



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL APPEAL NOS. 257, 258 & 264 OF 2009 (CONSOLIDATED)**

**BETWEEN**

**CHARLES HARAMBE OBARE**.....**1<sup>ST</sup>**  
**APPELLANT**

**NYARIBO NYAKANGI** .....**2<sup>ND</sup>**  
**APPELLANT**

**TOM HITLER ABUSA** .....**3<sup>RD</sup>**  
**APPELLANT**

**VERSUS**

**REPUBLIC**.....**RESPONDENT**  
**NT**

**(Being an appeal from the judgment from original conviction and sentence of the Principal Magistrate,**

**Hon. R.A. Oganyo (Mrs.) in Kilgoris SRM’s Criminal Case Number 310 of 2008 dated 23<sup>rd</sup> December, 2009)**

**JUDGMENT**

**1.**The three appellants herein, Charles Harambe Ombare, Nyaribo Nyakangi and Tom Hitler Abusa, were the 1<sup>st</sup>, 4<sup>th</sup> and 2<sup>nd</sup> accused persons respectively in Kilgoris SRM’s Criminal case Number 310 of 2008. Under the consolidated charge sheet dated 12<sup>th</sup> November 2008, the three appellants, together with one Simion Kengele faced 5 counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

**2.**In count I, Charles Harambe Obare and Tom Hitler Abusa were charged that on the 19<sup>th</sup> day of May 2008 at cemetery area Kilgoris in Transmara District of the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely a rifle, panga, maasai swords and rungu robbed of (sic) CORGAN MUSYOKA one wrist watch make Seiko, a mobile phone make Cell ink CL 100, a mobile earphones (sic), a pair of safari boots, two bottles of coca cola sodas, a cap, chips and cash Kshs.18,140/= all valued at Kshs.33,070/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said CORGAN MUSYOKA.

3. In the count II, Charles Harambe Obare and Tom Hitler Abusa were charged that on the 19<sup>th</sup> day of May 2008 at cemetery area Kilgoris in Transmara District of the Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely a rifle, pangas, maasai swords and rungas robbed of (sic) SILSIL SIALO of a pair of safari boots, a mobile phone make 2600-B-2, a cap and cash Kshs.800/= all valued at Kshs.10,800/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said SILSIL SIALO.

4. In count III, Charles Harambe Obare, Simion Kengele and Nyaribo Nyangangi were charged that on the 19<sup>th</sup> May 2008 at Sosio village Kilgoris in Transmara District of the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely pangas and Maasai swords robbed of (sic) EUNICE CHEPKOSGEI of a mobile phone samsang, a travelling bag, two radios make sonitec and national, 4 mobile chargers, keys to the motor vehicle KAD 742 Y Mitsubishi canter, and cash Kshs.53,000/= all valued at Kshs.63,300/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said Eunice Chepkosgei.

5. In count IV, Charles Harambe Obare, Simion Kengele and Nyaribo Nyakangi were charged that on the 3<sup>rd</sup> June, 2008 at water supply area Kilgoris in Transmara District of the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely Maasai swords robbed JANE SIAPAI of mobile phones make motorolla C123, Nokia 6330 and cash Kshs.5600/= all valued at Kshs.27000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Jane Siapai.

6. In count V, which was withdrawn under **section 87 (a)** of the **Criminal Procedure Code**, Charles Harambe Obare, Simon Kengele and Nyaribo Nyakangi, had been charged that on the 3<sup>rd</sup> June 2008 at Water supply area Kilgoris within Transmara District of the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely Maasai swords robbed RESPA MUSOMI of a mobile phone make motorolla C113 valued at Kshs.2200/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said RESPA MUSOMI.

7. The three appellants together with their co-accused all pleaded not guilty to the charges, thereby necessitating a full trial of the case. The prosecution called 7 witnesses all of whom were cross-examined at great length by each of the appellants.

8. The case for the prosecution was that on the 19<sup>th</sup> May 2009 at about midnight, Henry Silsil Nkurumo Ole Sialo (PW1) left Mwangi's bar together with Corgan Musyoka (PW2). They had been watching a football match on television, they left to go home on a motorbike which was being ridden by PW2. As the two of them passed through cemetery area in Kilgoris town, they were flagged down by a person who came from a feeder road. The person was wearing a police-like cap, complete with crown, a black rain coat and gumboots; a blue trouser. He was armed with a gun and had a torch.

