REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 238 OF 2006

LAWRENCE ODONGO WAMBIA.....1st APPELLANT

DANIEL ABUDHO WAMBIA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Criminal Case number 817 of 2005 of the Principal Magistrate's Court at Maseno)

Coram

R.N. Nambuye, A. Aroni -JJ

Mr. Gumo for the state

Court clerks Laban/Ochola

Appellants present in person

J U D G M E N T

The background information of this appeal is that the appellants namely **Lawrence Odongo Wambia,** the first appellant, and **David Abudho Wambia,** the second appellant, jointly with another faced two counts and an alternative count of criminal charges in the lower court. They were arraigned and tried by the Principal Magistrate's court Maseno.

They faced the charge of robbery with violence contrary to section 296 (2) of the penal code in count 1 and 2. The particulars of the charge read that

"on the 9th day of June 2005 at Kapuonja sub-location in Kisumu district within the Nyanza province jointly with others not in court robbed Opiyo the complainant in count 1 and Judith Adhiambo Anyango the complainant in count two of his/her 3 sufurias, wall clocks make Robinson and Ajanta, one big kettle, camera make Olympia, 2 caps, one radio, one green traveling bag, baptism card of Mary Atieno Onyango, Kenya commercial bank book Kshs. 200/= all valued at Kshs. 64,000/= and at or immediately before or immediately after the time of such robbery beat and wounded the said George Onyango Opiyo in respect to count 1 and Judith Adhiambo Onyango in respect to count 2".

The first appellant and another faced an alternative count of handling stolen goods contrary to section 322 (2) of the penal code in that on the **"9th day of June 2005 at East Karateng sub-location in Kisumu district within the Nyanza province otherwise than in the course of stealing dishonestly received or retained 3 sufurias, two wall clocks make Robinson and Ajanta, one Kenya commercial bank book, baptism card of Mary Atieno Onyango, one traveling bag, one big kettle and 9 cups (mugs) knowing or having reasons to believe them to be stolen goods".**

A total of seven (7) witnesses gave evidence for the prosecution. A ruling was made to the effect that the appellants had a case to answer and they were put on to their defences. Both appellants gave sworn evidence. The second applicant was not cross-examined whereas the first appellant was cross-examined. They called no other witnesses. Thereafter the court heard submissions from both sides and then the court delivered a judgment on the 20th day of December 2006 convicting the appellants as charged and sentenced to suffer death in the manner provided by law with right of appeal within 14 days being granted.

The appellants became aggrieved by that decision, and they have appealed to this court in person but later counsel who appeared for them in the lower court argued the appeal on their behalf.

The first appellant put forward six grounds of appeal namely:-

(i) That the magistrate erred by convicting me solely by evidence of identification by PW1 and 2 under difficult and unconducive circumstances.

(ii) That the identification conducted by PW6 was not conducted as per police force standing order 46.

(iii) That the magistrate erred when she failed to consider that there was no description of the appellant given to police except one Okoth who was not before court to testify.

(iv) That the magistrate further erred by not observing that the exhibit plus mark that was alleged by PW1 was not confirmed by PW1thus was not confirmed and proved before court.

(v) That the prosecution failed to summon vital witnesses. Also the recovery was made without any complainant.

(vi) That the magistrate erred by not considering that the evidence of PW4 that he brought the alleged goods to the accused. The evidence was just hearsay.

The second appellant put forward 5 grounds of appeal namely:-

(i) That the trial magistrate erred in convicting me on the basis of sole evidence of identification made by PW1 and PW2 under difficult circumstance.

(ii) That the magistrate erred when she failed to consider that the one who was described by the complainant as "Okoth" was not brought before court to answer the charge.

(iii) That the magistrate erred by not observing that the exhibit and marks alleged by PW1 to be confirmed by PW2 was not confirmed and proved before court as no mark was shown or any documents produced.

(iv) That the identification parade was not conducted as per the police force standing orders.

