



Wafula Juma Wanjala and Richard Wanjala Wafula. Both were arrested in their houses and no recovery was made. In their defence the Appellants denied committing the offences and said that PW1 was framing the case against them. They said that they had informed the police of the frame-up.

In her judgment, the magistrate failed to address the issue of credibility of the complainant and the contradictions in the evidence. The conditions were not conducive for positive identification. It is doubtful that the complainant saw the Appellants in her house. The court failed to warn itself on the danger of relying on a single identifying witness. A witness may be honest in her testimony but mistaken. It was the duty of the court to satisfy itself that identification was positive.

The complainant did not say that the attackers were armed until during cross-examination. As for the Appellants, there is no evidence that they were armed, even assuming that identification had been established.

It is our finding that the magistrate erred both in law and fact in convicting the Appellants. The case had not been proved to the standards required. We entirely agree with the state counsel on his observation.

The appeal must therefore succeed. We allow the appeal, quash the conviction and set aside the sentence. The Appellants are set at liberty unless otherwise lawfully held.

**D. A. ONYANCHA**  
**JUDGE**

**F. N. MUCHEMI?**  
**JUDGE**

Judgment dated and delivered on the 16<sup>th</sup> day of June, 2010.

In the presence of the Appellants, Mr. Luchivia for Mr. Makali for the Appellants and the State Counsel Mrs. Leting.

**F. N. MUCHEMI**  
**JUDGE**