9. As soon as PW1 and PW2 stopped, about 5 to 6 other persons emerged from the bush, with the first person ordering the two to sit down as he also tied PLW1 with a rope. The gang flashed torches at the faces of both PW1 and PW2. There was moonlight that night. The gang demanded to be given money. The person armed with the gun was the one who made the demands in Swahili language. The other persons also frisked PW1 for valuables. They took Kshs.800/=, a Nokia 2600 B2 phone, a college ID and National ID. The same armed person cut PW1 on the right forearm. Two other persons removed PW1's safari boots before advising PW1 and PW2 to go to the police station and ask for PC Kusemba. On being released, the pair was warned not to look back.

**10.** The matter was reported to Nyangusu police station the next day by PW1. He stated that their attackers had a Kisii accent; and that since there was moonlight he had recognized some faces. PW1 and PW2 then went to Nyangusu to see if they could trace their assailants and the mobile phone. They saw one of the suspected attackers, who had been referred to as “Corporal” but he eluded them. Another report was made to the AP camp at Nyangusu. Together with some APs, PW1 and PW2 went to a shop to which “Corporal” had delivered a battery. On enquiring at the shop, the APs were informed the same belonged to Harambe Obare. PW1, PW2 together with the AP’s mounted a search for Harambe Obare; they formed 2 groups of three people each. On that day one person was arrested – the one who had allegedly removed shoes from PW2’s feet.

**11.** PW1 stated that the attackers wore jackets, one was wearing a sweater and gumboots. Others wore plastic shoes. One of them was armed with a long gun, may be a G3 Rifle. The man who was arrested at Nyangusu after the robbery was tall and heavily built. He was armed with a maasai sword, an axe and a club. PW1 produced the jacket displaying the pocket from which his mobile phone was forcefully removed. PW1 stated that the person referred to as “corporal” by his accomplices during the robbery was Charles Harambe Obare, the 1<sup>st</sup> appellant herein. It is also this 1<sup>st</sup> appellant whom PW1 and PW2 saw at Nyangusu market as he hurriedly delivered a battery to a shop. PW1 stated that he had seen the 1<sup>st</sup> appellant some 3 years prior to the incident at a place called Endonya Onkopit.

**12.** PW1 testified that during the robbery, he was hit on the left side below the ribs to silence him. During the robbery, the only source of light was the moonlight, although the 1<sup>st</sup> appellant is also said to have had a torch. PW1 stated that when he went to report the matter to the police, he categorically told the police that he could identify his attackers if he saw them, and in particular the 1<sup>st</sup> appellant who frisked PW1 and also cut the breast pocket of PW1’s jacket in order to access the mobile phone.

**13.** PW2 was Corgan Musyoka (the “Mkamba”). He gave a similar testimony as that given by PW1. He said he lost his cell link CL 100 mobile phone valued at Kshs.5000/=, a Seiko automatic watch, a blue cap, a pair of safari boots, chips and two sodas, a packet of Embassy cigarettes and a matchbox.

**14.** After reporting the incident the following day, PW2 together with PW1 went to Nyangusu to see if they could see the faces of any of the people who had robbed them the previous day. It was market day at Nyangusu. The 1<sup>st</sup> and 3<sup>rd</sup> appellants were arrested at Nyangusu that day. On the night of the robbery, it was the 3<sup>rd</sup> appellant who, according to PW2, was carrying the long gun. PW2 stated that the 1<sup>st</sup> appellant was also wearing boots when they saw him the same way he had worn them on the night of the attack. PW2 stated that there was full bright moonlight on the night of the attack and that as such, he was able to see his assailants well, especially the 3<sup>rd</sup> appellant herein.

**15.** PW3 was Eunice, Chepkosgei Talala, a teacher at St. Joseph Girls Boarding Primary School. On the 19<sup>th</sup> May 2008 in the wee hours of the morning, she was woken up by the barking of her dog. She opened and saw many people outside – they alleged they were policemen and wanted to be shown the way to the Chief. Some asked her for water and also demanded to know where her husband was. They followed her into the house, and into the bedroom, demanding to be given a cell phone. She was slapped thrice. They stole Kshs.53,000/= from her.

