



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL 276 OF 2009

JAPHET GITUMA JOSEPH1ST APPELLANT

DAVIN BUNDI MIKWA2ND APPELLANT

ALFANO MWONGERA3RD APPELLANT

VERSUS

REPUBLIC RESPONDENT..

(From the Original conviction and sentence in criminal case No.287 of 2008 by Hon. M. S. G. Khadambi, PM Meru delivered on 24th December, 2009)

J U D G M E N T

The three Appellants were jointly charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code. The 3rd Appellant Aflano Mwongera faced a third count of preparation to commit a felony contrary to Section 308(1) of the Penal Code.

The facts of the prosecution case as stated in the charge sheet are as follows:-

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

On 19th day of June, 2002 at Mugene Trading Centre Kithoka s/location in Meru Central District within the Eastern Province, jointly with others not before court while armed with offensive weapons namely a rifle and axes robbed Elijah Imathiu of his coat, a revolver pistol/S.No.BBU 2133 with five rounds of ammunitions, cash Kshs.30,000/- and 250 US dollars all valued at Kshs.190,000/- and at or immediately before or immediately after the time of such robber used actual violence to the said Elijah Imathiu.

COUNT II: Robbery with violence contrary to Section 296(2) of the Penal Code.

1. JAPHET GITUMA JOSEPH 2. DAVID BUNDI MIKWA 3. ALFANO MWONGERA

On 19th day of June, 2002 at Mugene Trading Centre Kithoka s/location in Meru Central District within the Eastern Province, jointly with others not before court while armed with offensive weapons namely a rifle and axes robbed Joseph Mudambi of cash Kshs.4500/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Joseph Mudambi.

COUNT III: PREPARATION TO COMMIT A FELONY CONTRARY TO SECTION 308(1) OF THE PENAL CODE:

ALFANO MWONGERA: On the night of 12th day of August, 2002 at Makutano trading Centre in Meru Central District within Eastern Province was found armed with a dangerous or offensive weapon namely a panga in circumstances that indicate that he was so armed with the intent to commit a felony namely robbery.

After full trial, the Appellants were found guilty on two counts of robbery with violence and convicted by the trial court. The 3rd Appellant was acquitted on third count of preparation to commit a felony. Consequently, the Appellants were each sentenced to suffer death.

The Appellants being dissatisfied by the conviction and sentence of the learned trial Magistrate filed three separate appeal relying on the following grounds.

The first Appellant in his petition of appeal(HCCRA No.274/2009 listed the following grounds.

- 1. That, the learned trial Magistrate erred in law and in facts in failing to observe that the circumstances prevailed at the scene couldn't warrant a positive identification and or recognition.**
- 2. That the learned trial Magistrate erred in law and facts in failing to find that there was no any first report given to the police.**
- 3. That the learned trial Magistrate erred in law and facts in failing to observe the prosecution failed to summon vital witnesses for a just decision to be reached.**
- 4. That the learned trial Magistrate erred in law and facts in failing to find that the prosecution gave contradictory and conflicting testimonies.**
- 5. That the learned trial Magistrate erred in law and facts in making her own opinion which led to her to make a wrongful finding.**
- 6. That the learned trial Magistrate erred in law and facts in failing to hold the second count in abeyance.**
- 7. That the trial Magistrate erred in law in failing to uphold that the provisions of Section 72(3) of the Constitution was flouted.**
- 8. That the trial Magistrate further erred in dismissing and disregarding the preferred sworn defence without giving any cogent reasons for the same.**
- 9. That grounds herein have been drafted in the absence of certified copy of the lower court proceedings, I pray to be served with the same to enhance me draft further firm supplementary grounds.**

The 2nd Appellant in is petition of appeal(HCRA 275/2009) listed the following grounds:-

- 1. That, the learned trial Magistrate erred in law and in facts in failing to observe that the circumstances prevailed at the scene couldn't warrant a positive identification.**
- 2. That the learned trial Magistrate erred in law and facts in failing to find that the prosecution failed to summon vital witnesses for a just decision to be reached.**
- 3. That the learned trial Magistrate erred in law and facts in failing to note that there was an existing grudge between I and PW1 and PW2.**
- 4. That the trial Magistrate erred in law and facts in failing to find that there was not any report given to the police with my names.**
- 5. That the trial Magistrate erred in law and facts in failing to find that the provisions of Section 72(3) of the Constitution was flouted.**
- 6. That trial Magistrate erred in law and facts in failing to note that the prosecution witnesses gave contradictory evidence.**
- 7. That the learned trial Magistrate erred in law and facts in dismissing the preferred defence without giving any cogent reasons for the same.**

The third Appellant in his petition of appeal(HCCRA No.276/2009 listed the following grounds:-

- 1. That, the learned trial Magistrate erred in law and in facts in failing to observe that the circumstances prevailed at the scene couldn't warrant a positive identification.**
- 2. That the learned trial Magistrate erred in law in failing to find that the Section 72(3) of the Constitution was flouted.**
- 3. That the learned trial Magistrate erred in law and facts in failing to find that vital witnesses were not summoned in the trial case of for a just decision to be reached.**
- 4. That the trial Magistrate erred in law and facts in failing to find that the prosecution witnesses gave contradictory testimonies.**
- 5. That the trial Magistrate erred in law and facts in making presumptions and extraneous matter which led her to make a wrongful finding.**
- 6. That the trial Magistrate erred in law and facts in failing to find that there was no any first report given to the police.**
- 7. That the trial Magistrate erred in law and facts in failing to put the second count in abeyance.**
- 8. That the trial Magistrate erred in dismissing the sworn defence without giving cogent reasons contravening the provisions of Section 169(1) CPC.**
- 9. That the grounds herein have been drafted in the absence of certified copy of the lower court proceedings, hence I pray to be served with the same to enable me construct further firm grounds of appeal.**

During the hearing of the appeal the first Appellant opted to produce written submissions to support his appeal. The first Appellant referred to evidence of PW1, PW2 and PW3. He submitted that on page 28 of typed proceedings last line PW3 stated that he identified first Appellant through the yellow T-shirt. That apart from PW3 the others did not give any description of the first Appellant. He further submitted the arresting officers did not give evidence before the trial court. He submitted that he had not committed any offence and prayed he be acquitted.

The 2nd Appellant on the other hand, opted to submit written submissions to support his appeal. According to the second Appellant on page 18 of typed proceedings line 14, PW1 stated that the man with the rifle ordered them to lie down. On the other hand according to the 2nd Appellant on page 27 line 5 of the typed proceedings, PW2 stated that he did not see the 2nd accused during the robbery. The 2nd Appellant also referred to page 29 lines 27-29 and stated that there was no sufficient light in the bar and if there was sufficient light in the bar then all witnesses would have seen similar things. He submitted under page 20 line 10 that the witnesses said they were not drunk and then asked if the witnesses were not drunk what then stopped them from identifying the robbers?. Why did not the witnesses give the 2nd Appellants name? He submitted his name was not given during the first report either to the Chief or police. On page 44 lines 21-26 of the typed proceedings the 2nd Appellant submitted that the O.B did not contain any names of the suspects but of a group of 5 men. The 2nd Appellant submitted that as the complainant knew him if he was amongst the robbers he should have mentioned the Appellant's name and should have given it in the first opportunity that he had. On page 22 line 32 he submitted should have reported what he stated in the O.B.

