**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NYERI**

**Criminal Appeal 176, 146 & 205 of2005**

**JOHN KAMAU WAMATU …….…… APPELLANT**

***versus***

**REPUBLIC ……..…… RESPONDENT**

***(Being an appeal against the conviction and sentence by E. J. OSORO, Senior Resident Magistrate, in the Chief Magistrate's Criminal Case No. 2112 of 2004 at Nyeri)***

**Consolidated with**

**CRIMINAL APPEAL 146 OF 2005**

**DAVID MURIUKI KAROBIA …….....…… APPELLANT**

***versus***

**REPUBLIC ……..…… RESPONDENT**

***(Being an appeal against the conviction and sentence by E. J. OSORO, Senior Resident Magistrate, in the Chief Magistrate's Criminal Case No. 2112 of 2004 at Nyeri)***

**Consolidated with**

**CRIMINAL APPEAL 205 OF 2005**

**JOHN GITONGA MUREITHI …….....…… APPELLANT**

***versus***

**REPUBLIC ……..…… RESPONDENT**

***(Being an appeal against the conviction and sentence by E. J. OSORO, Senior Resident Magistrate, in the Chief Magistrate's Criminal Case No. 2112 of 2004 at Nyeri)***

**JUDGMENT**

When we began to hear this appeal there were three appellants. An order of consolidation was made and the appellant in **Criminal Appeal No. 146 of 2005** became the ***First Appellant.*** The appellant in

**Criminal Appeal No. 176 of 2005** became the ***Second Appellant*** and the ***Third Appellant*** was in **Criminal Appeal No. 205 of 2005**. All the three appellants were charged with two counts of robbery with violence contrary to ***Section 296(2)*** of the Penal Code. In the lower court and following their trial, they were convicted and sentenced to death. They have preferred this appeal against conviction and sentence.

This court is duty bound to re-evaluate the evidence of the lower court and in this regard the case of ***OKENO vs REPUBLIC 1972 EA 32*** is relevant. It was stated in that case as follows:-

*"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya VS R., (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs R.(1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958) E.A. 424."*

PW 1 was a business man running a shop called Nyeri Glass Mart. On 12th June 2004 at about 12 noon he saw three men enter his shop and close the metal door. All the three men were armed but he noted that the first to enter had a big gun. He was able to identify that person as the second appellant. They ordered PW 1 to lie down and demanded for his mobile which he gave out. They also took a customers mobile phone who was in the shop. They opened the cash box and took kshs. 5000. They also took money from the customer. The robbers took items from the shop which they put in their pockets. The second appellant PW 1 noted, had a long jacket. The moment the robbery was over and the robbers had left the shop, PW 1 followed them and saw them enter a Toyota Corolla E90. This vehicle did not have number plates. On being cross examined PW 1 said that as he followed the robbers he pointed them out to his employee. He estimated the distance between where he stood and where that motor vehicle was to be 10 feet. He further stated that he was able to identify the second appellant because when they were ordered to lie down, due to his health conditions he lay facing upward.

PW 2 remembered that on 12th June 2004 he had gone to Nyeri Glass Mart Shop. Whilst there he saw one person enter with a gun and he ordered them all to lie down. He lay down and was unable to see the robbers. He however noted that the first person to enter was wearing a cap. He however did not see him properly. The robbers took away from him Kshs. 15000 and his mobile alongside other items.

PW 3 was an employee at the Nyeri Glass Mart. On 12th June 2004 at around 10 a.m. he had been sent by his boss to deliver a parcel to Nanyuki at the 2NK offices. On his way he met his brother in law and later informed his employer that he was having a conversation with his brother-in-law outside near an ART shop. As they stood there he saw the front door of the shop being closed. He said that that was irregular. Shortly afterwards he saw one person coming out and he seemed to be measuring the door using a tape. He went to the shop where he found PW 1, his wife and PW 2 lying down. He said that it was about 5 minutes after the door was closed that he went to the shop. When he was questioned in chief this witness said that he was not able to identify the appellants herein. When these robbers left the shop this witness followed them and saw them boarding a motorvehicle without number plates. He stated that he was in a position to identify the motor vehicle which he described as having a red spoiler. On being cross examined the witness said that the robbers were wearing jackets. When they left the shop they did not run, they simply walked. He saw them walk to where their vehicle was parked which was about 3 metres away. Although he followed them he did not scream because they had guns and pistols. When they boarded their vehicle he followed them using his employer's vehicle towards Kingongo. He later added that he was able to identify three of the robbers who were about 100 metres away. PW 4 was the Deputy DCIO. He was requested by the Investigating officer to mount an identification parade. This he did on 24th June 2004. He stated that members of the identification parade were at the corridor in the police station. He got members of that identification parade from suspects who were in the police cells and from members of the public. In each case he informed PW 3 that he was to identify one of those