(v) That the magistrate erred in not considering the alibi defence which was totally detailed and not challenged by the prosecution.

A summary of the evidence adduced before the lower court is as follows:-

- **The incident took place on 9th June 2005 around midnight.**

- **He switched on the light but he does not describe the nature of the light switched on.**

- **Stabbed and hit and broke teeth.**

- **Items taken during the robbery were: 1 suit case, commercial bank book, certificate for the daughter all good suits, green bag.**

- **PW1 identified one George Okoth who was not in court.**

- **On 11th June 2005 PW1 went to the police station to record a statement. On arrival, they were told a lady been arrested with stolen items. He identified two wall clocks make Robinson and Ajanta, three sufurias, two big and one small with the small sufuria being new ,big kettle, green bag, cheque book and baptism card.**

- **On 5th, he attended an identification parade and identified two people who were among the robbers who attacked him.**

- **He was injured and was treated at Nyanza provincial hospital, issued him with a P3, and the same was duly filled on 13th September 2005. PW1 responses in cross-examination are as follows:-**

- **confirms to have identified the appellants on the identification parade.**

- **He had never seen them before.**

- **First accused had a torn sweater while other members of the parade did not have torn sweaters.**

- **The second accused had a green sweater. Not all members of the parade had green sweaters.**

- **The big sufurias are his but concedes that they had no mark and they could be found in any home in Kenya.**

- **They had scratched marks on the sufuria BOA.**

- **conceded that if they did not have those marks then they are not his.**

- **Other items stolen were power saw, Olympia camera, two god father caps.**

- **He had scratched the Robinson clock.**

- **concedes there are no scratches on the face or the back of the clock.**

- **asserts the wife was able to see robbers.**

- **He does not know how the accused persons were arrested.**

- **concedes the robbery took place at night.**

- **The robbery was on 9th day of June 2005, but he went to police station on 6th July 2005.**

- **confirms that the sufurias stolen from him had marks. Those in court which did not have marks are not his.**

PW2 had this to say:-

- **They were asleep.**

- **Husband heard a bang and then went to lit a lantern lamp.**

- **They were injured.**

- **Stole many items.**
- **On 11th she came to police station where she identified a kettle, spoon with steel handles cups, wall clocks and three sufurias though four were stolen.**

- **Her husband identified two suspects on the identification parade.**

- **She did not identify any suspects on an identification parade because the suspects refused to appear in the parade.**

When cross-examined, she had this to say:-

The spoons and forks identified were new. She conceded they were not the only ones manufactured. They lost baptism card for their daughter but the same were not in court then.

PW3 a clinical officer testified that he treated complainants at their facility on the 13th day of September 2005. He filled the P3 using treatment notes which showed that the complainants had been treated at Nyanza provincial general hospital four hours after the injuries.

PW4 testified that they left station on 9th June 2005 at 8.00 p.m. in a vehicle in relation to a robbery which had occurred the same night. Acting on information from an informer who gave them the name of Daniel Obudho, went to his home and found accused three who identified herself as the wife of accused two who had left for Kisumu in the company of his brother Daniel Wambia. They carried out a search and recovered two big sufurias, one medium sufuria, one big kettle, ten cups, nine spoons with red handles, KCB cheque book bearing names of George Opiyo and one baptismal card with names Mary Atieno Onyango. All the items were hidden under the bed.

When cross-examined, the witness stated that they went to East Karateng on 9th June 2005, at 8.00 p.m. and found two ladies in the house where the items were recovered. No inventory was made.

PW5 also a police officer gave evidence that they received a report of robbery at 2.00 a.m. on 9th June 2005, proceeded to the scene and found the complainants bleeding profusely and rushed them to Nyanza provincial hospital. The same date at 8.00 p.m. they visited the area and recovered stolen items which were later identified by the complainant to be among some of the items stolen.
The lady Betty showed them the marks BAO on one of the sufurias, while others had cuts made by the lady which she identified. The witness went on to state further that Dan Wambia had been arrested by Kondele police station and upon receiving him is when he led PW5 and others to his brother Lawrence on the 11th July 2005, and upon search they recovered a green bag. That on6th July 2005 an identification parade was conducted by IP Kibet and the appellants herein were identified.

