REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL APPEALS 206 OF 2005 & 208 OF 2005

EVANS KAMAU WANGARI……………...... …..……..1ST APPELLANT

SOLOMON THUKU KUNG'U……….…..……………..2ND APPELLANT

-AND-

REPUBLIC………………..……………………………...RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate Ms. Lucy Mutai dated 15th April, 2005 in Criminal Case No. 859 of 2004 at the Githunguri Law Courts)

JUDGEMENT OF THE COURT

The two appellants had been charged together, with the offence of robbery, contrary to s.296(2) of the Penal Code (Cap.63). The particulars were that the appellants, on *17th May, 2004* at Kairia Village in Kiambu District, within Central Province, robbed ***Joseph Kuria Kago*** of cash in the sum of Kshs.300/= and a cellphone, Sagem M.W. 3020 by make, and, at, or immediately before, or immediately after the time of such robbery, used actual violence upon the said ***Joseph Kuria Kago.***

Learned State Counsel ***Mrs. Kagiri*** applied at the beginning that the two appeals be consolidated, for convenience of hearing and determination, as they arose from one and the same criminal trial. No objection was raised by the appellants, and consolidation was effected, making Criminal Appeal No. 206 the lead file, with the appellant therein as 1st appellant; and the appellant in Criminal Appeal No. 208 of 2005 became the 2nd appellant.

PW1, ***Joseph Kuria Kago*** testified that he was a taxi operator, and in this regard he owned a Toyota Corolla saloon car, Registration No. KUW 343. On 17th May, 2004 at 7.00 p.m., two men came to his work-station, and wanted to be taken to Gakoe Waruhiu farm. PW1 asked for Kshs.400/= as consideration for the taxi service requested, and the two men agreed. After the two had made a private consultation between themselves, they returned to the taxi and entered, one sitting in the front, and the other at the back-seat. There was lighting at the time the taxi took off, and PW1 says he saw his two customers. He first drove the taxi to Kikinga Petrol Station, and asked for Kshs.100/= from the man sitting next to him, in the front, which he used for fuel. PW1 then drove on, being directed by the two passengers; but he began to sense that foul play was afoot, as the passenger sitting in the front preoccupied himself with a cellphone, and appeared to be disguising his face even though PW1 had seen him earlier. After the two passengers asked PW1 to stop the car, the passenger in the front seat pulled a knife out of his jacket, and stabbed him on the left side of his chest. PW1 was then stabbed on the right

hand, even as the passenger sitting in the back seat also hit him with some unknown object. The passenger in the front, again, stabbed PW1 twice in the back, and the "passengers" threw him out of the car and severely beat him up as he lay in a Napier grass plantation. PW1 was stabbed several more times, when the "passengers" endeavoured to start the car but without success. They got him, even as he was bleeding profusely, to start the car for these "passengers" who then drove off, leaving PW1 behind. PW1 sought help from one ***Kang'ethe Nuthu*** and his wife, and was able to get to Githunguri Police Station, to report the incident. The Police gave him a note to take to hospital, where his cuts were stitched, and a P3 form for medical records was duly filled in.

PW1 testified that for a period of at least one hour, he was in the company of his two passengers who-turned-robbers. The witness averred that he had been able to identify the faces of the robbers; in his words:

"I did identify the faces of the two persons well. They are the 1st and 2nd accused in the dock…The 2nd accused was seated next to me. The 2nd accused is the one who produced a knife and stabbed me repeatedly. When I stopped my motor vehicle I switched on the lights, and saw them well. They stole [my] Kshs.300/= and my Sagem cellphone… I had seen them [with the advantage of] electric lights."

PW1 testified that he had not seen the 1st accused before the robbery incident; but he had earlier seen the 2nd accused within Githunguri. He did not know how the two were arrested, but after their arrest PW1 was called to the Police station and he identified *them* in a *parade.*

PW1 identified in Court a shirt which he had been wearing on the material date. It was blood-stained, and the knife-cuts on it were visible.