On page 44 lines 14, PW8, the Appellant pointed out that Investigating Officer, stated that it was important in the first report for names of the suspects to be given. Appellant submitted PW8 stated he could not understand how the case came to be without any basis in the O.B.

According to 2nd Appellant he was only framed since PW1 is his neighbor who has bought land from 2nd Appellants family. The 2nd Appellant further submitted page 21 line 11 to 13 of the typed proceedings states how his brother stole maize from the land of the complainant and sold, consequently, the Appellant submitted that the complainant wants the 2nd Appellant to die in prison so that he can take the 2nd Appellant's land.

The third Appellant on his part, similarly opted to produce written submission to support his appeal. According to the third Appellant he was arrested for a different offence. He submitted that he explained that he was not involved in the offence with which he was charged with. The Appellant submitted that the police told him he would be informed about the offence later "Utajuambele". According to 3rd Appellant the complainant did not identify him. His name was not given to Police Officer by the complainant though the complainant named 3rd Appellant as his customer for miraa. He submitted that he was not explained the reason for his arrest as he had not committed any offence. He stated that he was arrested on 12/8/2002 and the offence had been committed on 19/6/2002. He prayed that he be released to join his family.

On the other hand, the appeal has been opposed by the learned State Counsel Mr. Musau who appeared for the Republic. Apart from the above, the learned State Counsel submitted that the Appellants were tried in criminal case No.1564 of 2002 and were all convicted and death sentence was passed. That the Appellants being aggrieved they appealed and were heard in Criminal Appeal No.189 of 2005. The High Court ordered a retrial that followed a trial, that culminated the present appeal.

The learned State Counsel Mr. Musau submitted the three Appellants' main ground of appeal is that they were not sufficiently identified. That there was contradictory evidence and that their constitutional rights under Section 72(3) of the Constitution were breached.

Apart from the above the learned State Counsel Mr. Musau submitted that the complainant who was PW1 on the night of 19/6/2002 at about 10.00pm was having a drink with his brother PW3 in a bar owned by PW2. That at around 10.00 p.m. they were violently attacked by a group of 10 men armed with a gun, axes and pangas. PW1 was robbed of his property and money. PW3 who was armed shot at one of the young men and they all ran away. The matter was reported to police and investigation was commenced. Subsequently, the three Appellants were arrested and charged. According to State Counsel all the three witnesses were identified and recognized by PW1 who knew them before. He submitted that according to PW1 there was sufficient light from the pressure lamp. He submitted that in fact PW1 described what each of them did. According to State Counsel 1st Appellant hit PW1 on the left ankle

fracturing the same. The 2nd Appellant took PW1's wallet while the 3rd Appellant took PW1's overcoat. According to the State Counsel the prevailing circumstances were favourable to positive identification. He submitted the Appellants ground of appeal, on the ground that the prevailing circumstances were unfavourable to positive identification as without merits. He further submitted that the ground of appeal on Constitutional violation was raised and adequately addressed in trial court and in addition the Appellants can file fresh suits to get compensation.

The State Counsel on the other hand submitted that if any contradictions, it did not occasion any miscarriage of justice and the same is curable under Section 382 of the Criminal Procedure Code. The 1st Appellant in response stated he did not have any reply. The 2nd Appellant on his part stated he never stole anything from the complainant and that he objected to his appeal being dismissed. On the basis of the above, the learned State Counsel submitted that the Appellants were convicted on sound evidence and hence he supported the conviction. On the basis of the above, he urged this court to uphold the conviction.

He prayed that he be released as he has been in custody for 10 years. On the other hand the 3rd Appellant stated that the complainant threatened to deal with them.

Being the first appellate court, we have duty to re-analyze and re-evaluate the evidence which was adduced in the lower court before reaching our own independent conclusion. We do also appreciate and are alive to the fact that we did not see or hear the witnesses during trial. Those basic principles were clearly enunciated in the case of **Odhiambo – Vs – Republic(2005)** KLR page 565.

In this particular case, PW1 Elijah Imathiu introduced himself as a businessman and a coffee farmer. He recalled that on 19th June, 2002 at 10.00 p.m he was in a bar at Mugeene, Kithoka called Mugene No.1 bar. PW1 was with his elder brother Isaac M' Arimi and the owner of the bar one Joseph Mudamba. There was no other persons. PW1 and his brother occupied a table which was 10 feet from the door. PW1 sat facing the door and the barman was at the counter behind PW1 about 6 feet from PW1. Suddenly 6 men entered the bar and stood by the door. One of them had a AK 47 rifle and the rest had pangas and axes. PW1 could see them clearly because the bar was well lit by a pressure lamp. Thereafter the man with the rifle ordered them to lie down, but as PW1 tried to lie down the man shot at PW1 but the bullet did not hit PW1. Subsequently 4 of the robbers moved to where PW1 lay down. One hit PW1's ankle with an axe breaking his left ankle. PW1 said it was 1st Appellant who hit him. PW1 averred that he knew all the robbers quite well as they all come from the same locality with PW1. He described the 1st Appellant as Japhet. One other robber as one Murage who PW1 saw now deceased, took PW1's gun from his waist which was on PW1's right side of the waist. PW1 averred his gun was a revolver, 3.8 Special smith 8 Weston Pistol. That another man David Bundi took PW1 wallet. PW1 said David Bundi was the 2nd accused. PW1 wallet had Kshs.30,000/- and US dollars 250. PW1 said someone else took his overcoat. PW1 stated that his overcoat was taken by Alphano Mwongera, the 3rd Appellant. That the lights were suddenly put off. Mr. Arimi who was lying on the other side of the table started shooting then, the robbers ran away.

Subsequently the barman put on the lights after they were sure the robbers had ran off. PW1 and others recovered the pangas and axe left behind by fleeing robbers. Arimi drove PW1 to the Meru Police Station to report the matter. According to PW1 he told the police that he did not know the attackers because there were too many civilians and he did not want the information to leak. PW1 went to hospital the following morning; where x-ray was taken in a private clinic and was issued with P3 form. PW1 had injuries to the left ankle. Subsequently at 10.00 a.m. PW1 went to CID offices, recorded a statement and gave the names of all robbers he had recognized. PW1 gave three names that is the name of Murage, David Bundia.k.a Miser and Alphano Mwongeraa.k.a Karithe. PW1 led police to the suspect's home for their arrest. 1st Appellant Murage was found at home and was arrested. 2nd Appellant presented himself to police when he heard he was being sought by police. PW1 was called to police after one week to identify the robbers. PW1 was able to identify 1st Appellant as the one who had an axe. According to PW1 he recognized 1st Appellant because he had not worn any hat on the day of the robbery and had a distinct moustache. PW1 subsequently got information that Mwongera had been arrested and was in police cells

on a different offence, consequently PW1 went to inform CID Officers and the officers accompanied PW1 to Meru Police Station. PW1 stated that the O.B did not have any of 3rd Appellant's name as he had been booked as Silas Mwongera and not Alphano Mwongera. That police went to cells and called out for Alphano. 3rd Appellant responded to the name and came out. Subsequently PW1 pointed him out to the police. PW1 averred that the 3rd Appellant was escorted to his house for search but there was no recovery of PW1's overcoat. After one month PW1's gun was recovered. The gun had been used to kill somebody. PW1 identified the gun to the police. PW1 averred that he was informed his gun had been recovered from somebody called Muriuki the brother to 1st Appellant. PW1 had certificate to the firearm being No.1268. PW1 stated the Appellants gained access to the bar through the door which was open. PW1 said it was 1st Appellant who broke his left ankle with an axe which was left on the bar floor and was recovered. A panga was also left behind by the robbers. PW1 stated that all the Appellants were convicted in Meru Cr. Case NO.1564/2002 and had proceedings marked as MFI. During cross-examination, the complainant specifically stated that the 1st Appellant is called Japhet Gituma.