When cross-examined, the witness stated that the suspects were satisfied on the identification parade. One said that he was not identified while another said that he had not prepared well for the identification parade. When cross-examined further the witness stated that he recovered the book from the 2nd accused's house. He did not make an inventory.

PW6 is the officer who conducted the identification parade for the appellants who were identified by the first complainant. The second complainant did not identify them because the appellants refused to participate in the identification parade.
When cross-examined the witness agreed that in an identification parade, members must have same height, complexion, body weight and outfit. Maintained that he followed the correct procedure.

PW7 the arresting officer allegedly arrested the first accused on 1st July 2005 but did not record his statement on the 7th May 2005 as indicated but on 2nd July 2005.

The 2nd appellant gave evidence as DW1 and the sum total of his evidence is that:-

- He is brother to 1st appellant.

- His mother died and he kept sufurias in his brother's home.

- He does not know where the other items were recovered from.

Concerning the identification parade, that they were called out of the cells to the report office where he met the complainant. He was called out four times. It is his testimony that the sufurias had been kept at his place for over two years. He gave an alibi that he was in Kisumu on the day of the robbery. DW1 Daniel Obudho was not cross-examined.

DW2 Lawrence stated he works in a bar at Naivasha. He was not at the scene of the robbery. He came back home on 3rd July 2005 and he was arrested at his home on 5th July 2005. He only knows about two sufurias. Agrees he appeared on the identification parade but he remarked that he was not satisfied with the manner the identification parade was conducted. He is a stranger to the other items.

When cross-examined, he stated that he made the card himself, it is not signed by his employer. It is not a letter of employment. He traveled home by bus but the ticket got lost. Maintains that on 9th June 2005, he was at his place of work. Maintained that the complainant saw him before the parade.

That he was not able to communicate with his employer because he has been in custody.

Against the afore set out evidence the learned trial magistrate made the following findings on the same:-

That the defence had raised the following issues for determination.

(a) Identification parade was conducted improperly.

(b) PW1 was unable to identify marks on the sufurias.

(c) Identification parade forms for accused 1 were not produced.

(d) Accused 2 was seen by a witness who supposed to identify him prior to parade.

(e) That before accepting visual identification as a basis for conviction, prevailing at the court has a duty to warn itself of inherent danger of such evidence.

(f) The court needs to give a careful direction regarding the conditions. Presenting the time of identification and the length of time the witness had the accused under observation.

(g) With the need to exclude the possibility of error was essential.

(h) That police never took an inventory of what was recovered from the accused persons and it is difficult to say where the other items were recovered from.

(i) That accuse 1 was arrested on mere suspicion and suspicion however strong can't be a basis for conviction

(j) Evidence of accused 1 on oath was not controverted.

The learned trial magistrate then went on to identify the following issues for determination:-

(a)Whether PW1 and PW2 recognized any robber or identified any of the robbers who attacked them.

(b)It will be important to know whether there was any lighting and duration that suspects/robbers were subjected to light to enable PW1 and 2 identify them.

(c) Whether exhibits produced in court were recovered from accused 3’s house and if so whether PW1 and PW2 properly identified them as belonging to them.

(d)Whether or not identification parade conducted by IP Kibet was properly conducted, considering that accused persons remarked in the parade forms they were not satisfied because they were not given enough time to prepare for the parade.

(e)The issue of A1, A2 having failed to appear on the identification parade a second time and its legal implication.

(f) Whether the alibi raised by A1 and A2 can suffice.

