



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NUMBER 676 OF 2010

(From original conviction and sentence in Nairobi Chief Magistrate's Court Criminal Case No. 1304 of 2009, G W Ngenye Macharia, PM on 24th November, 2010)

LUKAS WANYENYE NJOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant in this appeal, **Lukas Wanyenye Njoki**, was among 6 other accused persons charged with 7 counts in the Magistrate's Court in Nairobi Chief Magistrate's Criminal Case No. 1304 of 2009 as follows:

COUNT I

CHARGE: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

- (1) LUKAS WANYENYE NJOKI
- (2) GERALD MWANGI KAMANGUA ALIAS OCS
- (3) ELIUD KAGIRI MACHARIA (4) PETER KAMAU MUREU
- (5) LOSHILALE SINGO KAUMON (6) PETER KINYUA MUCHIRI:

On the 30th day of June 2009 at Dandora Phase 1 in Nairobi within Nairobi Province, jointly with others not before court, being armed with dangerous weapons namely AK 47 rifles and pistols robbed ANTHONY MWANGI KAMAU of his motor vehicle registration number KBA 781H Toyota Corolla 110 value at Kshs.500,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ANTHONY MWANGI KAMAU.

COUNT II

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

- (1) LUKAS WANYENYE NJOKI

(2) GERALD MWANGI KAMANGUA ALIAS OCS

(3) ELIUD KAGIRI MACHARIA

(4) PETER KAMAU MUREU

(5) LOSHILALE SINGO KAUMON

(6) PETER KINYUA MUCHIRI:

On the 30th day of June 2009 at Saika along Kangundo Road in Nairobi District within Nairobi Province, jointly with others not before court being armed with dangerous weapons namely AK 47 rifle and pistols robbed NELSON OCHIENG ADHOK of his wallet, Kshs.500/= and mobile phone make Nokia all valued at kshs.12,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said NELSON OCHIENG ODHOK.

COUNT III

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

(1) LUKAS WANYENYE NJOKI

(2) GERALD MWANGI KAMANGUA ALIAS OCS

(3) ELIUD KAGIRI MACHARIA

(4) PETER KAMAU MUREU

(5) LOSHILALE SINGO KAUMON

(6) PETER KINYUA MUCHIRI:

On the 30th day of June 2009 at Saika along Kangundo Road in Nairobi District within Nairobi Province, jointly with others not before court, being armed with dangerous weapons namely AK 47 rifle and pistols robbed JEREMIAH ODHIAMBO OKOTH of his driving licence and Kshs.12,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ANTHONY MWANGI KAMAU.

COUNT IV

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

(1) LUKAS WANYENYE NJOKI

(2) GERALD MWANGI KAMANGUA ALIAS OCS

(3) ELIUD KAGIRI MACHARIA

(4) PETER KAMAU MUREU

(5) LOSHILALE SINGO KAUMON

(6) PETER KINYUA MUCHIRI:

On the 30th day of June 2009 at Saika along Kangundo Road in Nairobi District within Nairobi Province, jointly with others not before court being armed with dangerous weapons namely AK 47 rifle and pistols robbed EUGINE NELSON MANDELA OCHIENG of his wallet, kshs.500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said EUGINE NELSON MANDELA OCHIENG.

COUNT V

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

(1) LUKAS WANYENYE NJOKI

(2) GERALD MWANGI KAMANGUA ALIAS OCS

(3) ELIUD KAGIRI MACHARIA

(4) PETER KAMAU MUREU

(5) LOSHILALE SINGO KAUMON

(6) PETER KINYUA MUCHIRI:

On the 30th day of June 2009 at Saika along Kangundo Road in Nairobi District within Nairobi Province, jointly with others not before court being armed with dangerous weapons namely AK 47 rifle and pistols robbed KALVIN ONYANGO OTIENO of ATM (Standard Chartered), wallet, 3 US dollars, Kshs.600/= all valued at Kshs.834/= and at or immediately before or immediately before or immediately after the time of such robbery threatened to use actual violence to the said KALVING ONYANGO OTIENO.