He testified that he knows that is Appellant's name. PW1 testified that his pistol was stolen from him and it was produced in Cr. Case NO.1564/2012 and court ordered its disposal. He testified the robbers had a panga and it is not before the court which was also produced as exhibit in the previous case. He also testified the axe was also produced in the same case. PW1 testified that he had stated that 1st Appellant had a moustache but did not tell the police so. PW1 stated that he was not present when 1st Appellant was arrested. PW1 testified that there was parade conducted on 28th June, 2002. PW1 stated that he had not spoken to the parade officers before the parade exercise nor had he given him any description to him. PW1 testified that Muriuki is brother to 1st Appellant and his home is at Rwankere. PW1 stated he was told so by police. On further cross-examination by the 2nd Appellant PW1 testified that he recognized the Appellant at the scene of crime as he was sitting at a table barely 10 feet from the door. PW1 stated he had a clear vision to see the robbers. PW1 testified he had known the 2nd Appellant since 1978. PW1 stated that he was not drunk. PW1 testified that he wears glasses for beauty and to enable him see far and on the night of robbery PW1 was not wearing glasses. PW1 testified that in 2002 he did have glasses but got glasses 2 years ago. PW1 testified that he was able to see the robbers clearly as there was a very bright pressure lamp. PW1 testified that when the robbers entered they were led by their leader Muriuki who was armed with a rifle. PW1 stated that he cannot recall whether 2nd Appellant was 3rd or 4th to enter the bar but 2nd Appellant came and stood before PW1. PW1 testified when he saw the gun he was a little shocked as he did not expect robbers but he did not get too shocked. PW1 testified he was a little surprised but did not fall down in shock. PW1 testified he lied down when Muriuki ordered them to lie down. PW1 testified he had already seen the robbers before he laid down. PW1 said he used very few minutes to recognize the robbers and that robbery took less than 10 minutes. PW1 testified that he recognized 3rd Appellant immediately he entered the bar and that later PW1 saw 2nd Appellant better when he stood before PW1. PW1 testified that Muriuki let off a shot. PW1 stated that he did not go into panic as he is used to gun sounds when practicing on his own gun. PW1 testified that 2nd Appellant is his neighbor and they did not scream for help but made a report that he had recognized the 2nd Appellant. PW1 testified that he had told Arimi and Joseph he had recognized 2nd Appellant. PW1 testified that Chief's office is 2 ½ km but he did not report to the Chief's office but to the police and the CID. PW1 testified that he told the court what he had testified in the previous proceedings and also what he had told the police on 20/6/2002. PW1 stated that he did not give police any names when he first reported because there were too many people there and he was in a lot of pain. PW1 testified that he had given the 2nd Appellant's name to CID officers. PW1 stated that 2nd Appellant is his neighbor and he recognized him at the scene of robbery.

PW1 stated that he has not trumped these charges against the 2nd Appellant. PW1 testified that he bought land from 2nd Appellant's uncle but did not try to buy land from the 2nd Appellant's father and the 2nd Appellant refused. PW1 testified that it is not true he made the 2nd Appellant's brother to be arrested and he died in prison. PW1 testified that he was not the complainant against the 2nd Appellant's brother. PW1 stated that the proceedings which he was shown, show that the 2nd Appellant's brother died

after he stole PW1's maize but PW1 stated the truth was that the matter never went to court. PW1 stated that his Manager told him that 2nd Appellant's brother is the one who had stolen PW1's maize. PW1 testified that 2nd Appellant's brother was arrested and he died. PW1 stated that he knows 2nd Appellant as miser but he gave 2nd Appellants names as David Bundi son of Ikwa. PW1 after being shown his statement dated 20.6.2002 he confirmed he gave 2nd Appellant's name as Bundi son of Mikwa. PW1 testified that all he needed was to give 2nd Appellant's name to police to identify him for arrest. PW1 stated that there may be many people called Bundi but 2nd Appellant is the only son of Mikwa that the PW1 knows. PW1 testified that he did not give the police the 2nd Appellant's physical description. PW1 testified that he really does not want to grab 2nd Appellant's land especially since the 2nd Appellant's father is dead. PW1 testified that it was 2nd Appellant who took his wallet from PW1's right side trouser pocket by personally pulling out the wallet. PW1 testified he saw the 2nd Appellant was armed with a panga. PW1 testified on 2nd Appellants arrest he did not have a panga. PW1 testified the 2nd Appellant took himself to police to report that his goods had been stolen leading to 2nd Appellant's arrest.

PW1 testified that there had been no other robbery in that week at Kithoka. PW1 stated he was not aware that 2nd Appellant was a victim of any robbery. PW1 testified that 2nd Appellant is his neighbor and he had never heard that the 2nd Appellant had been robbed. PW1 testified that his gun a revolver 3.8 special smith and Weston Pistol was used for his self-defence and was stolen from him.

PW1 testified that no gun certificate was disposed off with the gun and it was S/No.BBU 2133 as per his statement. PW1 stated that it is not true he bribed the police to arrest 2nd Appellant and keep him in cells for 26 days before being taken to court. PW1 stated he does not know why police kept 2nd Appellant for long in custody. PW1 testified no exhibit was recovered from 2nd Appellant.

The PW1 in further cross-examination by 2nd Appellant testified that he did not accompany police when they visited the scene of crime. PW1 testified that his statement was recorded by Cpl. James Ndereba but did not know who recorded Arimi's statement. PW1 stated that he recognized 6 robbers who robbed him. PW1 testified his gun was stolen and his certificate was No.1268 and not 1258. PW1 stated that was a typing error. PW1 stated that it is not true PW1 and his brother have trumped up these charges against 2nd Appellant. PW1 testified that when he went to police to report the incident he found a crowd there and he did not know if 2nd Appellant's friends were there or not so he feared to name him. PW1 stated that he did not tell the police that he could not name his attackers because of the presence of too many people at the vicinity.