When the afore set out issues were applied to the facts of the case the learned magistrate made the following conclusions:-

1. (i) when the robbery was committed police were given A1's name as a suspect and when police visited his home on 9th June at 8.00 p.m. they found A3, wife of A2 and conducting search recovered 3 sufurias, 2 wall clocks, KCB bank book for PW1, baptismal card for PW1's daughter, green traveling bag, one big kettle, 9 mugs and spoons all of which were positively identified by PW1 and PW2.

(ii) That PW1 said the sufurias were new and PW2 had put marks and P.C Juma said and showed court initials of PW2's names.

(iii) PW2 was not challenged as to ownership of the sufurias and whether or not she had unique marks was not raised with her.

(iv) P.C Onyango said they recovered all the items the 3 sufurias under A3's bed and she said they had been brought in by A1, A2 and 2 other men.

(v) No mark which could make the court believe they belonged to him.

(vi) A3 who said she found them in the home when she got married, was not certain whether she got married in 2002 or 2003.

2. (i) A1 and A3 talk of sufurias. A2 talks of 2 sufurias having been kept in his house by A1. PW1, PW2 said four sufurias were recovered and that they were the ones produced in court.

(ii)The contradiction between A1, A2, A3 with regard to the number of sufurias make the court to believe that they had cooked up a story to exonerate them from offences, to deny PW1 and PW2 of their rightful ownership of sufurias.

(iii) A3 said that only sufurias were recovered from her house but P.C Onyango said all the items were recovered from that home. She concedes she was found in that house with one Millicent and P.C Onyango was not challenged as to the scene of recovery. Later green bag was recovered from A2's home and was positively identified by PW1 and PW2.

(iv) A1 and A2 appeared in the identification parade and were positively identified by PW1 among other members of the parade as among robbers who attacked them.

3. A2 declined to attend parade allegedly because he had been seen by the witnesses when going for the second parade and also when arrested.

The green bag which had been positively identified was found in the home he had locked himself in from inside which leaves no doubt to his participation in the robbery.

4. A2 raised the defence of alibi and said he had been in Naivasha on the night of robbery and that he traveled back home on 3rd July 2005. he produced business card showing he was assistant manager of

New Naivasha Bar which was not an appointment letter or job identification card and as such court can't give regard to it to show he was away from his home on the day robbery was committed.

5. A1 also said he was away in Kisumu when the robbery was committed but sufurias recovered from him were stolen from PW1 and PW2's house.

(ii) It is not difficult for one to move from scene of robbery to Kisumu and accused's home within a few hours in a day or night and as such found that A1's, A2's alibi can't be sustained.

6. P.C Onyango and P.C Juma said that they were led to the accuseds by informers. A1 said he was known to police which can not be sustained because he cannot explain in what regard he was known to the police.

7. Items were recovered in A3's home and although she was not subjected to an identification parade, she was however found in possession of stolen items within hours of the robbery with violence subject to an identification parade leaves evidence of recent possession standing alone, and it can be concluded with certainty that she was also at the scene of robbery considering that there were four men while the rest were outside.

8. Failure to produce parade identification form is not fatal because A1 concedes he was identified on the identification parade and also claimed sufurias found in A3's house but which gave no mark to show they were his.

9. Circumstances described show that A1, A2 committed the robbery.

Against the afore set out findings by the learned trial magistrate, we have received the following submissions on appeal from the appellants' counsel.

a) PW1 said he recognized one George Okoth who was not among the accused.

b) PW1 and PW2 did not give proper description of the robbery.

c) There was contradiction with regard to the recovery of the green bag because PW1 says he identified it at the police station yet PW5 says it was recovered on 5th July 2005.

d) PW1 and PW2 were categorical that sufurias robbed from them had marks. The sufurias produced in court had no identification marks on them and PW1 conceded that if the sufurias did not have scratched marks then they did not belong to him.

e) They take issue with the identification parade in two fronts:-

i) The appellants had been seen by PW1 before the parade as they had been taken to the report office from the cells separately for no apparent reason.