COUNT VI

ATTEMPTED MURDER CONTRARY TO SECTION 220(a) AS READ WITH SECTION 388(1) OF THE PENAL CODE

(1) LUKAS WANYENYE NJOKI

(2) GERALD MWANGI KAMANGUA ALIAS OCS

(3) ELIUD KAGIRI MACHARIA

(4) PETER KAMAU MUREU

(5) LOSHILALE SINGO KAUMON

(6) PETER KINYUA MUCHIRI:

On the 30th day of June 2009 at Saika along Kangundo Road in Nairobi District within Nairobi Province, jointly with others not before court attempted unlawfully to cause the death of GEORGE ATAI by shooting him on his left side chest.

COUNT VII

KIDNAPPING OF A PERSON IWTH INTENT OT SECRETLY AND WRONGFULLY CONFINE CONTRARY TO SECTION 259 OF THE PENAL CODE

(1) LUKAS WANYENYE NJOKI

(2) GERALD MWANGI KAMANGUA ALIAS OCS

(3) ELIUD KAGIRI MACHARIA

(4) PETER KAMAU MUREU

(5) LOSHILALE SINGO KAUMON

(6) PETER KINYUA MUCHIRI:

On the 30th day of June 2009 at Saika along Kangundo Road in Nairobi District within Nairobi Province, jointly with others not before court kidnapped EUGENE NELSON MANDELA with intent to secretly and wrongfully confine the said EUGENE NELSON MANDELA.

Being dissatisfied with the conviction and sentence, the appellant has appealed against the same on the following grounds:

1. **That, the learned trial magistrate erred in both law and fact, by basing my conviction on evidence of a single identifying witness p.w.9 without considering that it was obtained in difficult circumstances and therefore unsafe.**
2. **That, the learned trial magistrate further erred in failing to consider that the description given in court by P.W.9 was not supported with the evidence of the earliest report to the police as required by law.**
3. **That, the learned trial magistrate erred in inferring that this is a case of recognition without seeing that it is even worse a case of dock identification without support of the same parade**

form.

4. That, my defence of denial was not considered for what it was meant as required by law.

After hearing the Court acquitted the appellant's co-accused but convicted the appellant on counts 3 to 7 and sentenced him to death in respect of counts 3 to 5 and made no orders with respect to counts 6 and 7.

The brief facts as can be gleaned from the record are as follows: PW1, **Anthony Mwangi Kamau**, a taxi driver with motor vehicle registration no. KBA 781H was on 30th June 2009 at 3.00am on duty when he was called by his client, **Patrick Njoroge** who testified as PW2, to pick him from his place of work at Dancing Pool Bar along Mama Ngina Street and take him home at Dandora Phase 5. After picking PW2 and on arriving at Pangani CDC stage PW2 told PW1 to allow him 5 minutes to talk to his friend which he did and they continued with the journey. The witness however did not see who PW2 talked to and on arrival at Kariobangi roundabout they came across a stationary vehicle of the road and noted that there was a vehicle behind him at high speed but PW2 told him not to worry. On reaching the bumps at Wamwere Stage the said vehicle caught up with them and when PW1 attempted to turn the vehicle into a police station the said vehicle blocked them and he continued with the journey with the said vehicle still in hot pursuit. However on reaching other bumps the said vehicle blocked them and they could not proceed and two men alighted therefrom both wielding guns one of whom came to PW1's side while the other went the opposite side. They were then ordered to go to the back seat and bend their heads. One of the attackers drove the vehicle and after diverting to a rough road stopped and they were ordered to get into a house. According to the witness the vehicle that blocked them was following behind them though he was unable to note the car's registration number. There were six young men and whereas outside there was electric light the said men were using mobile phone spot lights and according to PW1 he could see them when they went outside. The two men who had hijacked them left them with the six young men who robbed them of all their personal belonging and they stayed in the house for between 2-3 hours while the young men who were armed with a small gun were questioning them if they had relatives abroad and if their relatives were rich. In the meantime there was communication between the young men and the said hijackers in Kikuyu language. Between 6.00 and 6.30 am four of the said young men accompanied them to Jester Stage where they were abandoned from where they got a lift to Kinyago Police Post where they reported but were held until the owner of the car arrived and confirmed that PW1 was his driver. They then went to Buruburu Police Station where they recorded other statements. Later he was called to the same Police Station where he identified the appellant as one of the men who escorted them to the bus stage based on a mark on his fore face. He however said that he did not know the appellant before. In cross-examination he admitted that he never saw the appellant after their car was blocked since he never raised his head as the assailants were armed. Though in the house they could communicate with the assailants despite the fact that their heads were bent as the thugs were lighting one phone while talking to them and the light was directed to the person being questioned and it was bright light. There was also electric light from the neighbouring houses by which PW1 could see them. According to him, it was the appellant who was talking on phone and communicating with the other assailants and he saw the mark while he was escorting them to the bus stop. He was on the back seat when they were being escorted and his head was bent and that the appellant never looked behind so could not see the mark then. According to PW1 only the appellant had the mark among the members of the parade. He however denied having watched the news of the incident. Asked about the description the witness said that he did not describe the assailants though he told the police that he could identify them. He further stated that he did not know how the appellant was arrested and that the appellant did not talk to him while they were in the house and never saw him with any weapon. In re-examination he confirmed that the lighting was from the neighbouring houses. He clarified that the following morning they were taken to the bus stage on foot.