**16.** After the robbers left, she screamed for help. Neighbours and the watchmen of Sosio Primary school answered her screams. The robbers also took her radio, her car keys for M/v Reg. No. KAD 742 canter Mitsubishi. Her cell phone and pump for spraying cattle were also taken. PW3 also stated that there was full bright moonlight on that night of the robbery and that the people who were out there, one was wearing a raincoat for policemen, a peek cap and gumboots. Most of the people carried pangas. One of

the people had covered himself with a maasai red sheet and carried a large basket in which he put things as they took them from PW3's house. That person was the one being referred to as "Koblo" "Afande" by his colleagues. Whenever a valuable item was taken whoever had taken it would say to "Koblo" "Afande" *chukua hii kwa exhibit*". According to PW3 "Koblo" or "Afande" was the 1<sup>st</sup> appellant herein.

17. PW3 stated that the whole episode took about one hour; that the robbers had torches with bright light which they flashed around in the house as they looked for valuables while the outside was well lit with the light from the full moon. PW3 told the court that it was the 2<sup>nd</sup> appellant herein, Nyaribo Nyakangi who slapped her as he demanded money from her and that it was the 1<sup>st</sup> appellant, the "Koblo", the "Afande" who asked her for water. Though the robbers took the keys to PW3's car, they never drove off with the car which was parked outside the house. PW3 informed the police that though she did not know her attackers before, she could identify them if she saw them. It was the description she gave of her attackers that led to the arrest of the appellants; and in particular, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants who were 1<sup>st</sup> and 4<sup>th</sup> accused respectively in the lower court. PW3 produced the P3 form filled on 19<sup>th</sup> May 2008 as **PMF1-3**.

18. PW4 was Jane Kakenya Sapai of Water Supply area, Kilgoris. She narrated that on 3<sup>rd</sup> June 2005 at about 7.00 p.m., she was resting in her sitting room as her house help prepared supper. She was together with her stepson. As she got up to set the table, she heard a commotion outside her house. She also heard her maid asking them not to beat her. Then some people entered the house through the kitchen door. The electricity lights in her house were on and she was by this time hiding behind the sofa set. The robbers then switched off the lights and took the maid to the other rooms in search of money; alleging that since Mzee had been around, there must have been lots of money. They took 600/= which was in her purse. When the robbers eventually discovered her behind the sofa set, they took her Nokia Phone and a further Kshs.5000/=. They also stole three remote controls for the DVD, radio and for the decoder. One of the robbers was referred to as "Koblo" by the others. When PW4 failed to produce more money, she was cut on the head. She struggled with one of the robbers and overpowered him. She called for Ledama her stepson and her house help to come to her aid. They all screamed. Neighbours came and she was taken to the District Hospital for treatment. Her other workers who were in the homestead that evening had also been attacked. After being attended to at the hospital, she went to the police station to report. She was issued with a P3 form – **PMF1-2**.

19. PW4 also stated that of the attackers whom she saw before the lights went out was one tall and dark one who wore a sawn cap that went up to the eyes. He also wore a raincoat resembling those worn by policemen and he had a Somali sword as he entered the house. She identified the tall black person as the 1<sup>st</sup> appellant herein. She was also able to identify the 2<sup>nd</sup> appellant herein who she said wore a brown jacket and a woolen cap that covered up to the eyebrows. He was also armed with a maasai sword, and it is the 2<sup>nd</sup> appellant who cut her on the head. She said that she was taken to the bedroom twice by the 1<sup>st</sup> and 2<sup>nd</sup> appellants, but she could however not identify them on the parades; because according to her these two were not at the parade. She said the robbers who entered the house had warned her that there were other robbers outside the house who were armed with guns and that if PW4 or any of her people screamed, they would be shot. When PW4 was taken to the bedroom, she found her stepson and the maid down and their heads thrust under the bed. PW4 was categorical that when she made her report to the police, she told the police that she could identify her attackers if she saw them, and that the 1<sup>st</sup> appellant herein was referred to by the others as "Koblo" or "Afande". She also told the court that it was the description she gave to the police that led to the arrest of the 1<sup>st</sup> and 2<sup>nd</sup> appellants.

