



REPUBLIC OF KENYA
IN THE COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.14 OF 2007

(Appeal from the judgment of Hon. J.N Nyaga – Principal Magistrate in Maua Principal Magistrate’s Criminal Case No. 4033 of 2005 dated 26th January, 2007)

LEONARD MBOBUA MUNGANIA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

The Appellant, Leonard Mbobua Mungania, and his friend, Henry Muriera Mucheke were charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. Henry Muriera, his co-accused was acquitted for lack of evidence. The Appellant was however found guilty and was convicted and sentenced to suffer death as by law provided. He has appealed to this court on four grounds that-

- (1) the learned trial magistrate erred in law and fact in basing his conviction upon a defective charge sheet.*
- (2) the case suffered from several procedural irregularities which were prejudicial to the appellant;*
- (3) the witnesses gave contradicting evidence*
- (4) the court did not consider his defence of an ALIBI*

The Appellant also gave written submissions on each of the grounds of appeal. We have considered the above grounds of appeal, together with the appellant’s written submissions, and we set out our findings on each of the grounds as more particularly set out below.

1. Of the Evidence of Witnesses and the Defence of Alibi (Grounds 3 and 4)

Five witnesses gave evidence for the prosecution. PW1 was the victim of the robbery, and the complainant PW2 was a 10 year old pupil and an eye witness to the robbery. PW4 received a report by the complainant (PW1) that he had been attacked by the Appellant with another person whose name he did not mention. PW3 acting on a tip-off arrested the Appellant and the co-accused.

The evidence of PW1 and PW2 was consistent. The time was between 3.00p.m to 3.30p.m. PW1 was going to his school when he was attacked by the Appellant and his friend who knocked him and stole his cell – phone, worth Kshs. 400/=. PW2 saw this happen. She asked the Appellant “*Mbobua you want to kill the teacher?*” She had seen and knew both the Appellant and the co-accused. She was barely 2 metres from where the Appellant and his co-accused had wrestled PW1 down, causing him injuries to his face. PW5 testified and classified the injuries as grievous harm.

There is no contradiction in this evidence and this ground fails, we so hold.

The defence of alibi was abolished by Section 87 of the Miscellaneous Amendments Act, 2003. Before its repeal, Section 307 (2) required the Accused Person to supply to the court particulars of witnesses to support his plea of an alibi. The defence of alibi having been repealed as foresaid the contention of the

appellant that he was elsewhere when the offence was committed cannot stand, and we so hold.

2. Of Procedural Irregularities Prejudicial to the Appellant

The appellant’s contention is that the trial court did not afford adequate time to prepare for his defence as required by Section 77 (2) (c) of the constitution and consequently failed to comply with the provisions of Sections 210 (1) and 211 of the Criminal Procedure Code.

Section 210 of the Criminal Procedure Code empowers the trial court to acquit an Accused Person on the basis of the lack of evidence to put the accused to his defence, and therefore to acquit him. On the evidence of PW1, and PW2 and also PW3 the prosecution had established a prima facie case against the appellant and he could not be acquitted under Section 210 of aforesaid.

Section 211 of the Criminal Procedure Code requires that where the court finds adequate evidence to put the accused to his defence, the court is requires to explain again the substance of the charge to the accused and inform him of his rights to give sworn testimony from the witness box and be subject to cross-examination and also the right to call witnesses or give unsworn statement from the dock and be not subject to cross- examination. Judicial opinion from the Court of Appeal requires that all this information and the response by the accused person be recorded at length, instead of the common trial court’s abbreviation” that Section 211 compiled with”. In this case, there is no record of this nature “that Section 211 compiled with”. The record is merely that” Accused have a case to answer”. This is certainly an irregularity as it violates the statutory requirement of Section 211 of the Criminal Procedure Code. For these reasons, the appeal should be allowed, and we so find and hold.

Failure by the trial; court to adhere to the provisions of Section 211 of the Criminal Procedure Code may also lead to violation of Section 77(2) requiring that the accused be given adequate time and facilities for the preparation of his defence. Where the rights of an accused person under Section 211 of the Criminal Procedure Code are not explained to him, he is unlikely to appreciate the gravity of the charge facing him, and the seriousness of the sentence which may face him if he is not granted adequate time and facilities to prepare his defence. This is therefore another procedural irregularity which is prejudicial to the accused. For those reasons, we allow the appeal herein, and direct that the appellant be released and set free forthwith unless otherwise lawfully held.