During further cross-examination of PW1 by the 3rd Appellant, PW1 testified that he knows the 3rd Appellant and he had known him since 2002. PW1 stated that he had known 3rd Appellant 3 years before the robbery. PW1 stated that he was 3rd Appellant's customer at Makutano as 3rd Appellant was selling miraa. PW1 stated he was robbed while at Mugene No.1 bar. PW1 stated the bar is smaller than the court room and had 4 tables. PW1 testified that when robbers entered they did not behave like customers. PW1 stated that he was seated at a table next to the door, 10 feet away from the door. PW1 stated that the robbers were armed and he was not amused. PW1 stated when the order was issued they obeyed and lay down. PW1 stated the robbers were armed with AK 47 rifle and the robbers fired at him even when he lay down. PW1 testified that he saw 3rd Appellant at the scene and recognized him as Alfano the miraa seller. PW1 testified that he took no action until after 10 minutes later. PW1 testified robbers entered and stood at the counter and one shot was fired at him but missed. Then someone put off the lamp. That after robbers left PW1 noted the axe and panga had been left behind. PW1 testified that he told Joseph and Arimi he had been robbed of all his money, his gun and overcoat. PW1 testified that it was 3rd Appellant who stole PW1's overcoat. PW1 testified that robbers walked into the bar one by one. PW1 testified his brother Arimi drove him to police station. PW1 testified that he told his brother he had recognized the robbers. PW1 testified he did not give details of the robbers as he was in pain. PW1 was rushed to police station to make a report of the robbery by his brother. PW1 testified that he made report that he was attacked by 6 people. PW1 testified that 3rd Appellant took his overcoat which was not

recovered. PW1 testified that the 3rd Appellant was arrested in his absence. PW1 stated that it is not true the police have just pinned the case on the 3rd Appellant. PW1 testified the 3rd Appellant's nickname is Kaibithe. PW1 testified that he gave police the 3rd Appellant's name and police arrested 3rd Appellant on a different matter. PW1 testified that exhibits were produced in the previous case and 3rd Appellant had cross-examined PW1 on the exhibits. PW1 stated the exhibits are in custody of the court.

During re-examination PW1 testified that the case in which his maize was stolen never came to the court. PW1 stated that the robbers entered the bar together and Muriuki seemed to be the leader. PW1 was specific that he gave the names of the robbers on 20.6.2002 at 10.00 a.m. to the police. PW1 testified that he had known the names of the robbers but did not immediately tell the police because he was in great pain and there was a big crowd. PW1 testified he was apprehensive he could say the names and the robbers could go underground. PW1 stated the certificate for his pistol was No.1268. He stated the typed proceedings showed the number as 1258 which is a typographic error.

On the other hand, PW2 Joseph Mudamba testified that he is a businessman. PW2 explained that he recalled on 19th June, 2002 he was in his bar at Kithoka marked called Kithoka No.1 bar while PW2 was outside his bar, he saw two men who entered his neighbours bar and came out almost immediately.

Later at 10.00 pm the same two men PW2 had seen go into Roy Bar and came out immediately entered PW2's bar. PW2 was at the counter and by then he had 2 customers Elijah Imathiu(PW1) and one Isaac Arimi(PW3). PW2 testified that the 2 men were accompanied by others and all were 6 in number. PW2 stated that immediately one man stood at the door and ordered PW2 and his customers to lie down, at the same time he heard the sound of a gunshot. PW2 lay outside the counter. PW2 said that the men were armed with two pangas and axe. PW2 testified two men lifted him demanding money as three men went to Elijah(PW1) as one man who had gun guarded the door. PW2 subsequently gave out Kshs.4500/- to the robbers from his drawer. PW2 testified that meanwhile he saw Elijah (PW1) being beaten up as he was being asked to give out money and his gun. PW2 witnessed the robbers get money and the gun of PW1. PW2 stated that another gunshot rang out. PW2 testified he saw PW1 gun and coat being taken. That one man put off the light as he left PW2's counter and he heard several gunshots as robbers escaped.

PW2 testified that he learnt later the gunshot was made by Isaac(PW3) as he tried to save PW2. PW2 testified at the time of robbery he saw and recognized 2 robbers, one being Japhet, 1st Appellant. PW2 stated that 1st Appellant is the one who took money from his counter and he had an axe and his friend had a panga, which 1st Appellant grabbed and threatened to cut PW2 with. PW2 testified the other man was called Murage, not before court.

PW2 testified he also recognized the man with gun as Muriuki and was not before court. PW2 testified that PW2 hit one of the fleeing robbers who was eventually found at different place by police dead. Meanwhile PW1 was taken to the hospital as PW2 was left behind guarding his premises. PW2 testified that he was able to recognize 3 people because they were his neighbours and through use of optimum lamp whose flame was producing bright light. PW2 was able to see clearly the robbers in the light, who were wearing jackets and coats and were not wearing hats or masks so PW2 was able to see them quite clearly. During cross-examination by 1st Appellant, PW1 testified that he knows the 1st Appellant as Japhet and he was amongst the robbers. PW2 stated during the time of robbery there was optimum pressure lamp. That at time of robbery PW2 testified that he was at the bar with PW1 and PW3. That the robbers who came to the bar were 6 and PW2 was robbed Kshs.4500/-. PW2 stated that after the robbery he remained behind and did not go to police that same night; but police, OCS and OCPD came to his place of business and immediately he told them of the robbers he recognized. PW2 testified that he gave 1st Appellant's name to the police immediately and 1st Appellant was duly arrested. PW2 testified that he gave the police 1st Appellant's name as brother of Muriuki. PW2 stated that he named Muriuki and Murage. During cross-examination by 2nd Appellant, PW2 said he knows 2nd Appellant and his name is Bundi Mikwa. PW2 testified that he did not see 2nd Appellant at the time of robbery. On being cross-examined by 3rd Appellant PW2 stated that he does not know the 3rd Appellant.

Besides the above, PW3 Isaac M'Arimi introduced himself as a businessman who resides in Nairobi. PW3 testified that he recalled that on 19/6/2002 at 9.00 p.m he went to talk to his brother Elijah Mathiu(PW2) and found him at KithokaMugene bar No.1. PW3 asked for a drink from the barman Joseph Mugambi(PW2). Immediately after Joseph(PW2) served the drink, 6 men violently walked in led by a man who had an AK47 gun. PW3 stated all the men wore black jackets and some of them had pangas and one had an axe. The man with gun ordered them to lie down and all obeyed. PW3 testified that the group jumped on his brother (PW1) pinning him down. Pw3 testified that he saw 3 of the robbers on top of PW1.

PW3 testified that he saw 3 of the robbers move to the barman, who was lying down in front of the bar counter. PW3 saw the man with axe hitting PW1 on the leg as they were demanding money and the pistol. PW3 testified that he saw one person remove PW1 jacket. PW3 stated PW1 later told him all his money; pistol and coat had been stolen. Meanwhile PW3 who was armed shot at one of the robbers and suddenly the lights were put off which was being provided by a very bright pressure lamp.

PW3 stated that he aimed at the door and released two shots but did not hit anybody. After a while Pw2 put on the lights. PW3 stated that PW2 told him he was robbed Kshs.4500/-. PW1 told them he had lost his revolver, the jacket and a lot of money. That is to say Kshs.30,000 and 250 dollars. PW3 testified that when the robbers entered he was able to recognize 2young men who he had been seeing at the shopping Centre who PW3 has not known their names. PW3 testified one of the robbers was 2ndAppellant who he had known for more than 10years but the other person who PW3 had recognized was not before court. PW3 testified that during the time of robbery he was able to clearly see the man who was armed with axe.