persons by touching him. In respect of the first appellant, he said that he looked for other suspects of similar bodily and facial looks with him. He explained to him the purpose of the identification parade. That identification parade started at 11.30 a.m. PW 3 was the witness and he identified the first appellant by touching him. In respect of the second appellant his identification parade was carried out at 10.30 a.m. He got members of that identification parade from the police cells whilst others were members of the public. This was to ensure that they were similar to the second appellant. The second appellant was identified by PW 3. After the parade the second appellant remarked that although the parade was fair that his photograph had been taken from his home by the CID and he suspected that the identifying witness might have seen it. The identifying witness was unable to identify any other person. On being cross examined the officer confirmed that he took into account the appearances of the suspect in inviting the other members of the identification parade. He confirmed that the number of the members of the identification parade were in total nine. He stated that although the case had received media coverage through the newspaper he however confirmed that the photographs of the suspects were not published. He also confirmed that the identifying witness was not shown the suspect's photograph. He confirmed that the first appellant has a lump in his left eye and during the identification parade he did request him to put on a cap. That he remarked that he was innocent and did not require a cap. PW 5 was a policeman. He said that on 15th June 2004 they were instructed together with other policemen to carry out investigation relating to spate of robberies which had been on the increase in Nyeri. The group of police officers was divided into two. Whilst in his group on their way having passed Mweiga township they intercepted a motor vehicle saloon car which had six suspicious people. In that motor vehicle they found the first and third appellant. They were arrested alongside the other people. The first and third appellant led them to arrest the second appellant. On being arrested they were able to get a motorvehicle which was produced before court. That vehicle was recovered from Nanyuki and the same was identified by PW 3 at the Police Car Yard. He noted that that motorvehicle had a red spoiler and tinted glasses. On being cross examined by the third appellant, he confirmed that on him being arrested he stated that he was coming from Endarasha. That PW 3 identified the motorvehicle he confirmed that they were many other vehicles parked at that site. He confirmed that they had taken the photograph of the second appellant. This was because the wife of the second appellant was refusing to assist them. He however confirmed that that photograph was not given to the newspaper. This witness was recalled and on being recalled he stated that he had requested the security manager of Safaricom to establish whether there had been communication between the appellants. His inquiry had been responded to by a letter detailing the calls made amongst the appellants. This witness on seeking to produce that report of Safaricom, same was objected to by the advocates appearing for the accused persons. The basis of the objection was that the witness was not the maker of that report. The learned trial magistrate on hearing the objection allowed the production of that report by that witness. The accused persons were found to have a case to answer.

The first appellant said that he is a mason. On 11th June 2004 he had traveled from Nanyuki to Nyahururu to see his sick sister. On 12th June 2004 he was still at his sister's residence in Nyahururu. He denied that he was in Nyeri. On 15th June 2004 he left his sister's residence and whilst he was at Nyahururu bus stage he bonded a private vehicle. Before they reached Mweiga the driver stopped to allow some passenger alight. When that passenger alighted another vehicle blocked their vehicle and the people who came from that vehicle ordered them to lie down introducing themselves as police officers. Whilst the police officers were there his mobile rang and he said that the caller was the second appellant. He referred to the second appellant as his employer who had given him construction work in the year 2002. When identification parade took place he requested the police to ensure to get people who are similar to him since he had a lump over the eye. He therefore was dissatisfied with the identification parade and also because his picture had been shown on television and on newspaper. He concluded by saying none of the members in the identification parade resembled him. The second appellant said that he worked with the Kenya army at Engineers Battalion Nanyuki. On 15th June 2004 at around 5.30p.m.whilst he was playing pool with his colleagues his telephone rang and on checking he noted that it was a short message from his wife. She requested him to go home quickly. He went home when he found his wife and children seated outside in a state of panic. They informed him that police officers had visited his home in the company of their mason the first appellant. That the police officers had taken his photograph and his mission certificate. Although he went to the police station he was informed that they are unaware that he was wanted. He denied having committed the robbery on 12th June 2004 because he