ii) They had unique peculiar clothing which made them stand out amongst other parade members in breach of the force standing orders on the identification parade, in that, members of the parade must be of

the same height, and complexion, and dress in similar manner.

iii) Identification parade form for the 2nd appellant was not produced in court.

f) Lighting at the time of the robbery was insufficient to enable positive identification to take place.

g) The appellants raised a defence of alibi which should have been accepted and it was wrong for the court to shift the burden of proof to the appellants to prove it. The burden lay on the prosecution to disprove that alibi.

h) DW1 was not cross-examined meaning that his evidence was believed.

i) It was wrong for the learned trial magistrate to take into consideration issues of items not produced in court and identified by PW1 and PW2 as exhibits i.e. the cheque book and baptismal card.

The state countered that submission by stating that they support the conviction for the following reasons:-

i. Appellants admitted to have taken part in the identification parade. This is proof that the identification parade was procedurally done.

iii. Conceded that the issue of presenting preferential clothing on the identification parade was not considered but this is not material.

iv. Contends recovery of the stolen items in July 2005, when the robbery was in June 2005 if proof that recovery was almost immediately after the robbery.

v. Evidence on the record that violence was used against the complainants and failing to produce the treatment notes used to treat the complainants was not prejudicial to the prosecution's case.

vi. There is no express provision of law that an inventory be kept by the officer making recoveries.

vii. Contends that the burden was never shifted on to the appellants and the prosecution proved that the appellants were at the locus in quo.

We have made due consideration of the afore set out facts, findings of the learned trial magistrate, complaints raised by the appellants and their counsel against those findings, and the states support of the findings of the learned trial magistrate and in our opinion the following are own framed questions for determination in the disposal of this appeal:-

1) What offence/offences did the appellants face in the lower court?

2) What findings were made by the lower court with regard to these offences?

3) What complaints have the appellants raised against those findings by the learned trial magistrate?

4) Were there any principles of law that the learned trial magistrate applied? If so where were they sourced from?

5) Are there any other principles of law that this court can resort to in the disposal of this appeal?

6) In view of the responses to own framed questions in number 1-5 above what is the mandate of this court with regard to the same?

7) What are the final orders of this court with regard to the disposal of this appeal?

In response to own framed questions 1, 2, 3, above we state that what these questions are raising has already been set out earlier on in this judgment when assessing the evidence that was presented before the lower court and its resultant judgment.

As for questions 4 and 5, we note the learned trial magistrate though not quoting any specific cases bore in mind certain principles of law applicable to the cases as already reflected on the record when assessing the findings with learned magistrate's judgment.

In response to question 5 we are inclined to be guided by principles of case law decided by the court of appeal and as dutifully followed by the superior court on the subject. We note there is now a wealth of such case law and for this reason, we shall just sample a few for purposes of the record. There is the case of **Wangombe –VS- Republic [1980] KLR 149** where the court of appeal held ***inter alia*** **that when an accused person raises an alibi as an answer to a charge made against him he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time an unsworn statement at his trial, the prosecution or police ought to test the alibi whether possible but different considerations may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution.**

The case of **Ssentale –VS- Uganda [1968] EA 365** where the high court in Kampala held ***inter alia*** that **"an accused person who puts forward an alibi as an answer to a charge does not assume any burden pf proving that answer, and it is a misdirection to refer to any burden resting on the accused in such a case".**

The case of **Karanja –VS- Republic [1983] KLR 500** where the court of appeal laid down the following guidelines:-

(1)The word "alibi" is a latin word meaning "elsewhere" or at another place. Meaning where an accused person alleged he was at a place other than where the offence was committed at the time the offence was committed and hence cannot be guilty then it can be said that the accused was set ting up on alibi…..

(2)In a proper case the court, may on testing the defence of alibi and in weighing it with all the other evidence to see if the accused guilt is established beyond all reasonable doubt, take into account the fact that he did not put forward his defence or alibi if it amounts thereto at an early

stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought.

