



robbers.

**6. P.W. 4** is the arresting officer. He was stationed at Kiandutu AP Post. The Appellant Martin Mwaura Wairimu was brought to him by members of the public. Upon interrogation the Appellant mentioned the 2<sup>nd</sup> and 3<sup>rd</sup> accused who were also arrested. They also arrested one Cecily who after interrogation was released. The 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were acquitted under Section 210 of the Criminal Procedure Code as they were not identified by the complainant during the robbery.

7. In his defence the Appellant gave unsworn evidence and called one witness. The Appellant in his defence alleged that he had been employed by the complainant. He left that employment and went to work for one Cecily, whom he left and soon became self employed. He alleges to have been at a crusade when the complainant and her husband went to ask him for their stolen items. He denied the same and they took him to the police station where he was arrested when the complainant identified him as one of the robbers. He denied that he was called "Weche". He called one witness who testified that the Appellant was not called Weche as they had been in school together and could have known that name. The witness also testified that the Appellant used to work for the complainant. The witness also stated that "Weche" was in fact the complainant's boyfriend whom she put up with when she separated from her husband.
8. The trial magistrate found that the prosecution had proved its case beyond any reasonable doubt and that:-

1. ***A robbery had taken place.***
2. ***That the robbers were armed and used personal violence.***
3. ***That the accused was one of the robbers.***

The trial magistrate found that the Appellant was properly identified by the light from the torch and by his voice by both P.W. 1 and P.W. 2.

9. This is the first appeal in this matter. It is the duty of this court to appraise and re-evaluate the evidence adduced at the trial court and to arrive at an independent decision based on that evaluation. We have very carefully done that. Firstly, we have noted that the trial court found that the appellant was properly identified by both P.W. 1 and P.W. 2. P.W. 1 saw the Appellant with the help of torch light and his voice. P.W. 2 also testified that he saw the Appellant even as he lied down. He also recognized the Appellant's voice. For us, the issue of identification of the Appellant is paramount and crucial. So crucial, in fact, that if there is even a scant doubt the conviction by the trial court cannot stand.
10. P.W. 1 is alleged to have identified the Appellant with the aid of torch light and his voice. While this may be possible, it is a kind of identity which must be corroborated to remove any sense of doubt. The alleged corroboration to this is P.W. 2's evidence.
11. It is noteworthy that P.W. 2 was on his belly lying on the floor. His testimony that he saw the accused cannot be without doubt, even if he also alleges to have recognized the voice. We are not in the circumstances, satisfied that it was safe for the trial court to convict the Appellant on the basis of identification aided by light from a torch. Secondly, voice recognition can be misleading, leave alone a situation where one can decide to mimic someone else. It is noted that the Appellant in his defence denied that he was "Weche". Yet the voice that was recognized by the P.W.1 and P.W. 2 belonged to "Weche". The trial court found that the Appellant was indeed "Weche". That could be true. However, what about if the voice of Weche was mimicked in order to frame the said "Weche".
12. The trial court also found that there was violence used in the robbery. However, the weapons used in the said violence are not mentioned in the charge sheet. The evidence of the P.W. 1 and P.W. 2 that a panga was used does not come out forcefully. In fact, in this regard, the learned trial magistrate does not find as a fact that a weapon was used or that violence was meted but actually

infers that from the circumstances.

13. In his defence also the Appellant insisted that he had been employed by P.W. 1 and that indeed “Weche” was the boyfriend of P.W.1. In our view, this case brings out several issues which raise a lot of doubt.

- *Was Appellant an employee of P.W.1, and would P.W. 2 have had a grudge against the Appellant arising from that alleged employment.*
- *Was “Weche” the boyfriend of P.W. 1?*
- *Did the appellant use or threatened to use violence?*
- *Was the Appellant identified?*

14. These are weighty issues. We have reviewed the entire evidence. In our mind, while we appreciate the effort of the trial court in attempting to answer above issues, there is still a doubt in our mind regarding all the above issues.

15. The short of the above is that where there is any doubt, it is given to the favour of the Appellant. We believe that it was unsafe to convict the Appellant and sentence him to death on the basis of the available evidence. We hereby allow the appeal, quash and set aside the conviction and sentence, and set free the Appellant forthwith unless lawfully held.

**DATED, READ AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF NOVEMBER 2013**

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**E. K. O. OGOLA**

**JUDGE**

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**J. KAMAU**

**JUDGE**

**PRESENT:**

..... **for the Appellant**

..... **for the State**

**Teresia & Kipkurui - Court Clerks**