It is so ordered.

Dated, delivered and signed at Meru this.....day of.....2010

MARY KASANGO

JUDGE

M.J ANYARA EMUKULE

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.110 OF 2008

CONSOLIDATED WITH

CRIMINAL APPEAL NOS.112 & 113 OF 2008

(From original conviction and sentence in Criminal Case No. 837 of 2005 of the Principal Magistrate’s Court at Nkubu – A.K Kaniaru (P.M) dated 3rd July, 2008)

STEPHEN RIUNGU NJERU.....1ST APPELLANT

ELIAS KAMUNDE KIRIMA.....2ND APPELLANT

CORNEUS MURATHI NJERU.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Criminal Practice and Procedure – when a retrial may be ordered – overwhelming evidence

JUDGEMENT

The Appellants named above were charged with one count of robbery **with violence** contrary to **section 296(2) of the Penal Code**, and two counts of **attempted robbery** contrary to section 297(1) of the **Penal Code (Cap 63, Laws of Kenya)**. The three Appellants were acquitted on Counts II and III of attempted robbery. They were however convicted and sentenced on the 1st count of the offence of robbery with violence. The penalty is death when found guilty. All the three Appellants have appealed to this court against both their conviction and sentence.

The principal grounds in the Amended Grounds of Appeal by both the 1st and 3rd Appellants is that the

trial court did not comply with the mandatory requirements of **Section 211 of the Criminal Procedure Code (Cap.75, Laws of Kenya) (the CPC)**. The 2nd Appellant did not have a similar ground either in his original Petition of Appeal or the Amended Grounds of Appeal, but the trial having been conducted together, he has benefit of Section 211 of the CPC.

Section 211 lays down that where the trial court at the close of the evidence in support of the charge, finds that the prosecution had made a case against the Accused Person sufficiently to require him to make a defence the court shall again-

- (i) explain the substance of the charge to the accused person;
- (ii) inform the accused persons of his right to give evidence on oath from the witness box, and that if he does so, he will liable to cross examination, or
- (iii) to make a statement not on oath from the dock, and
- (iv) Ask the accused whether he has any witness to examine or other evidence to adduce in his defence.

It is only after compliance with those requirements that the court *shall* then hear the accused and his witnesses and other evidence (*if any*).

Section 211 (2) provides further that if the accused person states that he has witnesses to call but are not present in court, and the court is satisfied that the absence of those persons is not due to the fault or neglect of the accused persons, and that there is a likelihood that they could if present, give material evidence on behalf of the Accused Person, the court may adjourn the trial and issue process or take other steps, to compel the attendance of the witnesses.

The record (at p.27) sets out the Ruling of the learned trial magistrate. After stating that the prosecution had established a prima facie case, and that the accused had a case to answer p.31 of the record merely says, “Court, Defence hearing now”. There is no record stating either compliance with the requirements of section 211 aforesaid, or any responses by or from the Appellants (Accused Persons). This is a breach of the Appellants’ statutory rights and renders to trial not merely irregular but a nullity. Mr.Kimathi learned State Counsel was well directed to concede the appeals on this ground alone. His concession was however subject to caveat, that the courts do order a retrial of the Appellants.

The principles for ordering a retrial are now steered. There must be overwhelming evidence and a strong likelihood of a conviction of the Appellants if they were retried. The retrial must not be used by the prosecution to fill gaps arising from its own fault or negligence. See the case of **NZIOKA vs. REPUBLIC (1973) E.A.91.**

We agree with Mr. Kimathi that the evidence against the Appellants was watertight. It was overwhelming. Both PW1 and PW3 had gone to purchase small quantities of sugar and tea leaves from the kiosk run by PW2. PW3 fell victim first to the attack by the Appellants. They took him to a nearby compound and told him to lie down. The accused went back, and attacked PW1 who had gone to purchases paraffin from the kiosk PW2.

The first appellant is the person who first attacked PW1 and stole Kshs. 340/= from him. The 2nd Appellant had been an employee for 4 months in the house of PW1. PW1 had struggled with 2nd Appellant, who had hit him with a metal bar, and PW1 had in turn cut him with a panga he had wrestled from the 1st Appellant. The Appellant was the brother of the 1st Appellant.