PW3 had not seen him before but was able to identify the person as 1stAppellant. PW3 stated that the 3rdAppellant was also at the scene of crime. PW3 testified that he was able to attend identification parade on 28/6/2002 and was able to pick 1stAppellant. Pw3 testified after the robbery he drove PW1 to police station whereby they made reports of the robbery and police started their investigation. PW3 testified that the panga and axe were given to the police. PW3 testified the panga, axe and gun were at the first trial. During cross examination by the 1stAppellant PW1 testified he identified 1stAppellant at the identification parade at the police station. PW3 was specific that he had seen 1stAppellant clearly at the scene of robbery and he was able to recognize 1stAppellant's face clearly. PW3 testified that he noted the 1stAppellant's ears were particularly larger than normal and he had a yellowish shirt and was wearing very same shirt on the parade. PW3 testified that he told the police he knew some of the robbers but they did not give the names nor description because there were many people at the counter and they did not wish to let people know that they knew the robbers for fear of the information being leaked. PW3 testified that he had told the police he had recognized the 1stAppellant's physical physique. On being cross-examined by 2ndAppellant, PW3 testified that he knows the 2ndAppellant as BundiMikwa and he had known him for more than 10years before the date of robbery but had not known his names then. PW3 testified that he had not even tasted the drink when robbers came into the bar. PW3 testified that he saw 2ndAppellant on left side of the gunman.

PW3 stated that he lay down on his tummy but did not close his eyes hence he was able to see clearly what was going on. According to the PW3, the 2ndAppellant was known to him and as such he immediately recognized 2ndAppellant when he saw him. PW3 stated that the robbers had black jackets and their faces were not covered at all. PW3 stated the barman lost Kshs.4500/- and he had seen 2ndAppellant move to the counter. PW3 stated that the robbery took between 5-10 minutes. PW3 was affirmative that he recognized the 2ndAppellant immediately he saw him. PW3 stated that he recognized 2ndAppellant's physique and at the time of robbery 2ndAppellant did not have spectacles. PW3 testified that they did not tell anyone in the market they had recognized the robbers and that they did not get to Chief's Office though 1 kilometre away as they did not need to report to him but to the police immediately as the robbers were armed. PW3 testified after reporting to the police they were told to go back to the scene of the crime. PW3 testified that he did attend any parade to identify 2ndAppellant but

got to know his name in court. PW3 testified that he had seen the 2nd Appellant at the market for many years.

Besides the 3rd Appellant during cross-examination of PW3, PW3 testified that he does not know 3rd Appellant. PW3 stated that he was not sure whether he had seen 3rd Appellant or not at the scene of crime. PW3 testified that he cannot for sure testify the man he saw in the bar was the 3rd Appellant. PW3 testified that he did not see 3rd Appellant at the scene of robbery.

During re-examination PW3 testified that he saw 3rd Appellant at the scene as he was moving up and down the bar. PW3 testified he saw 2nd Appellant go to the counter.

PW1 Elijah Imathiu, was recalled and he testified that he was injured during the robbery and he has P3 form dated 26.6.2002, and X-ray. PW1 testified that he was at time of robbery armed with a pistol, a revolver, 38 *special* No. BBU 2133 and that he had original certificate No. 1268 for firearm produced as P.exhibit 4. PW1 testified that he recovered the firearm after first proceedings then disposed of the firearm and produced disposal certificate dated 28/11/2005 as exhibit P5. During cross examination PW1 testified that PMFI 2 is the P3 form which had been produced during the first trial and was the same P3 form which had been filed on 26/6/2002. PW1 testified that the original/previous proceedings show the PW3 form is dated 29/8/2002. PW1 testified the date he had given is what is on the P3 form before court. Being cross-examined by 2nd Appellant PW1 testified that MFI 2 is the P3 filled by the doctor. He stated it was filed by Dr. Wilson Namu and is dated 26/6/2002. On the other hand on being cross-examined by 3rd Appellant PW1 stated MFI 3 the x-ray was done at Uzima Clinic within Meru Town after Meru General Hospital referred PW1 there.

Besides the above, PW4, CPL Bernard Asirigwa introduced himself as No. 69029 CID Kiria, formerly at CID Meru where he used to perform general duties. PW4 testified that he took over investigation of this matter when Cpl. Ndereva was transferred to Kangundo.

PW4 testified he was summoned to produce O.B entry on 2nd Appellant's complaint who was alleging that he had made report vide Meru Police Station O.B.No.33 of 13.6.2002 at 11.01 hours. PW4 testified that the OB stated one David Bundi of Gaitune village made a report that he was a shopkeeper at the village and at 2.30 a.m. he had been asleep in his shop when he heard commotion from outside his main gate. That gangs were breaking his gate using stones. That they stole cash Shs.2000/=, 4 packets Eveready batteries, a newly blue heavy coat and a wrist-watch. PW4 testified that the reportee claimed he recognized one suspect but did not give the name. He claimed that he had been hit with a rungu on the left shoulder as per OB 36 of the same day. PW4 testified a team of police officers left the station from Kithoka to follow up that complaint led by IP Nkanata. During cross-examination by 1st Appellant, PW4 testified that P.Exh.6 entry No.106 of 19.6.2002 was of 23.30 hours and was made by Elijah Imathiu a businessman within Meru Town. PW4 said the report was of robbery at 10.00 p.m by gang of 5 men with an AK 47 rifle and axes who stormed in a bar at Mugaine market. PW4 further testified according to the report PW1 was robbed a revolver pistol with 5 rounds of ammunition, cash Kshs.30,000/-, a coat, wallet having personal documents, ignition keys for his car Reg. NO.KAK 974 Toyota Hilux. PW4 stated PW1 was also injured. In addition to the above, 2nd Appellant cross-examined PW4 who testified PEX.6 has no names of the suspects. PW4 stated that the OB does not disclose what report was made to IP Kamande. PW4 testified the OB No.41 of 21/06/2002 record 2nd Appellant's arrest at 2.15 p.m by No.62427. PC Oliver Mwanzia and No.31827 PC Paul Sila. PW4 testified that 2nd Appellant was a suspect in a robbery with violence case, vide OB 72 of 20.6.2002.

On further cross-examination by 3rd Appellant PW4 stated that PEX.6 the reportee did not name the suspected thugs who had attacked him.

On the other hand, PW5, Wilson Namu introduced himself as a Clinical Officer, Meru General Hospital. PW5 testified that PMFI 2 is the P3 form for Elijah Imathiu (PW1), 59 years of age as of 20.6.2002. PW4 testified PW1 came to the hospital on that day alleging to have been assaulted by a group

of people known to him.