On cross-examination by learned counsel ***Mr. Mbugua*** who represented both appellants herein, PW1 testified that he had operated his taxi since 1999, and that on one occasion (***10th January, 2004)*** the 2nd appellant herein, accompanied by someone else, had hired PW1's taxi to take them to Kiairia and, for this service, they had paid to PW1 Kshs.200/=. On that occasion, *four months* earlier there had been a robbery incident, at the end of the journey. When the taxi reached Kiairia, the 2nd appellant herein had fished out a gun, which he used to rob from PW1 Kshs.800/=, a cellphone, a motor vehicle spare wheel, a wheel-jerk, and several motor vehicle spare parts. PW1 had on that earlier occasion reported the incident to the Police on the same day. But on the later occasion of robbery, which is the subject of the charge herein, it had not at once occurred to PW1 that one of the two robbers was the same person who robbed him four mounts earlier. PW1 said he had identified the face of the 2nd appellant more clearly when the 2nd appellant asked PW1 to stop the taxi, at the point where he was stabbed, robbed and left in Napier grass. The one of the robbers who had earlier negotiated the taxi-fare with him, was the 1st appellant; and it was when asked to stop, that PW1 saw the 2nd appellant's face more clearly. It is this second appellant who sat next to PW1 in the taxi, and had endeavoured to evade PW1's direct view of his face by holding his face constantly to a cellphone that he kept fiddling with. PW1 testified that he had clearly seen the 2nd appellant drawing a knife, even through he could not say exactly *how long* the said knife was. At the time of throwing him out of his taxi, PW1 said in his answer to questions in cross-examination, it was the 1st appellant who opened the door and, as he was finding his way out, the 2nd appellant again stabbed him with a knife. PW1 was not sure which one of the appellants stabbed him the third time; and he was not able to ascertain if the 1st appellant was also armed. PW1 surrendered his money and cellphone while lying down, and so he was not able to notice which one of the robbers grabbed those items. PW1 said he had not seen the stolen items before the Court, nor been shown the assault-knife in Court.

Although PW1 had not given the particulars of the two robbers to ***Kang'ethe Nuthu*** who helped him thereafter, he did give those particulars to the Police when he reported the matter on the material night, at the Githunguri Police Station. He also reported to the Police that one of the two robbers, was the very one who had also robbed him on 10th January, 2004.

PW1 testified that he had attended an identification parade at the Githunguri Police Station. He had identified the 1st appellant herein, where the appellant was positioned, in the middle of the line of parade-members. PW1 noted that the 1st appellant is of dark complexion, and is slightly taller than him. He said he had seen the 1st appellant's face clearly, on the night of the robbery, just as he had also seen "very well" the face of the 2nd appellant. The 2nd appellant, too, had been positioned in the middle of the parade line, and PW1 had identified him.

PW2, Police Force No. 80095093 ***A.P. Inspector James Macharia***, of the DO's office Githunguri testified that on 27th May, 2004 at 8.00 p.m. he was on patrol within the Githunguri area, when he received a report of an incident of house-breaking and theft. Acting on certain leads, PW2 proceeded to a house, where some of the stolen goods were recovered. As PW2 and his colleagues searched the area and chased those who were in flight from the *locus in quo*, they stopped one suspect who gave his name as ***Thuku*** – the 2nd appellant herein. ***Thuku*** said his home was at Kiairia; and at the time, PW2 had a report of a taxi robbery which had taken place at Kiairia, and the name already recorded as the name of the taxi-robbery suspect, fitted the ***Thuku*** name which was now being given. So PW2 arrested ***Thuku*** and took him to the Police Station. PW2 had not, at the time, known anything about the 1st appellant herein.

PW3, ***Timothy Mwangi Njuguna,*** a clinical officer from Kiambu District Hospital, testified that he had been serving at Githunguri Health Centre, at the material time. While on duty at Githunguri Health Centre, the complainant had gone to see him wearing a shirt which had fresh blood stains. The complainant had a deep cut in the abdomen, on the left side of the chest and in the back. The injuries were fresh, and appeared to have been caused by a sharp object. PW3 classified the degree of injury as harm, and he made his record on the P3 form.

PW4, Police Force No. 45454 ***Sgt. Fred Moganga*** was serving at the Githunguri Police Station at the material time. On 17th May, 2004 at 10.15 p.m. the complainant came along and reported to PW4 that on that same evening, at about 7.30 p.m. he had been hired to provide a taxi service to two passengers who were going to Kiairia, and these passengers had turned out to be robbers, and had robbed him of his cellphone and his money (Kshs.300/=). The complainant, at the time, was bleeding from the chest and back; he had three stab wounds – two in the back, one in the chest; his shirt "was all bloody". The complainant told PW4 that he could identify the suspects. PW4 had not known the accused persons before; but later they were arrested and charged. An identification parade was conducted, at which the complainant identified the suspects. PW4 had recovered the complainant's shirt, which he produced as an exhibit.