(3)It is improper for the court to treat the prosecution and defence in isolation.

(4)The burden of proving the falsity of the defence was wholly on the prosecution.

(5)The rule about circumstantial evidence is that it must be seen as to be explainable only upon the hypothesis of the accused's guilt and incompatible with any other relevant explanation.

The case of **M'Riungu –VS- Republic [1983] KLR 455** where the court of appeal held ***inter alia*** that:-

1. Although an accused person could be convicted on the evidence of a single identifying witness in circumstances rendering identification difficult, would be a question of mixed facts and law.

5. Corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. In other words it must be evidence which implicated him that is which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed.

The case **Njihia –VS-Republic [1986] KLR 422** where the court of appeal held ***inter alia*** that:-

(1)As the complainant was the sole identifying witness in circumstances in which proper identification was difficult, the trial court needed to warn itself of the danger of relying upon the identification evidence or to look for corroboration if possible. As no such warning was employed by the trial court, the evidence of identification was highly suspect.

The case **Wamdwe –VS- Republic [2003] KLR 26** where the court of appeal drew an inference from possession of recently stolen property by the appellant that he was one of the men that had robbed the complainant.

The case of **Kimani & Another –VS- Republic [2004] 2KLR 46** where the court of appeal held ***inter alia*** that:-

(1)It was clear from the wording of section 296 (2) of the penal code that the offence of robbery with violence is proved if the prosecution proves any of the three elements which consists the charge of capital robbery.

(2)A dangerous and offensive weapon means any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use.

(3)There cannot be any doubt that although a knife is not made or adapted for use for causing injury to a person it would nevertheless be a dangerous weapon for the purpose of section 296 (2) of the penal code if the robbers weilding it in the cause of robbery intended to use it for causing injury

to any person.

The case of **Ajode –VS- Republic [2004] 2KLR 81** where the court of appeal held ***inter alia*** that:-

(1)It is trite law that before such a parade is conducted, and for it to be properly conducted a witness should be asked to give a description of the accused before the police conduct an identification parade.

(2) In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make an allowance for that.

The case of **Ganzi & 2 Others –VS- Republic [2005] 1 KLR 52** where the court of appeal held ***inter alia*** that:-

(1) The offence of robbery with violence under section 296 (2) of the penal code is committed in any of the following circumstances namely:-

(a)The offender is armed with any dangerous or offensive weapon or instrument, or

(b)The offender is in the company one or more person or persons, or

(c) At or immediately before or after the time of the robbery the offender wounds, beats, strangles or uses force or personal violence to any person.

(3) The words dangerous or offensive weapon in section 296 (2) of the penal code bear the same meaning as defined in section 89 (1) of the penal code, that is any article made or adapted for use or causing injury to the person if intended by the person having it in his possession or under his control for such use.

(4) Where the defence of alibi in first raised in the appellants defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecutions evidence.

The case of **Republic –VS- Kirima & Another [2005] 1KLR 658** in which Sitati Judge sitting at High Court Meru on May 17th 2005 held ***inter alia*** :-

(1) When an accused person raises an alibi as an answer to a charge against him, he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution ought to test the alibi whenever possible although different considerations may arise as regards challenging and testing it and its sufficient for the trial court to weigh the alibi against the evidence of the prosecution.

The case of **Patrick & Another –VS- Republic [2005] 2KLR 162** where the court of appeal held ***inter***

alia that:-

(1)An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. It is not the function of the appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conviction. It must make its own findings and draw its own conclusions.

The case of **Odhiambo & Another –VS- Republic [2005] 2 KLR 176** where the court of appeal also held ***inter alia*** that:-

(1)The act of being armed with a dangerous offensive weapon is one of the elements which distinguishes a robbery under section 296 (2) and one defined under section 295 of the penal code. Other ingredients or elements under section 296 (2) include being in the company of one or more persons, or wounding, beating e.t.c the victim and since all these are modes of committing the offence under section 296 (2), the prosecution must choose and state which of those elements distinguishes the charge from those defined in section 295.