20. Number 2006056635 APC Gerald Mutiria of Nyangusu AP Camp testified as PW5. He testified that on 21<sup>st</sup> May 2008, while at the camp, he received information that two of the suspects who were involved in the spate of robberies in the Kilgoris area had been seen at Nyangusu area. Together with the other AP

officers and PW1 and PW2, they went to Nyangusu area. On that day, the 3<sup>rd</sup> appellant was arrested. On the 6<sup>th</sup> June 2008, PW5 received further information regarding the 1<sup>st</sup> appellant who was said to be a famous thug in the area. They were informed that he was wearing a white shirt and was hiding at a swampy area where bricks were being baked. They went to the area and on arrival thereat at a time that is not given, a person wearing a white shirt took off, but the police officers found Nyakangi Nyaribo, the 2<sup>nd</sup> appellant herein who was said to be working for the 1<sup>st</sup> appellant and who had facilitated the 1<sup>st</sup> appellant's escape. The 2<sup>nd</sup> appellant was taken to the AP camp and later to Nyangusu police station.

21. Later on a date the witness could not remember, PW5 was informed that the 1<sup>st</sup> appellant was at the brick making hide-out. They went there and ambushed the 1<sup>st</sup> appellant at about 2.00 p.m., arrested him and took him to the police station. PW5 told the court that the 1<sup>st</sup> appellant was now well known to him although he did not know him before. PW5 also stated that the victims of the robberies gave a description of him. He lived in a well fenced compound and on many occasions, he escaped the police dragnet. PW4 stated that they recovered a police force number from the house of the 1<sup>st</sup> appellant. He also said they recovered many electronic items from the same house. PW4 stated that the names of the three appellants herein were on the Chief's list of wanted criminals in the area.

22. PW6 was Daniel Ledama Shoshoroi a Clinical Officer at Transmara District Hospital. He is the one who prepared the P3 form for Eunice Chepkoskei (PW3). He stated that on examination PW4 had tenderness on her cheeks. He assessed the degree as harm. PW6 produced the P3 form in respect of PW3 as **P. Exhibit 1**. He also produced the P3 form in respect of PW4, Jane Sapai as **P. Exhibit 2**. The same was completed and filled by one Rahab Ngure who classified injuries suffered by PW4 as harm.

23. PW7 was Number 61814 Sgt. John Wycliffe Olima of Kilgoris police station, crimes branch office. He was the investigating officer in this case. He is the one who received complaints of the robbery from PW1 and PW2. Together with other officers he went to the scene of crime and also went to the home of PW3. He told the court that both PW1 and PW2 told him that they could identify their assailants if they saw them. On 21<sup>st</sup> May 2008, the 3<sup>rd</sup> appellant was arrested with the help of the APs from Nyangusu AP camp. On 9<sup>th</sup> June 2008, the deceased 3<sup>rd</sup> accused was arrested and on 31<sup>st</sup> October 2008, the 1<sup>st</sup> appellant herein was arrested by officers from Nyangusu police station. PW7 produced the Navy blue jacket which PW1 was wearing on the night of the robbery as **P. Exhibit 3**. He also testified that when the victims reported the robberies, they maintained that the robbers had pretended to be police officers and were armed with a gun, which looked like a G3 Rifle, pangas and clubs. That PW1 and PW2 also mentioned the names "Obare" and "Hitler" to the police at the reporting stage. He also told the court that during the investigations, it came out clearly that the 1<sup>st</sup> appellant was the leader of the gang of robbers that terrorized and robbed PW1, PW2, PW3 and PW4. He also explained that he could not conduct an identification parade for the 1<sup>st</sup> appellant because the witnesses already knew him.

24. At the close of the prosecution's case, each of the three appellants, were put on their defence. They each gave sworn evidence but called no witnesses.

25. The 1<sup>st</sup> appellant, Charles Harambe Obare told the court that on 31<sup>st</sup> October 2008, he was at home working on the farm on the Transmara side of Mzee Ngasen's farm. The time was about 10.00 a.m. The appellant was arranging bricks for a customer when Mzee Ngasen's brother by the name Mzee Jenuro went to where the appellant was and demanded to be given money for the use of his land for making bricks. When the appellant refused to pay, Mzee Jeniro went away, promising that the appellant will see what would happen to him.

**26.** At about 4.50 p.m., some three policemen went to where the appellant was working and they asked him to accompany them to police station. One of the policemen was from Nyangusu police station. He was PW5. The policemen were accompanied by Mzee Jeniro who had complained to the police that the appellant had assaulted him on his (Jeniro's) farm. On the way to the police station, an officer who was in the police vehicle slapped the appellant, telling him that he had now been found in hot soup. The appellant bled from the nose and ears.