All the witnesses, (PW1, Leonard Muthaura Gitonga) the 2nd victim of the attack by the Appellants, PW2 (Joyce Kathure Mutugi – the kiosk owner), PW3 (Julius Mugambi, the first victim of the attack by the Appellants) were all affirmative that the Appellants had something *like a gun, a metal bar and a panga* (all offensive and dangerous weapons). All testified that there was moonlight and that there was a solar light from the kiosk. They not only recognized the Appellants, but that they also knew them well previously. In other words the circumstances for conclusive and positive identification of the Appellants were conducive and favourable.

We further agree with Mr. Kimathi that evidence of the child was not material, either to the prosecution or to the Appellants. The child had gone back to asker her mother what the change would be out of Shs 200/= PW3 had given her only to return to the kiosk and find the buyer (PW3) had “disappeared” in the hands of the Appellants. We further agree with learned State Counsel that it was not necessary to call the first investigation officer whose portfolio had been taken over by his colleague, PW5. There were no gaps to be filled by his evidence, particularly as the Appellants were arrested by the citizens and frog- matched to the police station. Similarly there were no gaps to be filled by either Mwangangi, Kinyua, Cyrus and

Domisiano who were merely the companions of PW4 who had heard noise from a nearby kiosk and went to inquire into the cause of the noise. There was no need to call such people. Their evidence would have been of neither benefit to the prosecution nor the Appellants. No prejudice can be said to have been caused to the Appellants.

In the premises therefore, we hold that there is overwhelming evidence against the Appellants and had it not been for the trial court's failure to comply with the requirements of Section 211 of the Criminal Procedure Code, the Appellants would have been properly convicted and sentenced. On account of that failure, great prejudice was caused to the appellants. The conviction is therefore quashed, the sentence set aside.

We however for reasons given order that there be a retrial of the Appellants before another magistrate, and pending such retrial, the Appellants shall be held in custody.

It is ordered.

Dated, delivered and signed at Meru this.....day of.....2010

MARY KASANGO

JUDGE

M.J ANYARA EMUKULE

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 28 OF 2008

(Appeal from the judgment of Hon. G. Oyugi – Senior Resident Magistrate in Tigania Senior resident Magistrate's Criminal Case No. 185 of 2007 date 21st February, 2008)

FRANCIS MBURUKU MUCHENA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Criminal Practice and Procedure – Court has made discretion to increase sentence – on appeal – section 3 Criminal Procedure Code (Cap 75, Laws of Kenya)

JUDGMENT

The Appellant was charged and convicted of the offence of manslaughter contrary to Section 202(1) as read with Section 205 of the Penal Code (Cap. 63 Laws of Kenya). He was sentenced to serve a term of 20 years. He has appealed to this court on eight grounds but Mr. Anampiu learned counsel for the Appellant argued only 3 of them, and even the three (3) may be summarized as only two, that there was insufficient evidence to convict the Appellant, and secondly that the sentence of 20 years was harsh.

It is the duty of this first appellate court to evaluate the evidence of the prosecution as well as the defence of the accused, the appellant.

The evidence of both PW1 and PW2, the companions of the deceased, is that three of them (PW1,PW2 and the deceased) were sitted on a bench outside the canteen of PW3, at about 7.00p.m when the Appellant came along, unzipped his trouser, and urinated in front of the three of them. The deceased took offence, and slapped the Appellant for behaving in a disrespectful manner before his peers. The Appellant in retaliation whipped out some sharp object which later turned out be a panga, and cut the deceased on the neck. The Appellant thereafter ran away, leaving PW1 and PW2 administering first aid to the deceased.

By a strange act of fate, the Appellant went to Miathene Police Post and reported to PW VI that he was slapped by the deceased, and in retaliation “he had cut him on the neck”. While the Appellant was making his report the deceased too arrived at the same Police Post and reported to the same Police Office, PW VI, that it was the Appellant who had cut the deceased on the neck. PW VI therefore arrested the appellant.

It was also the evidence of PW VII, that the weapon used to cut the deceased was recovered from the mother of the deceased and it was blood stained.