(2)Where any of those elements or ingredients are proved there would be no discretion on the part of the trial court but to convict under section 296 (2).

(3) Where the prosecution is relying on the element or ingredients of being armed, it must be stated in the particulars of the charge that the weapon or instrument with which the appellant was armed was a dangerous or offensive one. The test is the use or the purpose for which the person possessing it intends to put it to.

We have given due considerations of the afore set out principles of case law and applied them to the rival arguments herein as well as the totality of the evidence adduced before the lower court and we proceeded to draw out the following own conclusions on the same.

On recognition at the scene at the time of the robbery, with the help of lantern light PW1 was categorical that he only recognized one George Okoth. There is no mention that he could identify any of the other robbers. The information that he could identify other robers was not relayed to police who responded to the scene soon after the robbery.

PW2 does not mention recognizing anyone in the room where she was when the robbers struck. She alleges to have been taken to another room where the robbers asked her if she knew them and she responded that she did not know them. There is no mention of any lighting in the room she was taken to and so the possibility of any identification in the said room by PW2 is ruled out.

Identification at the identification parade is limited to the testimony of PW1 as the appellants declined to appear on the identification parade a second time for PW2 to participate. PW1 conceded in his cross-examination that accused were the only ones with a torn sweater in the first parade, and a green sweater in the second parade. This arrangement went contrary to the rule of the requirement that we have judicial notice of and which has also been crystallized by judicial decisions that we have judicial notice of that members of the identification parade be of the same height, complexion and manner of clothing. To us,

the distinctive peculiar dressing of the appellants as opposed to the manner of clothing of the other identification parade participants prejudiced the appellants' position on the identification parade. PW1's human ingenuity could have told PW1 that those oddly dressed were the suspects. This coupled with the fact that PW1 gave no description of the other robbers soon after the robbery, and before the parade makes the identification of the appellants on the parade to be weak and are which cannot be acted upon in the absence of any other direct or circumstantial evidence linking the appellants' to the commission of the offence.

As for PW2 having doubted her ability to register the appearance of robbers who conversed with her in the room where she had been taken to, and her failure to state that the robbers moved with the lantern to this room since it was only one, and having failed to take part in an identification parade because the appellants declined to appear in the identification parade a second time, leaves PW2's identification of the appellants to be one of dock identification which case law on the subject set out above has stated that it is one of the weakest kind of mode of identification which can only be acted upon if there is some other corroborative evidence. We also find that in view of our finding that the distinctive manner of clothing of the appellants as distinct from other identification parade participants prejudiced their position, and considering that there is no mention by the parade officer that the appellants manner of clothing was different for the intended second parades we find the appellants were justified in declining to appear in the second identification parade as they would have stood prejudiced as in the first parade. More so when there is no mention that witnesses had been kept separate and were not in communication with each other.

Having discounted the evidence on identification, we come to the evidence of possession of the stolen items. We note from the evidence of PW1 and 2 that the peculiar items were a bank book and a baptismal card for the complainant's child which were not produced as exhibits. Once these peculiar exhibits are discounted, we are left with the items produced as sufurias, a green bag and cutlery. It is undisputed that the link between the complainants and the sufurias were scratch marks allegedly made by them and standing for the initials of the names of PW2.

PW1 was categorical that the sufurias in court had no scratch marks and if they had no scratch marks then, they were not theirs. It is on record that PW1 did not point out any scratch mark on the sufurias displayed in court.

PW2 identified spoons, forks and plastic cups as well as sufurias three of them. She concedes the spoons, forks and mugs had no mark. She is silent with regard to any mark on the sufurias PW2 did not volunteer that information. In the absence of any peculiar mark on the sufuria. PW2 goes to confirm PW1's evidence that there was no mark on the sufurias in court. In the absence of such a mark, there is nothing to remove those sufurias from their common pool since they are common items of usage. For this reason we feel it is unsafe to act on such evidence as a basis for conviction.