**27.** Later, the appellant was transferred to Kilgoris police station where he stayed for 10 days before being taken to the court. He denied any involvement in the alleged crimes. The appellant further stated that he was arrested in the presence of his wife, the late Rael Kemuma. He also denied being arrested and beaten by members of the public on 30<sup>th</sup> October 2008.

**28.** The 2<sup>nd</sup> appellant, gave his names as Wilfred Nyaribo Nyakangi. He told the court that on 20<sup>th</sup> July 2008 at about 10.00 a.m., he was at a brick making site on the Transmara/Gucha border. He saw people running away over his bricks. When he sought to know why they were stepping on his bricks, 2 of those people approached him and asked him if he knew who they were. The two had guns under their jackets and looked annoyed. They arrested the appellant, handcuffed him. They also asked him if he knew Dalmas. He was then taken to Ololchani AP Camp in Nyangusu, but later transported to Kilgoris Police station.

**29.** After one week, a police ID parade was conducted by the Kilgoris Deputy OCS in the presence of PW7. He denied any knowledge of the charges against him which charges he said were stranger than fiction. He also testified that he did not know any of his co-accused persons before.

**30.** I must state here that there is no indication from the court record (both original and typed) whether the prosecution was ever called upon to cross-examine this appellant. The proceedings end abruptly with each of the appellants closing their case.

**31.** The 3<sup>rd</sup> appellant, Tom Hitler Abusa stated that on the 16<sup>th</sup> May 2008, he was involved in the arrangements for the funeral of his father's brother, one Samwel Nyangwono. The body was removed from Akemo Valley Mortuary on 21<sup>st</sup> May 2008. As he waited to transport the coffin to the mortuary between 12.00 and 1.00 p.m. some 2 people alighted from a motorbike and went to a shop which was closed. The 2 people then boarded the motor bike again and headed for Nyangusu. The appellant and others involved in the funeral plans proceeded to Akemo Valley mortuary. At the mortuary a cyclist went to where appellant and 2 other people were standing and asked them to go to where the 2 people who had left on a motor bike for Nyangusu were. He gave his age to be 41 years.

**32.** On reaching the 2 people, the appellant was asked to identify FRED GUMO. When the appellant told them that there was no such person known as Fred Gumo, he was arrested and handcuffed and taken to the police station without being told why. Immediately thereafter, the appellant was put into a pick-up and taken to Kilgoris police station for identification. At Kilgoris he was asked if he knew a young man called Fred Gumo. There was no Fred Gumo. Appellant was taken back to cells. He refused to give his fingerprints.

**33.** On the next day, the appellant was arraigned in court on charges he knew nothing about. No questions were put to this appellant.

34. The trial court considered the evidence placed before it and concluded that the prosecution had proved its case beyond any reasonable doubt on counts I, II and IV as follows:-

(1) The 1<sup>st</sup> and 3<sup>rd</sup> appellants were found guilty and convicted on counts I and II of the charge.

The 1<sup>st</sup> and 2<sup>nd</sup> appellants were found guilty and convicted on count IV of the charge.

35. Subsequent to the conviction, each of the 3 appellants was sentenced to suffer death as by law provided on each of counts I, III and IV.

36. The appellants were aggrieved by both the conviction and sentence, hence this appeal. The three appeals which were filed separately were consolidated by an order of this court dated 19<sup>th</sup> January 2011. The common grounds of appeal were that:-

- 1. The learned trial magistrate grossly erred in both law and fact when she accepted that the prosecution had proved its case against the appellants beyond any reasonable doubt.**
- 2. The learned trial magistrate grossly erred in both law and fact, when she failed to consider the appellant's defence.**
- 3. The learned trial magistrate grossly erred in law and fact by placing undue reliance on circumstantial evidence.**
- 4. The learned trial magistrate grossly erred in both law and fact by failing to appreciate that there were serious contradictions in the prosecution's evidence, including the ID parade evidence.**
- 5. The learned trial magistrate grossly erred in law and fact in failing to find that the appellants' constitutional rights as enshrined in section 77 (1) of the repealed constitution of Kenya had been violated.**