PW2, confirmed that on the said date he was picked up with PW1 and they stopped at Pangani where he wanted to see someone and not finding him they continued with their journey and they were followed by a vehicle which eventually caught up with them and two armed men alighted therefrom. When they surrendered they were bundled into the back seat after taking control of the vehicle. Since it was at night and he was frightened he was unable to recognise any of them. They were eventually taken to a house which had six men where they remained between 3.00am and 6.00am. According to him the six men were talking in whispers and robbed him of a mobile phone and Kshs 2,000/-. At 6.00am four men escorted them on foot to the bus stage during which time they warned them not to look at them a warning which he

obeyed so was unable to identify them. At the stage they got a lift to Kinyago Police Post and reported where they were initially treated as suspects and locked in after which they were transferred to Buruburu Police Station where they recorded their statements. Later he was called to go for identification parade in which he identified accused 4 as one of the person who escorted them to them and who according to him behaved like the commander. In cross examination he said he had never seen the appellant.

On 30th June 2009 at 5.50 am, PW3, **Atai George**, was driving alone to work from his house in Saika Estate when a few metres from the gate he saw a car packed besides the road. When he started overtaking the vehicle, another vehicle emerged from the opposite side of the road and blocked him but due to the fact that it dark and it was so sudden he never marked the vehicle's registration number. He saw a shadow on his left, heard a bang and felt pain on his body and tried to reverse but due to the shock was unable to do so and due to the fright he had slumped on the steering wheel. He heard voices ordering him to open the door and after a while the voices went dead and heard the voices shouting he had been shot which he confirmed and he was taken to Nairobi Hospital where he was admitted for 11 days. According to him he was shot on the right side of the chest. After being discharged he was issued with a P3 form. He noted that his vehicle had a lot of blood and was damaged. He was however unable to identify the attackers because the light from the vehicle which blocked him were directed on him.

PW4, **Jeremiah Odhiambo Okoth** was on 30th June 2006 at 5.40 am coming from Saika Estate with the deceased, PW5, **Kalvin Onyango** and PW5's son, **Eugine Mandela**, PW9, in motor vehicle registration no. KAN 177F when they were blocked by motor vehicle registration no. KBA 871H out of which three people came ordered them to lie down and surrender everything they had which they did after which they were ransacked. Another vehicle approached from behind and on seeing what was going on started reversing but was shot at. According to PW4 he lost Kshs 12,000/- and that the incident took less than 10 minutes. However, PW9 was bundled in the vehicle belonging to the attackers in order to seek ransom after which they drove on Kangundo Road. PW1 and PW5 reported the incident at Kayole Police Station and that another lady who came from Saika Estate rushed the shot man to the Hospital. According to him he only managed to identify the 2nd accused who was not armed as the man who was ransacking his pockets. According to him the said accused was not armed. Later PW4 was called to Kayole Police Station where he identified the vehicle which had blocked them and the 2nd accused. He however said that he did not know the appellant prior to the incident and did not recognise any of the accused persons.