On cross-examination by defence counsel, PW4 testified that the complainant had not given the *names* of the suspects, but had indicated that he had on an earlier occasion, seen one of the suspects – and that is the 2nd appellant herein. PW4 is the one who arrested the 1st appellant herein; and identification of the two appellants herein had been made at an identification parade.

PW5, Police Force No. 217310 ***Inspector Gladys Gituku***, the OCS in charge of Githunguri Police Station, had been requested by the Investigating Officer (PW4) to conduct an identification parade, and she proceeded by using Police – cell inmates as members of the parade. She held the parade in a yard, where the line-up was arranged in the absence of the complainant. There were nine members of the parade, excluding the suspect. The suspect was positioned between parade member No.6 and No.9; and the complainant was asked to come and show the suspect by touching the suspect's body. The complainant came and did the identification; PW5 asked of the suspect an indication of his satisfaction with the manner of conducting the parade; PW5 recorded the suspect's dissatisfaction; PW5 made a certificate to that effect.

On cross-examination, PW5 testified that she had conducted three different parades on the day she conducted one for the 1st appellant herein, and the 1st appellant was not involved in those other parades. The complainant had had no opportunity to see the 1st appellant herein at the Police Station prior to the identification parade. PW5 said on re-examination, that she had complied with all stipulated instructions

for the conduct of identification parades.

Upon the conclusion of the prosecution evidence, the learned trial Magistrate heard submissions, and put the two appellants herein to their defence.

The 1st appellant in his sworn statement pleaded an alibi: that on the material date, ***17th May, 2004 at 7.30 p.m***. he was at Mathare North in Nairobi, in the company of one ***Anthony Njoroge*** who is his employer. He said he had been arrested on ***12th June, 2004*** at Kiairia, which is his rural home-area. He said the arresting Police officer did not search his home, and nothing implicating him in the crime charged, was found on him. He said he was later questioned by the Police, and then taken for an identification parade where there were nine others lined up; and then somebody came "and identified three of us"; and he was then charged in Court. He said he did not know the person who identified him at the parade.

On cross-examination, the 1st appellant herein said the Police officers had arrested him while he was at his house, at Kiairia. He said he did not know his co-accused (2nd appellant herein), and he only saw the 2nd appellant at the Police station.

The 2nd appellant too gave sworn testimony. He said he was "***Samuel Thuku*** from Giachumi", a milk-hawker at the Nairobi Industrial Area. He said he had taken milk from Githunguri on the material date at 2.00 a.m., reaching Nairobi at 5.00 a.m., and he worked in Nairobi upto 3.00 pm., returning home in Githunguri at 4.00 p.m. He then cleaned the milk cans up to 7.00 pm., and began collecting milk from customers, for the next delivery to Nairobi. When he completed his task in milk-collection, the 2nd appellant had dinner with his parents, wife and children, after which he watched television upto 10.00 p.m. and then retired to his house. At his house he went to sleep, waking up at 2.00 a.m. to milk his cattle. He said he had never met the complainant, until another prosecution case against him commenced, relating to offences alleged to have been committed on ***10th January, 2004.***

The 2nd appellant said he had been arrested on ***27th May, 2004*** as he was walking home at 10.00pm. after buying bread from a shop. He was held at Githunguri Police Station, and on 13th June, 2004 he was put on identification parade, and identified together with the 1st appellant herein and a third person. He said he had expressed his dissatisfaction with the parade as conducted.

DW4, ***Monica Mukami Kung'u*** testified that the 2nd appellant herein was her son. She said that on ***17th May, 2004*** she was with the 2nd appellant at home, after 2nd appellant arrived home from milk-sale work in Nairobi, at 5.00p.m. Thereafter 2nd appellant and his wife cleaned the milk cans, and then milk deliveries to him went on until 9.00 p.m., following which 2nd appellant had dinner at her house up to 10.15 pm. DW3 said 2nd appellant had been arrested on 27th May, 2004.

On cross-examination, DW3 testified that although the 2nd appellant has a separate home, he and his family take their meals at DW3's home. DW3 testified that she was not present when the 2nd accused was collecting milk from farmers in the night, for delivery in Nairobi the following day.

DW4, ***Anthony Njoroge Kamau*** from Kiairia, testified that he lives at Mathare North in Nairobi and he sells second-hand clothes at Gikomba in Nairobi. He said he was at his Mathare North house on the material date, when he met the 1st appellant herein at 6.00 p.m.; they had supper, and went to sleep at 9.00 p.m. By DW4's testimony, the 1st appellant did not leave the house that night; and the two woke up the following morning at 5.00 am. When the 1st appellant went to visit his grandmother in June, 2004 at Kiairia, he did not return to Nairobi on the following day. DW4 went to Kiairia to check, only to find that the 1st appellant had been arrested by the Police and was being held in Githunguri. There was no cross-examination of this witness by the prosecutor.