said that he was on duty and not at Nyeri. He said that he did not leave the army camp that day. He was doing his duty of distributing newspapers from 9.00 a.m. He confirmed that the first appellant had built his house extension. That he had known him since 2002 when he built the main house. Although he signed the identification forms he said that he was dissatisfied with the identification. He denied that he knew the identifying witness and further stated that the members of the identification parade were boys who had been in the police cells for four months. The third appellant in his defence said that on 12th June 2004 he was at Kagio Market selling onions. On 15th June 2004 he left that market to Ngarua where he was to look for onions. On his way he stopped a saloon vehicle which was to give him a lift to Nyeri. The vehicle stopped to pick a person and when it stopped it was blocked from moving by another green vehicle. People from the other vehicle came out and order them to lie down. They were arrested and later charged with the present offence.

We would begin by stating in this judgment that the production of the Safaricom report by a police officer was prejudicial to the appellants. Production by police officer can only be in terms of the provisions of ***Section 77(1)*** of the Evidence Act. That section provides:-

"***In criminal proceedings any document purporting to be report under the hand of government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence."***

As can be seen from the above section the report by Safaricom does not fall within its ambits. The production of that report was allowed by the learned magistrate despite the objections raised by the appellants through their counsel. We are of the view that that evidence was hearsay evidence and the same ought not to have been introduced since it led to the prejudice of the appellants. However even discarding that evidence we are of the view that there is cogent evidence leading to the identification of the first and second appellants. PW 1 said that he was able to identify the second appellant who entered the shop first and who had a gun. He identified him in the manner he was dressed in. He said that he was wearing a green jacket. PW 3 identified three people. He identified at the identification parade first and second appellants. The third person he identified was acquitted in the lower court. PW 3 in his evidence stated how he noticed his employers shop door being closed. Thereafter it was opened and he was able to follow the robbers up to the point where they boarded their vehicle. He said that first he saw their back and as they boarded the vehicle he saw their faces. He was very clear on his identification of those robbers. On the identification parade being mounted he picked out the first and second appellants. Although the second appellant complained that this witness could have seen his photograph, it is pertinent to note that that question was not put to PW 3. Second appellant was represented by counsel in the lower court. PW 3 was also not questioned on whether he had seen the media coverage of this case together with the appellant's photographs.

We have re-examined the evidence of identification parade and we are of the view that it was properly conducted. The police who mounted that identification parade stated that he tried as much as possible to get people of similar physique with the appellant. It is noted that the first appellant had a deformity to his eye. He was requested to wear a cap during the parade which he declined. Other than that deformity the police officer was able to confirm that the other members of the identification parade resembled him. That evidence was clear and can sustain the charge that the appellants face. Second appellant in his defence stated that he was on duty on the day the robbery was committed. In his defence he stated that his duty was to circulate the newspapers. He began circulating them at 9.00 a.m. He did not tell the court how long that duty took although strictly speaking he was not required to explain anything. He was identified by PW 1 in the dock and by PW 3 at the identification parade. First appellant in his defence gave alibi evidence. On the material date of the robbery he said he was with his sick sister in Nyahururu.

We have considered the evidence in totality and having found that the Safaricom report having been adduced as it was, was prejudicial, we find that there is no evidence to sustain a conviction against the third appellant. However on the evidence we have outlined above we are satisfied that the conviction of the first and second appellants was well founded. Accordingly the end result is that the appeals by the first and second appellant are hereby dismissed and we uphold their conviction by the lower court and their sentence. In respect of the third appellant, **JOHN GITONGA MURIITHI**, we find that this appeal

does succeed against conviction and sentence. His conviction is hereby quashed and his sentence is hereby set aside. We order that **JOHN GITONGA MURIITHI** be set free unless otherwise lawfully held.

**DATED AND DELIVERED THIS 15TH DAY OF MAY 2008.**

**MARY KASANGO**

**JUDGE**

**M. S. A. MAKHANDIA**

**JUDGE**