PW5, confirmed that on 30th June 2009 he was robbed in the morning as he was going to work in the morning when another vehicle blocked them and they were ordered to surrender and they were ransacked by the robbers one of whom had a gun. He surrendered his wallet containing Kshs 600/- and ATM card and USD 3 and passport size photograph. As they lay down another vehicle emerged from the estate and when the driver attempted to reverse he was shot and one of the robbers took PW9 and put him in their car and they drove off saying they would demand ransom. He was found after 3-4 days. He reported the incident at Kayole Police Station but was unable to identify any of the robbers.

PW6, **PC Thomas Simiyu** was on 3rd July 2009 on night duty with **Corporal Kilonzo** at Dandora Police Post when at 9.30pm he was called by Deputy OCPD Mr Maringa and asked to go to Dandora Phase III and search a house following a kidnapping report. On opening one of the houses which was latched from the outside, they found PW9 sleeping on the bed who informed them that he had been kidnapped and that his kidnappers had left shortly before the officers arrived. They then arrested the occupants of the Flat and took them to Jogoo Police Station. Of the 12 people arrested he identified the appellant, the 2nd and 3rd accused. According to him although the Estate has electricity the plot in question did not have. He confirmed that the appellant was arrested in a house within the same area although he did not bother to know who the owner of the house was although he said there could be a plot in between the appellant's house and where they found PW9 which were 50 metres apart. He confirmed that the appellant as arrested in his house.

PW7, **Wilfred Mwangi Kamau**, confirmed that motor vehicle registration no. KBA 781H was his and that PW1 was his driver and that he received a report that the same was hijacked and he reported the same to car track and the same was found in Dandora Phase 1 near a river but without a jack, spare wheel and

other items in the boot. He however did not know the accused.

PW8, **IP George Amyoja** carried out identification parade for the appellant which was done on 6th July 2009 and was identified by PW1, According to him he was unaware that the matter had been highlighted in press before the parade. While stating that he did not think that members of the parade were the same in all the parades he did, he said that the suspects are not of similar physical appearance. Referred to exhibits 4, 5 and 6 he confirmed that the members of the parade were the same and that they were suspects in the cells who were chosen by the suspects.

PW9, **Eugene Ochieng**, a minor. Testified that on 30th July 2009 at 5.45 am he was going to School in the company of his cousin called Calvin and his father who had called a person by the name Jeremiah to pick them up and on joining Kangundo Road they were attacked by 3 people from a vehicle in front of them who ordered them to alight and lie down ransacked their pockets. He lost Kshs 700/- in the process. The said robbers also shot at a motorist who came along. They later took him to their car and drove along Kangundo Road to Juja Road. In the car there were 4 thugs one of whom had an AK 47 and he was able to identify one. When they reached Dandora he was told to alight and he was blindfolded and was placed in a house where he was interrogated about his family background. He was later taken to another house which had no lights where he fell asleep in the company of two other men whom he was unable to see clearly. The following morning one of them left and returned during the day. In the evening he fell asleep and when he woke up he found nobody and when he tried to escape someone came and threatened that he would shoot him. He was warned against looking at the kidnappers and was beaten and was told to remove his uniform and given other clothes to wear. He was removed and taken to another house with two men and spent one night there where he was being guarded in shifts. At 7.30pm he was removed and taken to a fourth house where he was given bread and soda after which he slept and woke up at 12.00 when he heard a knock on the door which was opened and police officers entered and after narrating to them his ordeal he was taken to the police station. While in the second house he peeped through the steel grills and saw a woman but when he sought help from her she did not talk to him. Later he went to an identification parade and identified the appellant as the person he saw at the scene of the robbery and in the house and as the person who was wielding a gun and as the person who beat him although he did not know him before the incident. In cross examination he said that while going to the house he was blindfolded so he did not see them in the car. All the houses according to him had no electricity. He recorded in his statement how the appellant looked and described him as brown with red eyes and shaggy hair.