In the submissions, learned defence counsel stated that he would fall back on the preliminary

submissions which he had made.

It was the defence submission that the complainant (PW1) had not been a truthful witness; because PW1 had said he did not know the accused persons before the prosecution of the instant case commenced, yet there is an earlier case in the Githunguri Law Courts, *Criminal Case No. 867 of 2004* in which the appellants herein are charged with having robbed PW1 of some effects, in January, 2004.

Counsel urged that the claim that the appellants had stabbed PW1 with a knife was not true, as no such knife was recovered. Counsel noted, in this regard, that none of the effects said to have been robbed from PW1 were ever recovered. It was urged, too, that PW1 had not shown any documentary proof showing he did own the items said to have been robbed from him by the appellants.

Learned counsel submitted that there was no corroborating evidence for PW1's identification claims, in respect of an offence that took place at night. As regards the identification parade at which the appellants were identified, counsel urged that the circumstances attending the parade were not proper; the parade took place 16 days after the 2nd appellant had already been in Police cells – "and such period gave the complainant an opportunity not only to see the accused [persons], but also to get their identification [features]." Counsel submitted that if indeed the 2nd appellant had robbed the complainant on another occasion, then there would have been no need for an identification parade, since the complainant had already seen the 2nd appellant.

Learned counsel submitted that the Police investigations had not been properly conducted, as none of the prosecution witnesses had visited the premises of either of the appellants – in search of stolen items, or assault weapons. This point was urged especially against the background of the arrests which, it is clear from all the evidence, were not specifically effected as part of the investigations into the offence charged in this matter. Arrests conducted in such a manner, counsel urged, needed to be accompanied by corroborative evidence, over and above the testimony of the complainant alone; in the words of counsel, "putting [either] accused to his defence [in such circumstances] would mean requiring them to prove their movements and their innocence, and [thus] to strengthen a poorly-investigated prosecution case" ? which would be "against [the] cardinal rule [regarding the] burden of proof which lies on the prosecution."

In addition to the foregoing submissions which had been recorded at an earlier stage, learned counsel added that the prosecution had not proved their case beyond reasonable doubt. ***Mr. Ngugi*** urged that, by contrast, it is the appellants herein, who had given "credible evidence on their whereabouts on the material date, well corroborated by their witnesses"; and he noted that "none of the items allegedly stolen from the complainant was recovered from either of the [appellants herein]."

Learned counsel urged that the prosecution case, insofar as it hangs on the identification parade, fails to comply with recognized rules for safe evidence as a basis for conviction, as the parade was conducted only after one of the accused persons had spent some two weeks in detention at the Police Station – a factor which accorded the complainant all opportunity to see the accused persons.

Learned counsel noted that it was not clear from the evidence that *separate identification parades* were conducted for the two appellants herein; but it was apparent that both were picked from but one such parade.

To the foregoing submissions, the prosecutor made *no response,* but opted to rely on the evidence on record.

The manner in which the identification parade was conducted leaves certain matters in darkness. PW1 testified that he identified both 1st and 2nd appellants at an identification parade. *How many* identification parades were held? Was there an identification parade for the 1st appellant, which was different from that for the 2nd appellant? The witness who conducted an identification parade, was PW5; but in her testimony she spoke of such a parade for the 1st appellant, but not for the 2nd appellant. The impression emerging from the testimonies of both DW1 and DW2 is that only *one parade* was held, in

respect of this particular case, and that at that parade, both 1st and 2nd appellants, as well as a third (unidentified) person were identified by PW1. From the significance of the identification parade, as a foundation of the prosecution case, such an *uncertainty* regarding the mode of identification would render the said identification process unsafe, in our view. Moreover, there is evidence that PW1 (the complainant) already knew the 2nd appellant, and indeed there was, in the same Court, a pending trial involving the 2nd appellant, and in which he was the complainant. If again the 2nd appellant were to be paraded for PW1 to make an identification, such a parade would, we think, not have been guided by the known purpose of an identification parade. The testimony of DW1 and DW2, that the complainant had identified several persons, including the two appellants, in *one* identification parade, was *not contested* in cross-examination; and assuming such testimony to be truthful, then the parade could not have been so designed as to give a forum for the accurate identification of any *particular* accused person. It was also not contested that the said identification parade took place several weeks from the time the 2nd appellant was held in Police custody. This would render the parade not reliable as a medium for the identification of a suspect, as the rather long period elapsed since the arrest and detention of the suspect, would have given room for an undue degree of knowledge of the suspect, coming to the complainant.

