the possibility from this evidence that there was insufficiency of light at the specific place where the 1<sup>st</sup> Appellant opted to read the permit from, but this would not have the effect on the identification of the 1<sup>st</sup> Appellant at the room where PW1 was sleeping. In cross examination PW1 was consistent the tall man came in the room while the short one stood just outside the door. PW1 explained clearly that there was security light where the lorry was parked, but that the 1<sup>st</sup> Appellant went at the back of the lorry to read the permit. Only the 1<sup>st</sup> Appellant would know why he opted to go to the back of the lorry to read the permit using the light from a mobile phone. PW1 described the 1<sup>st</sup> Appellant as tall and with a cut mark on the nose. PW2 corroborated this evidence, testifying that one of the attackers produced an identity card alleging the attackers to be Police Officers. PW2 stated he marked two men who woke him from sleep as there were security lights at the buildings. In cross-examination, PW2 revealed that the lorry was parked just below a security light which illuminated from a florescent bulb. PW1 and PW2 were driven in the small grey car from Mai Mahiu to Nairobi, by their assailants. The journey took about one and a half hours. The assailants even allowed PW1 and PW2 time to relieve themselves while guarding them at Githurai 45 bus stop. The car stopped at various Police roadblocks, including at a weighbridge. As the car approached Nairobi there were other roadblocks including one where the robbers engaged the Police in banter. There was ample time and opportunity for the complainants to identify the Appellants. The evidence of PW1 and PW2, except for some few and insignificant inconsistencies, clearly placed the two Appellants at the Mai Mahiu Centre and in the journey to Nairobi. The evidence of PW4 who conducted the identification parades further corroborated the evidence given by PW1 and PW2. PW1 was able to identify both Appellants, while 2<sup>nd</sup> Appellant was not identified by the turn boy.

19. We do not think that the identification of the Appellants by their victims could be faulted under the principles argued by the Appellants in the case of ***Terekali v. the Republic***. The robbery took place on the night of 9<sup>th</sup> May 2009 and morning of 10<sup>th</sup> May 2009. The Appellants were apprehended on 10<sup>th</sup> May 2009 before they could even offload the timber at Umoja Inner Core. They were paraded and identified the day after, on 11<sup>th</sup> May 2009. There was as much chance as there is of a snowball in hell, that the robbery victims could be engaged in embellishment or made up cases, a day after they were carjacked and driven from Mai Mahiu to Nairobi. Their recollection was fresh, and there was no time for them to consult others, so as to contaminate their recollection with any measure of suggestibility. We think the Court properly looked at the totality of the identification evidence, and analyzed matters that may have undermined the reliability of that evidence.

20. There existed strong physical and testimonial evidence corroborating the evidence of PW1 and PW1. The 2<sup>nd</sup> Appellant was arrested at the crime scene at Umoja Inner Core. He had the ignition key for the recently stolen Mitsubishi Canter. He had the lorry itself, and the timber, both of which were destined for Mombasa. He was not able, under Section 119 of the Evidence Act, to rebut the presumption that he was a guilty possessor or indeed the thief, of these properties. The 1<sup>st</sup> Appellant went to the Police Station after being called by the 2<sup>nd</sup> Appellant, claiming to own the stolen lorry. He did not explain why he would be laying claim to a stolen lorry with its stolen cargo. He was shown to have played a major role in the planning of the robbery, by the evidence of PW3 Moses Njoroge Honge. The 1<sup>st</sup> Appellant hired the grey Nissan Sunny B15 registration KBF 953 S. He was an old customer of Moses, and had a retainer hire file, complete with identification documents. The 1<sup>st</sup> Appellant signed a hire agreement, paid Kshs. 6,000 and drove the car to Mai Mahiu. The complainant’s description of the car that drove them to Nairobi fitted the car hired by the 1<sup>st</sup> Appellant. The 1<sup>st</sup> Appellant did not return the car to PW3 as agreed, but abandoned the same at Mesora in Buru Buru and through a contact directed PW3 to pick his car from

Mesora. This was after the police had foiled the completion of the felony which was authored and directed by the 1<sup>st</sup> Appellant. The conduct of the 1<sup>st</sup> Appellant in relation to the hiring of the Nissan Sunny car from PW3 was quite incriminating. There was sufficient physical and testimonial evidence linking the two Appellants to the crime.

21. The Police were not attentive to detail in framing of the charges and in calling of evidence to support the charges. The failure of the main count one, relating to the theft of the motor vehicle was occasioned by this inattention to detail. Count two described the items stolen from Geoffrey Kinyua Wanjohi to be a phone, make Nokia, valued at Kshs. 6,000 and cash of Kshs. 3,800. The detail on the money stolen from PW2 matched his evidence, but the make of his phone in Court was stated to be Torando. It was important that the prosecution describe the phone with as much correct detail as would enable the Appellants to mount a proper defence. We do not think that failure to give such details resulted in a miscarriage of justice. It is not lost on this Court that PW1 also claimed to have lost a phone to the robbers, whose brand name he gave as Tornado 2626. The evidence given by the prosecution and details on the charge sheet ought to have clarified if there is a relationship between the mobile phone brand Nokia and Torando or Tornado 2626. We accept on the whole that details of property stolen should be given as correctly as possible, but unless it can be shown by the Appellants that error, omission or irregularity in the charge sheet or information occasioned failure of justice and went to the root of the offence charged with, we have no legal basis to reverse or alter on appeal the decision of the Lower Court based on such default. The Appellants could also have raised the issue of the defect earlier in the proceedings. In our view, however, failure to clarify if Tornado or Tornado is the same phone as, or part of the Nokia brand, did not go to the root of the charges, and in no way did it prejudice the Appellants. They were also found to have robbed from PW1 Kshs. 3,800 which was correctly described and supported in the evidence of PW1. The allegation that PW2 was variously named as Geoffrey Kinyua Wanjohi and Geoffrey Kinyanjui Wanjohi is groundless. Count 1 clearly gives PW2's name as Geoffrey Kinyua Wanjohi and PW2 gave the same name in his testimony. If he is described by any other name which does not belong to him in sections of the proceedings, this was a minor error which should have no significance to the quality of evidence through which the Appellants were convicted.