With this type of primary evidence, I am unable to subscribe to the submissions of Mr. Anampiu, Counsel for the Appellant that there was insufficient evidence to convict the Appellant. I would say that the evidence was overwhelming and none of it was contradictory as counsel suggested.

Counsel for the Appellant also played a pun with the question of identification. The time is about 7.00p.m two men are sitted in a couch outside a canteen passing away the early evening air. A third man (*the appellant*) appears in their midst, he ignores their presence, unzips his trouser, and proceeds to urinate in front of them. One of the two men protests, and slaps, the urinating man, who responds quite

disproportionately by inflicting a deep cut on the neck of the protesting man. The same ill mannered intruder has the courage, I would say, effrontery, to go and report to the Police, that he had cut on the neck, the man who slapped him. The cutter and the cut man again meet at the Police Station. What identification is required? Absolutely none in my respectful opinion. Having placed himself in the midst of the incident, the Appellant cannot be heard to suggest that he was not identified. Why would he himself say, to the Police (PW VI), that he had cut the deceased? The question of identification is clearly not tenable, and I reject it.

Ground 5 of the Petition of Appeal charges that the trial court shifted the burden of proof from the prosecution to the defence or the accused. This is not so at all. The trial court found as a fact that the murder weapon was in the Appellant's possession, within the terms of the definition of the word "possession" in Section 4 of the Penal Code-

"Possession –

(a) " *be in possession*" or " *have in possession*" includes not only having in one's personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether the belonging to or occupied by oneself or not) for the use of benefit of oneself or of any other person".

The evidence of PW VIII No. 48214 Sgt. Jonah Wangila is clear that he interviewed the Appellant as to who had taken away the exhibit – a panga and that he told the Appellant to send for the person who had taken away the panga. "*The mother of the accused person the panga which had blood stains. I took possession of the same*"...It is he panga that was used to cut the complainant (*the deceased*).

There is no hint of any shift of the burden of proof to the Appellant. This was purely investigation by PW VII, whose role was to recover the weapon used to cut the deceased. It was produced as an exhibit. In the circumstances of the Appellant's own report, that he had cut the deceased on the neck with a panga, there was no necessity to send the panga for analysis of the blood.

Dr. Isaac Macharia was PW VIII. He carried out a postmortem of the deceased. The deceased had suffered a deep cut on the left side of the face, involving the skin muscles and the bone, and internally the arteries were severed, also severed were superficial neck joint – there was also a compound fracture on the left side of the lower jaw. The Doctor formed the opinion that the deceased died as result of heavy hemorrhage (*bleeding*).

The Appellant was found guilty of manslaughter and was sentenced to twenty (20) years imprisonment, and he is currently on bail pending appeal. He contends in ground 5 of the Petition that the sentence was harsh in the circumstances. I do not think so. The punishment prescribed for the offence of manslaughter under Section 205 is life imprisonment. In the circumstances of this case the sentence of 20 years was in fact very lenient. Even if the native used to run half – dressed in times of yore, he had the decency not to urinate or defecate in the presence of his peers. A child might do that, but not an adult. A child of understanding will be subjected to spanking in much the same way the deceased felt offended and slapped the Appellant as a show of extreme disapproval of the Appellant's behavior.

The reaction of the Appellant was almost premeditated, and was totally disproportionate to the mere slap by the deceased. The Appellant was lucky that he was charged with the offence of manslaughter. Murder should have been the proper charge. In the circumstances, I find the sentence of 20 years imprisonment was too lenient for the Appellant. Section 354 (3) (a) (ii) of the Criminal Procedure Code gives this court wide discretion where there is sufficient ground for interfering on appeal from a conviction to alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence.

In this case, the court properly convicted the Appellant, and on the evidence, the sentence as observed above, was lenient. In exercise of the discretion conferred upon this court by Section 354 (3) (a) (ii) of the Criminal Procedure Code, alter the sentence of twenty years to one of life imprisonment.

In the result therefore the appeal herein is dismissed, and the sentence of life imprisonment is substituted for that of 20 years. For avoidance of doubt, the bail granted herein is hereby cancelled, and the Appellant is committed to commence his life sentence forthwith. It is so ordered.