PW13, **Corporal Charles Kihoro**, was one of the police officer who rescued PW9 and arrested the appellant within the vicinity where they found PW9. PW14, **Inspector Painito Bera** conducted identification parade at which the appellant was identified by PW9. He said the other accused persons were not members of the parade and that the members were almost similar in physical appearance and none had a scar or spot. According to him he was unaware that the suspects were in the media before the parade. PW14, **Zephania Kamau** was the one who prepared the P3 form for PW3 while PW15, George Ojuka, was the investigations officer who after interviewing the witnesses charged the accused. He however took over the case after all the accused had been arrested and the identification parades were conducted by the time he took over. According to him the media people came and so accused's were broadcast in the media and this was before he zeroed in on the 6 accused. According to him there were many people who had been arrested in Kayole and Dandora and when the media came they found many suspects. He however denied that he was the one who called the media and could not tell the purpose of their presence, although by that time he had not zeroed in on the 6 accused and before the parades were done. However accused 1-4 must have been in the group broadcast. According to him the parade would fail if some members of the parade are the same since each accused person should be paraded with different members.

In his unsworn statement, the appellant stated that on 2nd July 2009 he went to work in the morning and closed his business in Dandora Phase 5 at 5.30pm and returned home at 7.00pm and went to bed at 9.30pm. At midnight his door was knocked and his wife thinking they were thieves screamed and the people knocking introduced themselves as police officers. Two police officers entered the house one of whom knew him and after conducting a search recovered nothing. He was then handcuffed and informed

that they working on the orders of their boss to arrest all the young men in Dandora Phase 3. He was put in a vehicle in which he found other young men and taken to Buruburu Police Station where he was locked up. He was later called out of the cell and they were paraded before the media and informed that they would be charged with capital robbery, murder and kidnapping. Thereafter an identification parade was conducted in which the members of the parade did not resemble while he had one shoe and PW1 and PW9 pointed at him. He was later charged with the offence of which he stated he was innocent.

In her judgement the learned trial magistrate found that the description given by PW9 of the appellant matched the appellant's description which PW9 described in his statement. Which not only strengthened PW9's evidence but convinced the Court that PW9 was a trustworthy witness. The Court found that the fact that the appellant beat up PW9 when the latter tried to escape brought the two face to face which enabled PW9 to identify him as the same person who was holding the gun at the scene of the robbery. According to the trial magistrate this amounted to recognition as opposed to identification. According to the learned trial magistrate there was no possibility of mistaken identification hence the appellant's defence that he was not at the scene of robbery against PW4, 5 and 9 could not stand. With respect to the media, the Court stated that PW9 recorded his statement long before the media parade in which he described the appellant and since he stated that he did not see the media coverage, the said coverage had no adverse effect on the decision as it did not in any way influence the manner in which PW9 recognised or identified the appellant hence the conviction and sentence aforesaid.

In his submissions the appellant contended that PW9's observation was not in composed state of mind but in circumstances of shock and fear of death or injury and that the observation time was very short in stolen glances. He further submitted that the learned trial magistrate did not inquire into the nature of the light available, its size and position relative to the suspect. It was therefore submitted that the identification by the single witness ought not to have been relied upon since in such matters a witness may be honest yet mistaken. It was further submitted that although PW9 testified that he recorded the description of the appellant, the evidence of such first report was not put in evidence and that PW9's evidence was further weakened by lack of supporting parade form. The appellant further submitted that his defence was never considered.

As this is a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanor of witnesses. Even where, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336; Coghlan vs. Cumberland (3) [1898] 1 Ch. 704.**

It is clear from the judgement of the learned trial magistrate that without the evidence of PW9, there was no basis upon which the appellant could have been convicted. That evidence was clearly evidence of a single witness. The learned trial magistrate however found that PW9's evidence was evidence of recognition rather than that of identification since PW9 was at the scene of the robbery and was also kidnapped and was beaten by the appellant while in captivity. It is however clear that before the date of the incident PW9 did not know the appellant. Recognition would therefore only apply if PW9 saw the appellant at the scene of the robbery which would amount to identification and then saw him again in the house where he was kept in which case the latter could then be termed as recognition.

What then is the distinction between recognition and identification? In **Peter Musau Mwanzia v Republic [2008] eKLR**, the Court of Appeal expressed itself as follows:

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the

incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition.”

It was PW9’s evidence that when he saw the appellant after he had been kidnapped he was able to recognise him as the person whom he had seen at the scene of the robbery wielding a gun. According to PW9, the appellant was the person who beat him up when he attempted to escape from the room in which he had been kept. While it is true that this was evidence of a single witness, as it was held in Anjononi & Others vs The Republic [1980] KLR 59:-

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

In Stephen Karanja vs. Republic [2011] eKLR, the Court of Appeal held:

“The evidence of the complainant was that the robbery took place at about 8:00 a.m. hence in broad daylight. The appellant was known to the complainant prior to that day. This makes the evidence of identification, although by a single witness, free from any possibility of error as it was, indeed, evidence of recognition.”