Turning to the green bag, it is evident that it looked like any other green bag. There is also contradiction as to when it was recovered. PW1 stated he found it at the police station on 11th June 2005 when he went to record a statement about a month before the arrest of the appellants.
Another version is that it was recovered at the house of accused 3. This conflicting piece of evidence was not reconciled by the learned trial magistrate as it creates doubt as to whether the bag PW1 identified at the police station on the 11th day of June 2005 soon after the robbery as the one robbed from him left the police station and went to be recovered in the home of accused 3 almost a month later. This lack of reconciliation on this as part of evidence is fatal to that piece of evidence in so far as it seeks to link the appellants to the commission of the crime.

Turning to the defence, it is clear that the 2nd appellant who was the first accused gave evidence as DW1.

The sum total of his evidence is that the sufurias belong to him from the date the mother died. He has no house at home and that is why he kept all his belongings inclusive of the sufurias at his younger brother's house. As for the robbery he said he was at his place of work in Kisumu when the robbery occurred. He was not cross-examined.

The first appellant who was the 2nd accused in the lower court gave sworn evidence to the effect that on the night of the robbery he was at his place of work at Naivasha and only returned home on 3rd July 2005 and then arrested outside his house shortly thereafter. He knew two sufurias. When cross-examined he stated that he did not have any employment card and that the card he had was a business card.
That he lost receipts he used to pay fare to his home. Also stated that he was seen by the complainants before the holding of the identification parade.

We have given due consideration to the defences raised by the appellants and we are satisfied that both appellants raised what is known in law as defences of ***"alibi"***. Case law on the subject set out herein is to the effect that this defence can be raised at any stage of the proceedings. If raised at the plea stage then the prosecution has an opportunity to test it during the prosecution of the case. If raised at the defence stage in sworn testimony, it will be tested during cross-examination. If raised in an unsworn testimony, it has to be weighed against the totality of the prosecution evidence. Further that an accused person who avails himself/herself of the said defence does not assume the burden of proving it. The burden lies on the prosecution to disprove it.

We have given due consideration to the said defences. That in respect of the 2nd appellant is two fold namely that the sufurias belong to him and that he was not at the scene of the robbery. He was not cross-examined. On this assertion when weighed against the totality of the evidence of the prosecution, we find that there is nothing in the prosecutions evidence to show that police visited the appellant's place of work Kisumu to disprove his presence there, at the time of the robbery. As for the claim to the sufurias this too, has not been displaced considering that the sufurias produced in court had no special mark linking them to the complainants. There is therefore nothing to oust the appellant's assertion that they belonged to him. Having inherited them from his mother.

As for the first appellant who was the second accused in the lower court, his alibi has not also been displaced because no efforts were made to confirm his allegations that he was at his place of work in Naivasha. Once the alibi is found to be sound and an ousted then the prosecutions case stands tainted.

We recall issue was also raised about failure to produce the initial treatment notes used to fill in the P3s for both complainants. We have revisited that evidence on the record and we are satisfied that miscarriage of justice had not been caused by failure of the prosecution to produce the said treatment notes. We are satisfied with the testimony of PW5 that he saw the notes and that he used them to fill in the P3s.
If the defence had doubts about the existence of the notes then they should have applied to have the treatment records from New Nyanza General Hospital produced. We are of the opinion that had the conviction stood, the failure to produce the treatment chits could not have affected that conviction.

For the reasons given in the assessment we are satisfied that the appellants convictions stand tainted. We accordingly quash the same and order appellants released in connection with convictions which led to this appeal unless otherwise lawfully held.

Dated, signed and delivered at Kisumu this 22nd day of February 2011.

R.N. NAMBUYE

JUDGE

ALI-ARONI

JUDGE

RNN/va