37. At the hearing of this appeal, the 1<sup>st</sup> appellant was represented by Mr. Momanyi Aunga while the 2<sup>nd</sup> and 3<sup>rd</sup> appellants appeared in person. The Respondent was represented by Mr. N. Mutuku, Senior Principal State Counsel. Mr. Mutuku conceded the appeal in its entirety. He submitted that the circumstances under which the 4 complainants were allegedly robbed were not conducive for positive identification; that the conviction of each of the appellants hinged on dock identification and that none of the appellants was found with any of the stolen items at time of their arrest. He further submitted that though both PW1 and PW2 assisted the police in the arrest of the 1<sup>st</sup> and 2<sup>nd</sup> appellants, there was no attempt to subject the said witnesses to an identification parade. In summary, Mr. Mutuku submitted that the testimonies of the 4 complainants were all uncorroborated and was thus not sufficient for a safe conviction.

38. In response Mr. Momanyi, counsel for the 1<sup>st</sup> appellant agreed with the Senior Principal State Counsel, that it was necessary to mount a police identification parade, especially in view of the fact that the witnesses did not give a description of the appellants with their first report to the police. Mr. Momanyi submitted that the reason for the arrest of the 1<sup>st</sup> appellant was because his name was on the chief's list of wanted criminals generally and not because he was wanted in respect of the offences committed on 19<sup>th</sup>

May 2008. It was also submitted that the learned trial magistrate did not consider the defence of the 1<sup>st</sup> appellant and further that there were material contradictions in the evidence. Mr. Momanyi urged the court to allow the appeal as prayed.

39. The 2<sup>nd</sup> appellant gave written submissions. We have read and considered the same. The 3<sup>rd</sup> appellant concurred with the submissions made by both the Senior Principal State Counsel and by Mr. Momanyi for the 1<sup>st</sup> appellant.

40. Although the Respondent has conceded the appeal, it is still our duty as the first appellate court to reconsider and evaluate the evidence afresh with a view to reaching our own conclusions in the matter. See **Okeno –vs- Republic [1972] E.A. 32** and **Patrick & another –vs- Republic [2005] 2 KLR 162** amongst others.

41. We have set out the evidence in full, hereinabove, considering the complaints that were raised by the 3 appellants against the judgment of the lower court. Upon such consideration, we are satisfied that this appeal must succeed. As it were, the series of robberies involving PW1, PW2, PW3 and PW4 were all committed in the night. The only source of light in all the incidences was moonlight, and the fact that there was a tall and dark “commander” of the gang referred to as “Koblo” or “Afande” by the other robbers. Each of the counts on which the appellants were convicted were supported by the evidence of only the complainant in the respective counts. We do not see anywhere in the judgment where the trial court warned itself of the dangers of relying on the evidence of a single identifying witness as was required of the court. In our view, this was a serious flaw in the evidence whose benefit goes to the appellants.

42. We also note that the trial court did not consider the defences of each of the appellants. We have ourselves reconsidered and evaluated the defences. We are not certain that those statements are true, but the fact that the trial court said nothing about them worked to the detriment of each of the appellants. Whatever their worth, it was incumbent upon the trial court to consider the defences and to either accept or reject them.

43. We have noted the contradictions in the prosecution case in respect of each of the counts of which the appellants were convicted. Those contradictions and inconsistencies go to the core of the case against the appellants. The appellants and each of them must get the benefit of the doubt. See **Simion Kiprono Langat –vs- Republic [2009] e KLR.**

44. One final point we must comment on before we conclude this judgment: In the judgment of the lower court, each of the 3 appellants was sentenced to death on each counts I, II and IV. A man can only die once. It was therefore necessary for the court to have sentenced the appellants to death on only one of the counts and held the other sentences in abeyance.

45. In the premises, this appeal succeeds. The convictions on counts I, II and IV against each of the appellants is quashed and the sentence of death set aside.

46. Unless otherwise lawfully held, each of the appellants is to be released from prison forthwith.

**Dated and delivered at Kisii this 07<sup>th</sup> day of April, 2011.**

**ASIKE-MAKHANDIA**

**RUTH NEKOYE SITATI**

**JUDGE.**

**JUDGE.**

In the presence of:

Mr. Momanyi Aunga (present) for 1<sup>st</sup> Appellant

Mr. Momanyi for Mokuu for 2<sup>nd</sup> Appellant

Present in person for 3<sup>rd</sup> Appellant

Mr. Mutai for Respondent

Mr. Bibu – court Clerk also interpreting.