PW5 stated the injury was assessed as grievous harm and he filled the P3 form on 29/8/2012 and signed the same. PW5 produced it in evidence as Exhibit 2. During cross-examination by 1st Appellant PW5 testified he is the one who treated PW1 but another doctor treated him later. PW5 stated that he is the one who filed the P3 form. On the other hand, during cross-examination by 2nd Appellant PW5 stated that he is not the one who filled the P3 form but he filled PEX2 and is what he tendered in evidence. Besides the above PW5 on being cross-examined, he testified that he was not the first one to treat PW1. PW5 stated that he was not aware of production of another P3 form over PW1's injuries and specifically stated he was only aware of P3 form of 29/08/2002. PW5 testified that the patient(PW1) said he knew his assailants. PW5 stated that he did not ask for the names of assailants as that was irrelevant to PW1's treatment.

PW6, Joel Mwangi Njeru on the other hand introduced himself as Executive Assistant Officer Meru Law Courts. PW6 testified that he had worked with Meru Law Courts for 5 years. PW6 testified he had been summoned to produce the file Meru Criminal Case No.1564 of 2002. PW6 testified MFI 1, was a skeleton file as the original file seemed to have been misplaced when it went on appeal to the High court.

PW6 testified the file he had was certified copy of the said Criminal Case. PW6 testified the accused were Japhet Gituma Joseph, Peter Murango Mwangi, and David Bundi Mikwa who were facing 2 charges of robbery with violence C/s 296(2) of the Penal Code. PW6 stated the register did not give the outcome but judgment was delivered on 14/10/2005 signed by Hon. J. Omburah who sentenced each of the accused to suffer death as per skeleton file. PW6 testified that the skeleton file was HCRA No.189/2005, 190/2005 and 191/2005 as the appeals had been consolidated on 15/10/2008 by Hon. Justice Ouko. PW6 tendered the skeleton file as P.Exhibit 1 (consisting of proceedings and judgment Cr.1564/2002 and certified copy of the criminal court register for 18/7/2002).

During cross-examination by 2nd Appellant PW6 stated that 2nd Appellant was indicated as 4th accused. PW7, Ag. Sgt Lawrence Ndhiwa, on the other hand introduced himself as No.230245 a firearm examiner CID headquarters Nairobi. PW7 testified that his duties include examination and identification of firearms, ammunition and their components.

PW7 stated he had worked for 8 years as such. PW7 testified that he had a ballistic report which he had prepared on 20.8.2002.

PW7 testified he had examined the exhibits to prepare his report. He had revolver S.No.BBU 2133 marked 'A' and 8 rounds of ammunition marked "B 1-8" submitted to the laboratory on 19.8.2002 by No.35917. CPL James Ndereba CID Meru. He also testified on examination he found the revolver to be a Smith and Weldon revolver in calibre.38 Special. That after testing the same he formed the opinion that the revolver was a firearm as under the Firearm Act. He further testified that he examined the 8 rounds of ammunition and found them to be of different calibre B1, 3 and 6 were Calibre 7.62 by 25mm, while B2, 4, 5, 7 and 8 were in caliber 9 by 19mm. PW7 then formed the opinion that the 8 rounds were all alive and were ammunition under the Firearm Act. PW7 tendered his report in evidence duly signed as P.Exhibit 7.

During cross-examination of PW7 by 1st Appellant, PW1 stated that he recovered the revolver and ammunition from CID Meru and he has released them to CID Meru. On cross-examination by 2nd Appellant, PW7 testified that he was not informed from whom the revolver and ammunitions were recovered from. On further cross-examination by 3rd Appellant, PW7 stated that the exhibit Memo indicated the name of "Japhet Gituma and others."

Besides the above, PW8 Cpl James Ndereba testified that he recalled on 20.6.2002 he was at station at CID Meru when he was instructed by DCIO to take over investigation of robbery with violence case reported at Meru Police Station. PW8 and Sgt. Kitimi took over the investigations and recorded report that no suspects had been arrested. One was held at Meru Police station and the other admitted at hospital with a bullet injury. PW8 testified when Officers went to the hospital they found the suspect was already

dead. The suspect at Meru Police Station was Japhet, the 1stAppellant. 1stAppellant gave the names of his accomplices in the robbery. PW8, testified the 1stAppellant also gave the names of Murage, Bundi and AlphanoMwongera and Pius. PW8 testified 1stAppellant told him his brother Muriuki was the one who had taken PW1's pistol.

Subsequently PW8 got information that some suspects had been seen at Kithoka area. PW8 testified they managed to arrest Murage. On 24.5.2002 and escorted him to Meru Police Station. PW8 got information another suspect was within Meru Police Station and proceeded to arrest him. PW8 testified the suspect is Bundi, the 2ndAppellant. PW8 also received information AlphanoMwongera was at Meru Police cells on other charges. PW8 testified 3rdAppellant was identified to him by the complainant. PW8 testified that he had interrogated the complainant(PW1) and he had given the names of Murage, Bundi, and AlphanoMwongera as they all come from the same village.

PW8 testified the names concurred with the names given by the 1stAppellant. PW8 testified the complainant had told him he had been robbed Kshs.30,000/= cash, and USD 250, heavy jacket and a revolver and at the time of robbery he was with his brother one Isaac, who was not robbed.

PW8 said there was also the bar attendant Joseph Mudamba (PW2) who was robbed Kshs.4500/-. PW8 stated the number of stolen revolver was BBU 2133 make Wilson and Smith with 5 rounds of ammunition. PW8 testified that the complainant was injured at the time of robbery. PW8 identified P3 form. PW8 stated that he learnt the person who was shot by complainant's brother was Pius, and had died at the hospital. PW8 testified that he visited the scene of crime and found PW2, at the said Mugene bar. PW8 testified the mark at the wall confirmed shooting. PW8 made no personal recoveries at the scene. PW8 testified that he continued with investigation and that Muriuki brother to 1stAppellant was shot dead at Makutano area by Police Officers on 31/7/2002; and a firearm recovered from him. PW8 testified the firearm was confirmed to be the one stolen from the complainant(PW1). PW8 stated that PW1 subsequently identified the firearm as his. PW8 subsequently forwarded the revolver to the ballistic examiner accompanied by his exhibit memo form P.Exh.7. PW8 later received firearms examiners report. PW8 testified that 1stAppellant had been identified to him by the complainant(PW1). PW8 later organized an identification parade which was conducted by IP Kamande in presence of PW8. PW8 testified the 1stAppellant was identified by Isaac(PW3). PW8 testified that he received identification parade form for one JaphetGituma(1stAppellant) (PMFI 8). PW8 testified also 1stAppellant was identified by Joseph Mudamba(PW2) in a parade in which parade Commander was the late PC Mutuku. PW8 stated that 2ndAppellant was known to the complainant (PW1) and was named by 1stAppellant as one of the robbers.

PW8 testified that 3rdAppellant was also known to the complainant(PW1) and was recognized during the robbery. He also testified that some exhibits which included a panga and axe were recovered at the scene of robbery and he testified that he had produced the exhibits in the criminal case. P.exh.1 he stated was the court proceedings in which he had testified as PW11 on 29/11/2004. He stated the people he had charged are the three accused before the court. During cross examination of PW8 by 1stAppellant, PW8 testified that he knew the 1stAppellant when he was arrested. He testified that the 1stAppellant is called JaphetMwongera. He testified that the complainant told him he had recognized 3 robbers but he did not give him the names of the robbers. PW8 testified that he was not the one who had first arrested 1stAppellant. He testified that the 1stAppellant had told him Muriuki had the gun. He also stated the names of robbers given by 1stAppellant were similar to those given by the complainant to him earlier. He testified that he knows second Appellant as Bundi. He stated that the complainant (PW1) went to Police Station on 20.06.2002 and gave the names of the suspected robbers he had recognized. PW8 testified that he was not aware of a family dispute between the complainant and Appellant's family. He stated that he only established that the complainants and 2nd respondents are neighbours. PW8 testified no identification parade was carried out from 2ndAppellant as the complainant knew the 2ndAppellant.