Of the manner in which the 2nd appellant had been identified, the learned Magistrate stated as follows:

"**I had no reason to doubt that the complainant positively identified 2nd accused at the scene. He recognized him [2nd appellant herein] as one of those who had robbed him [on an earlier occasion]. It is on record that …PW1 was the only one present at the scene of crime. The offence took place at night. Even after warning myself that I am dealing with a sole identifying witness, I found that the 2nd accused was properly identified by the complainant. [The 2nd appellant] was [not] new to him….Even [though] the 2nd accused told the Court that he was at home with his family on that date, as was also [testified] by his mother *Monicah*, I failed to be convinced [by] the evidence."**

We have noted the fact that the learned Magistrate indeed warned herself of the dangers attendant on conviction based on the testimony of a single eye-witness who claims to have seen the suspect at night. The guiding principle where identification of a suspect takes place in such circumstances, is set out in the Court of Appeal decision in ***Gikonyo Kirumo v. Republic*** [1980] KLR 33:

"***Where the conviction depends upon the identification of the defendant by a single witness, the evidence must be always tested with the greatest care. The Court must satisfy itself that it is safe to act upon that evidence. Whether it is safe is a question of mixed law and fact."***

On the facts of this case, is it plain that the trial Court tested the evidence of identification in respect of the 2nd appellant with the greatest care? And is there such evidence in respect of the 1st applicant?

With regard to the 1st appellant herein, the trial Court's finding on identification was as follows:

"***The Court heard that the 1st [appellant herein] who sat at the back of the vehicle hit the complainant …on the face ….The complainant remained alert. He testified that he was with the [appellants] for over an hour. The complainant did identify the 1st [appellant] in an identification parade…The complainant testified [that] he had seen the 1st [appellant's] face when they were hiring his vehicle since there were electric lights. There were lights as well at Kikinga Petrol Station where his vehicle was fuelled. At the scene of crime the interior light of his vehicle was on. He did state that he was transacting [business] with 1st accused and that it was 1st accused who gave him money for the fuel. I find that [visibility was favourable and] it was [easy] for the complainant to identify the [appellants] at the parade. The two accused…were found with nothing relevant to this case, but I was satisfied that the complainant was robbed of Kshs.300/= and his cellphone…"***

It is clear that the conviction entered in respect of both appellants was based, firstly, on the testimony of a

single witness who said there were electrical lights which enabled him to see the robbers; and secondly, on the fact that the complainant had made identifications at the identification parade.

PW5, in her testimony, said she had conducted the identification parade on *13th June, 2004*; PW2 arrested and detained 2nd appellant on *27th May, 2004*; PW4 arrested and detained the 1st appellant on 12th June, 2004. So in the case of the 2nd appellant, the identification parade would have taken place ***16 days*** after he was held in Police custody; and in the case of the 1st appellant the identification parade took place shortly after he was held in custody. There is testimony that neither of the two appellants had been arrested and detained *in connection with the offences* that are the subject of appeal herein. And no explanation was apparently proffered for the respective periods of detention, which in each case went beyond 14 days, before the appellants were brought before the Court to be charged with the commission of particular offences.

Although the complainant affirms that he did, indeed, properly see those who robbed him, it is clear from the evidence that the person who sat next to him in the front seat, did not readily avail his face to be observed; and the person who sat in the back seat, obviously was not within easy view from the driver's front seat. In these circumstances, I would hold *corroboration* to have been critical, a purpose which could have been served by properly-conducted identification parade.

The scenario in this case re-enacts the case of ***Peter Ndung'u Njoroge & Another v. Republic,*** Criminal Appeal No. 201 of 2005 which was recently decided by my learned sister ***Lesiit, J.*** She had remarked poignantly as follows:

"***When one considers that the complainant had a fleeting glance at his attackers under difficult circumstances, that the attackers were total strangers, the lapse of six months [before the holding of an identification parade] is long enough to cause the identification in the parades to be of no material importance, given all the circumstances of the case. The lack of prior description of his assailants, and [the] fact that he never led to their arrest at all, erode the weight that can be given to the identification by the complainant. The use of the same members of the parade in the identification conducted on the same day further eroded the quality of the complainant's visual identification of the appellants… Having carefully tested the complainant's evidence of identification, I find that it was not watertight, was unsafe, and could not sustain a conviction. The identification parades also did not provide corroboration to the complainant's evidence for [the] reasons I have given."***