22. There is however strong reason to find substantive fault with Count 3 for which the 1<sup>st</sup> Appellant was convicted. The charge sheet does not reveal what law the 1<sup>st</sup> Appellant was charged under. How would he be expected to defend without being told what law he had violated? During plea taking, he is not recorded as having denied or admitted guilt on this count. The record indicates it was the 2<sup>nd</sup> Appellant who answered 'not guilty' to the second count. The trial Court may have made an error in recording the proceedings, but it was a fatal error, particularly given the other defect in the Count, pointed out in the foregoing. There was nothing therefore, upon which the 1<sup>st</sup> Appellant could be convicted on the offence of making a document without lawful authority.

24. In our view the unsworn statements made by the Appellants were adequately analyzed by the Lower Court before their rejection. The 1<sup>st</sup> Appellant attempted to blame his prosecution on the differences which arose between him and the Police over the alleged Kshs. 10,000 he paid to them to secure the release of his friend Jackson Matete Kisongosh. This evidence was correctly found to be diversionary and untrue by the Trial Court. There was absolutely no suggestion that police fabricated the evidence of PW1, PW2 and PW3. Jackson Matete had earlier testified in the proceedings before the trial restarted under a new Magistrate. He was not called after the trial restarted, and we may never know why. His earlier evidence however, did not match the evidence of the 1<sup>st</sup> Appellant given in the unsworn testimony. The 2<sup>nd</sup> Appellant similarly gave a highly improbable story that he was arrested for walking around Umoja at night without his identity card. He made no attempt to rebut his possession of the stolen motor vehicle, the ignition key and the stolen timber. He was arrested at the scene of the crime while offloading the timber. While the law recognizes that an accused person does not have to prove his innocence in a criminal trial, an accused person who is called to rebut a presumption, such as relates to the presumption of guilt in possession of recently stolen goods should always make some effort in creating a rebuttal. Requiring an accused person to rebut a presumption of guilt cannot be equated to shifting the burden of proof in a criminal trial from the prosecution to an accused person. Where the opportunity to explain has been given, and the accused persons choose engage the mind of the Court in a cock and bull story, they

cannot be heard to lament later of appeal that their respective statements in defence were disregarded.

25. The first Trial Magistrate was prevailed upon by the Appellants to disqualify herself on 21<sup>st</sup> September 2009, when most prosecution witnesses had closed their evidence and some of the exhibits produced in Court released to their owners. The prosecution applied to have the proceedings typed, and be allowed to rely on the evidence of exhibits already given in the previous proceedings, relying on Section 34 of the Evidence Act. The Appellants through their Advocate opposed this proposal vehemently, and pushed for total recall of evidence. The Trial Court made a ruling directing proceedings to be typed and exhibits admitted on the basis of the evidence in the previous proceedings. The Appellants' position is that subsequently, the Magistrate ought to have read and explained to them of their right to have witnesses recalled and cross-examined under Section 200 [3] of the Criminal Procedure Code. The trial under the new Magistrate resumed on 30<sup>th</sup> April 2010. The complainants gave evidence all over again and were cross-examined by the Appellants' Lawyer. PW1 was cross-examined on 30<sup>th</sup> April 2010, and further cross-examined by the Appellants' lawyer on 10<sup>th</sup> September 2010. There were other witnesses who were not only called to give evidence again before the new trial Magistrate, but were recalled after such evidence and re-cross-examined. The trial Court did not state to the Appellants in specific words that they had the right to have witnesses testify afresh under the succeeding Magistrate. It was however in the ruling of the trial Court relating to Section 34 of the Evidence Act Cap 80, that the adverse party in the first proceedings had the right and opportunity to cross-examine. The conduct of the proceedings after this ruling indicate the Trial Court fully paid regard to the Appellants' procedural rights, and it is difficult to see what prejudice was occasioned to them under Section 200 [3] of the Criminal Procedure Code, particularly as they were represented by a Lawyer at the material time in the proceedings. Witnesses were called, gave evidence afresh, were cross-examined and later recalled on the application of the Appellants, and subjected to fresh bouts of cross-examination.

26. In the end all the grounds of Appeal must fail except with relation to Count 3. We hereby Order:-

***[a] The 1<sup>st</sup> Appellant's Appeal on Count 3 is allowed, conviction quashed and sentence set aside;***

***[b] Appeal on Count 2 with respect to both Appellants is rejected and the decision of the Lower Court on conviction and sentence upheld; and***

***[c] Appeal on Count 4 with respect to the 2<sup>nd</sup> Appellant is rejected and the decision of the Lower Court on conviction and sentence upheld***

Dated and delivered at Nairobi this 20<sup>th</sup> day of November 2013

Monica Mbaru

James Rika

Judge

Judge