PW8 testified that he was not aware that 2ndAppellant had been robbed on 12th and had reported on 13th

and at the time of his arrest had come to draw his statements. PW8 testified that it was true that he took longer than 14 days before preferring charge against the 2nd Appellant because he was still investigating the matter against the 2nd Appellant.

On the other hand, the 3rd Appellant in cross-examination of PW8, PW8 stated that he got to know 3rd Appellant on the date of his arrest on 12/8/2002 at Makutano area by police officer when he was found with offensive weapons being a panga and sword. PW8 testified that he had been looking for 3rd Appellant but he did not know him. That he had been given 3rd Appellants name by the complainant. PW8 stated PW1 had recognized the 3rd Appellant during the time of robbery. He further stated there was a delay in charging the 3rd Appellant. He stated that 3rd Appellant told him he had been called to scene of robbery by 1st Appellant. He testified that 3rd Appellant had been named by 1st Appellant and complainant (PW1).

PW8 testified that he did not make any recovery from 3rd Appellant. He denied that the charges against 3rd Appellant were trumped against the 3rd Appellant. He stated that the 3rd Appellant had given a different name when he was arrested.

Besides the above PW9 PC Michael Koros introduced himself as No.60366 attached to Siaya Police Station. He testified that he recalled on 13/8/2002 while on patrol with his colleague Mutuma at 9.00 pm within Makutano area at Three Steers Hotel they met a man and stopped him. On quick search they found him to be armed with a panga and as he was being questioned he ran off. PW9 stated the man was 3rd Appellant. PW9 testified the dog they had was set upon him and it caught up with him. PW9 testified they got suspicious of the 3rd Appellant's behaviour and got in touch with the Officer the late S.Sgt. Jane, who came to the scene and rearrested the 3rd Appellant and took him to the police station and booked him in for being in possession of an offensive weapon.

PW9 testified that he did not know the 3rd Appellant. That the panga was taken as an exhibit. During cross-examination by 3rd Appellant, PW9 testified that they recovered a panga from the 3rd Appellant. He stated that he arrested 3rd Appellant on 13/8/2002.

Besides the above PW10 PC Francis Kateria introduced himself as No.47140 attached to Mumias Police station. He testified that he recalled on 30/07/2002 at 8.00 a.m he was with PC Maroo and PCPC Gitonga on normal patrol. That they got information that 3 thugs had been spotted at Kenafric Bakery and they looked like they were preparing to rob the bakery. Immediately they moved to the site and challenged the three. Suddenly one produced a gun and PW10 shot him while his two accomplices fled off. PW10 testified that the thugs he shot died on the spot. He recovered the gun which was a smith and Witson S/No.BBU 2133 and it had 5 bullet calibre 38. That on search of the body they found 3 more. They called the duty Officer who came with scenes of crime personnel and took the photographs. PW10 testified the two people who ran off were arrested later. He testified that he later came to know the deceased was identified as Muriuki or Mwangi. He testified he came later to know the gun belonged to one Jeremiah M'Imathiu (PW1) which had been stolen from him. That the owner of the pistol identified it. He testified the pistol had been produced in court in the first hearing.

On 1st October, 2007 court found the three Appellants had case to answer and complied with Section 211 of the Criminal Procedure Code. Each of the Appellant opted to give sworn testimony and call no witness.

On the other hand, the evidence on record show that the three Appellants denied having committed the offence. According to 1st Appellant, Japhet Gituma Joseph, he is a farmer and he was aware of the charge to which he stated that he is innocent. He testified that he recalled on 20.6.2002 in the morning he took his machine and proceeded to open his barbershop.

According to 1st Appellant after 10 minutes he stated that he found people running out of their houses near the gate. Consequently Appellant moved over to see what was going on. Suddenly he said 2 police officers, one entered the house while the other approached him. 1st Appellant stated that the police officer

enquired from him where the fleeing people had run to which 1st Appellant replied that he did not know. 1st Appellant stated that the officer turned against him claiming 1st Appellant was the one who had told them to run away and escape. He was consequently arrested and police officer went to 1st Appellants' home and carried out search. That nothing was recovered from 1st Appellant's home. That police officer's picked 1st Appellant's clothes and told him to carry them. The 1st Appellant was subsequently taken to Nchiru Police Station, then driven to Meru Police Station whereby he was under custody for 2 weeks. That 1st Appellant complained to OCS and he was taken by Police Officer to an office where he found 2 police officers, the complainants and PW3 Isaac M'Arimi.

1st Appellant testified that he was told he would undergo a parade or police officers would kill him. 1st Appellant testified that he knew only Joseph Mudamba (PW2) but he stated he did not know the other two men. The 1st Appellant testified that he was then returned to cells till 18.7.2008 when he was arraigned before court where he denied the charge because he knew nothing about the matters complained of. 1st Appellant testified that he recalled on 19.6.2002 he was at home and went to bed as usual at 8.30 p.m. He stated that he never robbed anybody. During cross-examination DW1 testified that he only knew Joseph Mudamba PW2 but did not know the other complainants. He stated he had no previous grudge with PW2. 1st Appellant testified that on 19.6.2002 he was at home in the evening with his wife Mukiri and children.

On the other hand, 2nd Appellant gave evidence as DW2 at the lower court. He introduced himself as a shopkeeper at Kithoka area, Gaitune village testified that he is aware of the charge and had nothing to do with the robbery. He testified that all he recall is that he was a shopkeeper from 1993 in Meru and Nanyuki till he was arrested. That he used to open shop at 6.00 a.m in the morning then close at 9.00 p.m in the evening. According to 2nd Appellant he used to sleep in the same premises as he was not yet married. That he can recall that on 13.6.2012 he was robbed whilst at his shop and he made a report vide OB No.33 of the same day. That investigations were commenced and he was summoned to record a statement. That on 21.6.2002 he came to Meru Police Station to follow up on his robbery complaint when he was arrested over this case.

That he was subsequently arraigned before trial court on 18/7/2002. He testified that he had not seen any of the complainants before. He stated that the complaints are his neighbours. He stated the charge was trumped up as OB No.106 never mentioned him as a suspect. He referred to PEXh.6. He testified PW1 is his neighbour and his family sold them some land to PW1 and that PW1 had put 2nd Appellant's brother in Police cells and he died while in custody.