Parallel weaknesses, as we have already noted, did afflict the identification parade conducted in the instant case. Firstly it appears that *one single parade* was held for the identification of a *plurali*ty of suspects. Secondly, the said parade was being held for the identification of *suspects who had already been held in custody for more than two weeks*. Thirdly the complainant had not at the time of reporting, given an account of the defining physical marks of the suspects. Fourthly, one of the appellants was already the subject of a criminal prosecution wherein the complainant herein, was also the complainant; *so he very well knew this particular appellant*, and in the circumstances, even the purpose of the identification parade appeared doubtful.

It is an established principle of law that certain safety measures have to be taken to ensure reliability and safety of evidence, as a basis for conviction, where visual identification is concerned. This principle is well stated in ***Blackstone's Criminal Practice 2002*** (12th ed. By ***Peter Murphy*** and ***Eric Stockdale***) (Oxford: OUP, 2002), p. 2304, para. F18.2:

"***The visual identification of suspects or defendants by witnesses has for many years been recognised as problematic and potentially unreliable. It is easy for an honest witness to make a confident, but false, identification of a subject, even in some cases where the suspect is well known to him. There are several possible reasons for errors of this kind. Some persons may have difficulty in distinguishing between different subjects of only moderately similar appearance, and many witnesses to crime are able to see the perpetrators only fleetingly, often in stressful circumstances. Visual memory may fade with the passage of time, and may become confused or distorted by suggestive influences from***

photographs or other sources of contamination. There is evidence that false identification can sometimes be caused by a process known as unconscious transference, in which the witness confuses a face he recognises from the scene of the crime (perhaps that of an innocent bystander) with that of the offender. Such problems may then be compounded by the understandable, but often misguided, eagerness of many witnesses to help the police by making a positive identification."

Such considerations, we think, must inform this Court's perception of the identification of the suspects which led to the case now before us.

Learned counsel for the respondent, ***Mrs. Kagiri*** urged that the prosecution had sufficiently demonstrated that the complainant was attacked by two men whom he later identified as the appellants herein. She submitted that there had been sufficient lighting at all critical points in the complainant's trip with the robbers, and so he had had a chance to see and to identify their faces.

Mrs. Kagiri urged that, at the *locus in quo*, the complainant had switched on the car's roof light only to realise that the person seated next to him in the front seat, had robbed him on an earlier occasion. We think he would have recognised a person who robbed him on an earlier occasion, much more readily than turned out to be the case here. We believe the complainant had driven off with his passengers before seeing their faces very well; and if this is true for the passenger in the co-driver's seat it would be no less true for the robber sitting in the hind seat. We have to conclude that all the while the complainant drove his two passengers in his taxi, he had not identified them very well.

Once we draw that conclusion, as we have done, then corroboration because all-important. But no corroborative circumstances were adduced before this Court; and as we have held, the identification parade that was held by PW5 did not meet the required standards, and so could not serve to corroborate the complainant's evidence of identification.

The law of burden of proof in Kenya is well-established and has its foundations in the common law tradition, in respect of which the *locus classicus* is the English House of Lords decision, ***Woolmington v. The Director of Public Prosecutions*** [1935] 462, at p.481 – per Viscount Sankey, L.C.):

"***Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to…the defence of insanity and subject also to any statutory exception. If, at the end of the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal***."

It is evident to us that the prosecution, in the instant matter, has failed the test, at the level of identification. What is placed before the Court as evidence of identification is not secure, and thus cannot be a basis for arriving at a conviction. The shortcoming in the prosecution evidence is even more apparent when it is taken into account that both appellants have raised *alibis*, conveyed through their own sworn testimonies as well as sworn testimonies of their witnesses. In view of the feebleness of the prosecution case, the prosecutor appeared quite unable to cross-examine effectively on the alibi accounts, thus leaving the said alibis still standing up; and that is a statement that proof-beyond-reasonable-doubt had not been achieved in respect of either of the appellants.

We have a duty in law, therefore, to set aside the convictions and sentences recorded by the learned Senior Resident Magistrate on 15th April, 2005, and to order the immediate release from custody of both appellants, unless either of them is otherwise lawfully held.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 24th day of July, 2007.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ.

Court Clerks: Tabitha Wanjiku & Erick

For the Respondent: Mrs. Kagiri

The Appellants in person