Therefore the mere fact that the identification is by a single witness does not necessarily render the conviction based thereon fatal if the conditions were such that the identification was satisfactory. In this case PW9 had occasion to see the appellant at the scene and in captivity where the appellant even punished him for attempting to escape. There was no evidence that the appellant concealed his identity at the time when PW9 was being beaten. PW9 described the appellant’s features before the parade and the mere fact that his initial statement was not produced is not necessarily fatal. However as was held in Nathan Kamau Mugwe vs. Republic [2009] eKLR:

““James swore he saw the appellant from the time they met and negotiated the fare and was with him from the place of hiring upto the place where he was attacked and tied up. The appellant was sitting next to him on the front passenger seat. The trial Magistrate and the first appellate court were satisfied that James had ample time to see the appellant during the period the two were alone in the vehicle and also at the beginning of the journey. James had no difficulty in identifying him at a properly conducted identification parade.... We think the identification of the appellant was, in all the circumstances of the case, sound and even if the two courts below had excluded the evidence of Mwendo with regard to the parade, they would have inevitably come to the conclusion that the appellant had been properly and correctly identified as the person who had hired James at Cheers Makuti Bar and subsequently robbed him in the company of another person.....As to the complaint in ground six that the witnesses had not given to the police a description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL’s case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness “SHOULD” be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify

him. In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.”

While it is true that the parade form was not produced in evidence for some unknown reasons, as the evidence of PW9 was not purely evidence of identification but both identification and recognition, the failure to produce the said form is not in our considered view fatal to the conviction of the appellant. In any case in Muiruri & 2 Others vs. Republic [2002] 1 KLR 274, the Court of Appeal stated at pg. 277 between paragraphs 25 and 40:-

“We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo v. Rep (1953) 20 EACA 166, Roria v. Republic [1967] EA 583, and Charles Maitanyi v. Republic (1986) 2 KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”

As indicated elsewhere in this judgement this Court sitting as a first appellate court is duty bound to re-evaluate the evidence adduced before the trial court but not forgetting that it neither saw nor heard the witnesses testify. We have done and having considered the prosecution evidence as well as the statement by the appellate we are satisfied that the appellant’s conviction on counts 3 to 7 was safe. Accordingly nothing turns on the allegation that the appellant’s defence was never considered. We however wish to rely on Isaac Njogu Gichiri vs. Republic [2010] eKLR, where the Court of Appeal held as follows:

“With regard to failure by the superior court to give due consideration to the appellant’s defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: *“I find that the defence of the 5th accused is not true.”* We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: *“The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances.”* We agree with this confirmation.

However with respect to the sentence, in John Kinyua Miriti V Republic [2011] eKLR, the Court of Appeal stated:

“On sentence, this Court has said time without number that it is improper to sentence an accused person to death on more than one count. For the foregoing reasons, we dismiss the appeal with an order that the sentence of death in the second count relating to robbing, Simon Newesa Lei shall remain in abeyance.”

Similarly in Fanuel Makenzie Akoyo vs. Republic – Criminal Appeal No. 45 of 2006 (unreported) the Court of Appeal said:-

“Regarding sentence the appellant was sentenced to death in respect of three counts of robbery with violence. That was in our view, erroneous as the appellant cannot logically suffer death twice or thrice. We accordingly correct the error by setting aside the sentences in counts 2 and 3. The result is that the appellant shall suffer the sentence of death in count 1 only.”

Accordingly, this appeal is dismissed and the sentence of death imposed on count 1 is upheld. However

pursuant to section 354(3)(b) of the *Criminal Procedure Code* we order that sentences on the rest of the counts shall remain in abeyance.

Subject to the foregoing this appeal fails and is dismissed.

Judgement accordingly

Judgement read, signed and delivered in open court this 11th day of December 2013.

F N MUCHEMI

JUDGE

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Ms Mwaniki the State Counsel