He testified that PW1 expected to buy more land he refused to give consent hence his relation and that of PW1 became strained. He further stated PW2 had originally claimed in PEXh.1 that he had fully recognized 2nd Appellant yet in his evidence before court he testified that he never saw 2nd Appellant at the scene of robbery. He stated he never robbed anyone. He stated that PW3 did not know him. During cross-examination the 2nd Appellant testified that he knows both the complainant's and that they are his neighbours. 2nd Appellant further testified he said PW1 may have grudge against him over refusal to enable him buy 2nd Appellants' land. The 2nd Appellant testified he never told PW1 of his decision to object to sell of land. The 2nd Appellant stated complainant was robbed on 19.6.2002 as per charge sheet.

Besides the above, the 3rd Appellant gave evidence as DW3. He introduced himself as a miraa dealer. He stated that he is aware of the charge. According to 3rd Appellant he recalled that on 12.8.2002 he went to Muringene market and purchased miraa upto 1.00 p.m and thereafter travelled to Makutano Meru arriving there at 2.00 p.m. He testified that he distributed miraa and started selling the miraa till 10.00 p.m, when he closed the kiosk. According to 3rd Appellant on his way to his home he met 2 police officers who arrested him as he did not have his National Identify card and was taken to the police station. After being in police cells for some time he complained to OCS and was then informed of being involved in robbery with violence. He testified that on 18/8/2002 he was led to crime office whereby he met one fat man wearing a God-father hat. According him it was alleged that he had robbed that man. That on 30.8.2002;

he was then arraigned in court. During cross-examination, the 3rd Appellant testified that he sells miraa. He denied that he was armed with a panga and alleged that the panga was planted on him. He stated that he did not know of the complainant's. He stated that was his that was his first time to see PW1. He also stated that the police framed the charges against him. He admitted he had no prior grudge with any of the complainants or police but stated the charges were trumped up against him.

This court has carefully considered the evidence which was tendered in the lower court. There is no doubt whatsoever the Appellants were arrested after the complainants and their witnesses had reported to police station, and recorded their statements stating that they had identified and recognized the robbers and even gave names of some of the robbers. The complainant's evidence on record clearly show that the complainants and their witness PW3 were able to identify and recognize the robbers who were known to the complainants and PW3. According to the evidence on record by PW1, PW2 and PW3 there was sufficient light from pressure lamp. The robbery took about 10 minutes. The robbers were known to PW1 and PW2 by their names as well being their neighbours. PW1, PW2 and PW3 in fact were able to describe what each of the robbers did. PW1 in his evidence testified that 1st Appellant hit him on left ankle fracturing the same. 2nd Appellant took PW1's wallet while the 3rd Appellant took his overcoat.

PW2 testified he had seen and recognized 1st Appellant and that he is the one who took money from PW2's counter. PW2 testified there was optimum pressure lamp. PW3 testified that when the robbers entered he was able to recognize 2 young men he had seen earlier at the shopping Centre. PW3 stated he had known 2nd Appellant for more than 10 years. He testified that he had also seen 1st Appellant and 3rd Appellant at scene of robbery. PW3 was able to identify the 1st Appellant at the identification parade. PW3 testified that he had recognized the 3rd Appellant immediately he saw him. The evidence on record show that the complainants and their witnesses knew the robbers, and were able to identify and recognize them through the bright light of pressure lamp that was on during the time of robbery for about 10 minutes. This concurs with the learned State Counsel submissions that the circumstances during the robbery was favourable to positive identification.

The leading case as far as identification is concerned is that of **Republic – Vs – Turnbull & Others(1976) 3 ALLER**. The above mentioned case sets down the basic principles to be considered when issue of identification comes into place. In addition to the aforesaid case, in the case of **ROBERT GITAU – V- REPUBLIC CRIMINAL CASE NO.63 OF 1990**(Nakuru), the Court of Appeal held as follows:-

“It was held in Abdullah Bin Wendo and Another V R 1953 Volume KXX 166 and Cleophas Otieno Wamunga V R(Criminal Appeal No.20/89) that evidence of identification should be tested with great care especially when it is known that the conditions favouring a correct identification were difficult. The witness who testified that they could identify the Appellant in circumstances of shock and fear could easily be mistaken because the duration of observation was short. We are doubtful whether the witnesses could have identified the Appellant's face in the manner described by the witness. We are also doubtful how the witnesses were able to identify the Appellant in the identification parade. In this respect, the Appellant complained that it was easy for him to be picked up because in the parade he was only one from the cell.”

Besides the above-mentioned case, in the case of **Abdala bin Wendo&Ano –V-Republic(1953) 20 EACA 166**, the court stated as follows:

“There was a need for testing with the greatest care the evidence of a single witness respecting identification, especially when it was known that the conditions favouring a correct identification were difficult. In such circumstances what is needed was other evidence, whether it be circumstantial or direct, pointing guilt, from which a Judge or Jury could reasonably conclude that the evidence of identification, although based on the testimony of a single witnesses, can safely be accepted as free from the possibility of error.”

In addition to the above, in the case of **Francis KariukiNjiru& 7 others –V-Republic Criminal Appeal**

Case NO.6 of 2001(UR) the court stated as follows:-

“The evidence relating to identification had to be scrutinized carefully, and was only to be accepted and acted upon if the court was satisfied that the identification was positive and free from the possibility of error. The surrounding circumstances had to be considered and among the factors the court was required to consider was whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.”

In this present case we are satisfied that the trial court did not only rely on the issue of identification by the complainant and his witness(PW3) but also on recognition. Significantly the complainant and his witnesses were able to give the names of the robbers and there after they were able to identify the robbers. The complainant knew the Appellants. This court also notes that there does not seem to be any grudge between the complainant and the Appellants. PW1 did not make any complaint against brother to 1stAppellant nor did he attempt to purchase land from 1stAppellant’s father and the alleged grudge by 1stAppellant against PW1 was found to be without basis. Equally we do not find any basis for PW1,PW2 and PW3 to have grudge against any of the Appellants. The Appellants claim that this suit is framed against them by police. We have gone through the evidence in this case and we find no basis at all for the police to frame any of the Appellants.

The trial court considered the Appellantsdefence and found the same to be weak and not capable to displace the prosecution case. We find the trial Magistrate considered the defence and gave reasons for rejecting the defence. We equally do find the Appellants defence to be evasive andwithout merits and find that it was properly considered and rejected.

Having carefully, considered the evidence on record, we are convinced that the evidence which was adduced by the prosecution witnesses in the lower court proved the offence beyond any reasonable doubt. We have no doubt in our minds that the Appellants actually participated in the robbery that took place on the material night.

We are of the opinion that the conviction is safe and well deserved. The upshot is that we hereby dismiss the appeal since the same has no merit at all.

In the same breath, we hereby uphold the conviction but as regards sentence we note the trial court sentenced the Appellant to suffer death under two counts. It is improper to sentence an accused person to death on more than one count, consequently the sentence in the second count relating to robbery with violence should remain in abeyance.

In conclusion the Appellant’s appeals are dismissed and as regards sentence on count 2 the same is put in abeyance.

Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED AT MERU THIS 18thDAY OF JULY, 2012.

MUGA APONDI
JUDGE

J. A. MAKAU
JUDGE

Judgment delivered in open court in presence of:

Mr. MungaiState Counsel

Appellants present in person

MUGA APONDI
JUDGE

J. A. MAKAU
JUDGE