Dated and signed at Nakuru this.....day of.....2010

M.J ANYARA EMUKULE
JUDGE

Delivered at Meru this.....day of.....2010

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JUDGE

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 11 OF 2008
CONSOLIDATED WITH
CRIMINAL APPEAL NO.14 OF 2008

(From original conviction and sentence in Criminal Case No. 138 of 2007 of the Senior Principal Magistrate's Court at Isiolo – M..R. Gitonga – Ag. SPM)

ELIM ALIM JOSEPH.....1ST APPELLANT
YUSUF ABUBAKAR.....2ND APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellants were charged and convicted of the offence of robbery with violence contrary to Section 296 (2) Penal Code. Both were sentenced to death as prescribed by that Section of the Code. Both have appealed to this court on seven and eight respective grounds, which may be summarized as follows:-

- (1) *that the charge was defective*
- (2) *that the appellants were not identified in the circumstance,*
- (3) *there was insufficient evidence to convict the appellants as one eye witnesses was not called to corroborate the evidence of the complainant, PW1,*

- (4) *that the trial magistrate failed to comply with requirements of Section 211 of the Criminal Procedure Code.*

We will deal with each of these grounds respectively.

1. Of a defective charge

Section 134 of the **Criminal Procedure Code (Cap.75, Laws of Kenya)** (the CPC), prescribes that every charge or information shall contain, and shall be sufficient if it contains-

: a statement of the specific offence or offences with which the accused person is charged.
: such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

We have examined the charge sheet herein. It clearly states the charge,- robbery with violence contrary to Section 296(2) of the Penal Code. It also gives clearly, the particulars of the offence. It gives the names of the Appellants, the date, the place of the commission of the offence, that the appellants were armed with a dangerous weapon, and robbed the complainant of Kshs. 4,300/= and at or immediately before or immediately after the time of such robbery threatened the complainant (Ali Hassan), with the use of violence upon him.

Those are the classic ingredients of the offence of robbery with violence.

The Appellants were two in number, they were armed with a dangerous weapon, a kitchen knife as the evidence of PW1 would later show, following the immediate arrest of 2nd Appellant. They threatened to use violence upon the complainant. Judicial precedent suggest that the facts constituting an offence such as dangerous, or like in this case, robbery with violence, need not be stated otherwise than in terms of the law – See the case of **NZIOKA vs. REPUBLIC (1973) E.A. 91.**

The charge sheet is clear as to both the offence and the particulars thereof. We thereof find no merit on this ground and it therefore fails.

2. Of the Identification of the Appellants

PW1 testified that the time was 5.45 a.m. the crack of dawn. The Appellants were known to the complainant, who also each of them. The complainant knew the sisters of the 1st Appellant. He testified that he had no grudge against either of them. It is possible for a witness to mistake, the identify of even those he thinks he knows – **R.vs. TURNBULL (1976) 3 ALL E.R.** I do not however think that the complainant could have mistaken the identity of the Appellants. The complainant and the Appellants had social contracts. The 1st Appellant was free to ask the complainant for a few shillings to take tea, and the complainant would oblige. The complainant knew the 1st Appellant's family – and his sisters. A witness is not likely to mistake such a familiar face, at 5.45 a.m. particularly where, as in this case, they had

exchanged greetings. “*They greeted me nicely*”

There was a security light at the time of the robbery. The robbers’ faces were not covered or hidden. We are in the circumstances satisfied that the Appellants were conclusively and positively identified by the complainant and we must therefore reject this ground as well, and we so do.

3. Of the Evidence of one witness

Section 143 of the Evidence Act (Cap.80, Laws of Kenya) provides that no number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

Judicial opinion born of experience spanning many generations however suggests that the courts should be cautious of convicting an accused based upon the uncorroborated evidence of one witness. There was in this case an eye witness a watchman called “Adam”. He was not called by the prosecution not deliberately though. The court went out of its way to issue witness summons but the witness could not be found, and could not therefore be served with the summons. In this case, the court was aware of this, and warned itself.

What was left was the evidence of PW2 and PW3, two police officers. PW2 was No. 79909 P.C. Kanampiu and PW3 was No. 84229 P.C. Patrick Yego. The time was 6.00a.m. They were about break – off duty when they received a report of robbery with violence from the complainant, PW1. PW2 testified that he together with PW3, accompanied PW1 to scene of the robbery at Transit Lodge. They questioned the watchman. He informed them of his efforts to rescue PW1 but was restrained by 2nd Appellant who was armed with a knife. In search for the Appellants, PW1 heard the voice of the 2nd Appellant, who was immediately arrested outside Safari Hotel.

PW2 testified that the 2nd Appellant was difficult, but admitted to them that he took the money and offered a refund. He confirmed that he was in the company of the 1st Appellant Elim Elim Yusuf who was later arrested at Bula Pesa (estate) who in turn informed them that he had received Shs 300/= from the 2nd Appellant.

In our considered opinion, the evidence of PW1 was adequately corroborated by the evidence of PW2, which was in turn confirmed by PW3.

It is therefore not correct to allege that the Appellants were convicted on the uncorroborated evidence of one witness.

In their defence, the 1st Appellants opted to keep silent.

The 2nd Appellant gave an unsworn statement, which was merely a denial.

In our view there was overwhelming evidence against the Appellants and they were properly convicted and sentenced. We find no merit in their appeals. The same are dismissed. It is so ordered.

Dated, delivered and signed at Meru this.....day of.....2010

MARY KASANGO

JUDGE

M.J.ANYARA EMUKULE

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.70 OF 2007

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 75 OF 2007

(Appeal from the judgement of Hon. A.K. Kaniaru – Principal Magistrate in Nkubu Principal Magistrate’s Criminal Case No. 738 of 2005 dated 3rd May 2007)

MORRIS MUREGA.....1ST APPELLANT

TIMOTHY KIRIMI KIRUJA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Criminal Practice and Procedure – Irregularity – failure to explain to accused – his trial rights – S. 211 of the Criminal Procedure Code.

Criminal Practice and Procedure – Retrial – Trial a nullity not by fault of prosecution – Retrial ordered

JUDGEMENT

The Appellants were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code, and were convicted and sentenced to the penalty of death so prescribed by that Section. They both appealed to this court against both the conviction and sentence. These appeals were consolidated by order of court made on 29th July 2008.

At the hearing hereof both Appellants submitted ten (10) Supplementary Grounds of Appeal respectively which were admitted in terms of **Section 350 (v)** of the **Criminal Procedures Code, (Cap.75, Laws of Kenya)**. One ground common to both appeal was that the trial magistrate erred in law by failing to comply with the provisions of Section 211 of the Code, to the prejudice of the Appellants. Section 211 of the Code requires the trial court to explain to the accused person the substance of the charge, where the Court finds that the prosecution has established adequate to call upon the Accused to his defence.

The provision also requires the trial court to remind the Accused Person of his rights to give sworn testimony and be subjected to cross-examination, or give an unsworn statement and escape cross-examination, and also the right to call witnesses to testify on his behalf.

The trial court's record does not show any compliance with the said mandatory requirements of Section 211 of the Code. That omission in law constitutes a serious irregularity and renders the trial a nullity. This was realized by Mr. Kimathi, learned State Counsel who readily conceded to the appeal on this ground but asked for a retrial.

According to the case of **M'KANAKE vs. REPUBLIC (1973) E.A 67**, a retrial will not be asked for to fill gaps in the evidence, nor to rectify faults of the prosecution.

In this case, there is enough evidence to support a conviction. The Appellants were clearly identified by PW1 with the aid of her torch which she testified had brand new batteries, and the Appellants were 3 to 4 metres close to her, she could see them clearly. In addition the 1st Appellant had been drinking in her earlier in the day. It was easy to recognize him. The Appellants were also known to PW1, the question of mistaken identity would not arise.

PW3, who responded to the screams of PW1, was informed by PW1 that the Appellants had robbed her (PW1). PW2 also confirms in his testimony that PW1 mentioned the names of the Appellants when PW1 accompanied by PW3 went to inform him of the robbery. PW6, the investigating officer also confirms in his evidence that PW1 mentioned the Appellants names as the primary suspects, and it was 2nd Accused/ Appellant who had led him to recover another stole item, a radio. All that information was thus fresh in the minds of these witnesses and there is no likelihood of any explanation to fill gaps by the prosecution.

We consequently allow the appeal, quash the conviction, set aside the sentences herein. We however direct that the Appellants be retried before another magistrate and in the meantime they be remanded in custody.

We so order.

Dated, delivered and signed at Meru this 18th day of June, 2010

MARY KASANGO

JUDGE

M.J ANYARA EMUKULE

JUDGE