



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION**

Criminal Case 1053 of 2002
(From the original conviction and sentence in Criminal Case No. 2840 of 2001 of the Chief Magistrate’s Court at Nairobi)

KENNETH MAINA MWANGIAPPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 1054 Of 2002

ALLAN KIBE MAINGI APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 1055 Of 2002

WILLIAM KIMARI MWANGI..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 1056 Of 2002

MAINA KAMURI KARIUKI..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLATED WITH

Criminal Appeal 1057 Of 2002

EVANS MWANGI MWANIKI APPELLANT

VERSUS

REPUBLICRESPONDENT

CONSOLIDATED WITH

Criminal Appeal 1058 Of 2004

KAMUNGA MURIU NDUNGIRE..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellants, **KENNETH MAINA MWANGI, ALLAN KIBE MWANGI, WILLIAM KIMARI MWANGI, MAINA KAMURI KARIUKI, EVANS MWANGI MWANIKI** and **KABUNGA MUIRIU NDUNGIRE** (hereinafter referred to as “the Appellants” in this Judgment) were jointly charged with Julius Machoki Gacire and James Maina Mwangi before the Senior Principal Magistrates Court at Nairobi with four counts of robbery with violence contrary to Section 296 (2) of the Penal Code. The 1st and 4th Appellants also faced another count of being in possession of public stores contrary to Section 324 (2) of the Penal Code. The particulars of each count were specified in the charge sheet and we need not repeat them here. Following a full trial in which the prosecution called seven witnesses, these Appellants were convicted on three counts of robbery with violence. The co-accused aforesaid were however acquitted. Similarly the 1st and 4th Appellants were acquitted for the offence of being in possession of public stores. Upon conviction as aforesaid the Appellants were sentenced to death as required by the Law. The Appellants were aggrieved by the conviction and sentence. Accordingly they mounted separate and individual appeals which were however consolidated at the hearing.

The Prosecution case was that on the night of 3rd December, 2001 PW1, PW2 and PW3 were on duty at Warsame Petrol Station in Eastleigh Area of Nairobi. PW1 and PW2 were pump attendants at the said petrol station whereas PW3 was the watchman. In the course of their duties PW6 a taxi driver, came to have his tyre puncture repaired. Suddenly a gang of people some of whom were wearing Police attire stormed the Petrol Station. They were accompanied by two other people whose hands had been tied. Some of the people in the group carried gadgets that looked like firearms and iron bars. They confronted the watchman (PW3) and asked him whether the iron bars they were carrying had been stolen from the petrol station. He answered in the negative and as PW6, the taxi driver was returning the punctured tyre into the boot of his motor vehicle, this gang of people who numbered eight in total ordered all those present at the petrol station to lie down. The order was complied with. The gang turned out to be robbers and not police officers as PW1, PW2, PW3 and PW6 had initially thought. They frisked the pockets of PW1, PW2, PW3 and PW6 and took from them money and various other items listed in the charge sheet. Thereafter the said victims were taken to the toilet area of the petrol station and made to lie down. Apparently someone had witnessed the robbery and alerted the Police. The police control ordered the police on patrol in the area to proceed to the petrol station. Among those who proceeded to the petrol station were police officers – PW4 and PW5. On reaching the petrol station, they fired in the air and ordered the robbers to surrender. The robbers ran to the back of the petrol station to the toilet area where they had abandoned PW1, PW2 and PW6 respectively. They all surrendered and with the help of PW1, PW2 and PW6, the robbers were allegedly identified and forced into the police lorry and taken to Shauri Moyo Police Station. Later and upon further investigations they were charged with the offences outlined in the charge sheet.

When put on their defences, the Appellants denied involvement in crime, and stated that they had been arrested for various other offences ranging from failure to have Identity Card to smoking bang and were therefore surprised when they were charged with the instant offences. They all said that they were not at the scene of crime when the acts of robbery with violence complained of were committed. Essentially they all raised as their defence, an alibi.

As already stated, the Appellants filed separate Appeals. The grounds advanced in the various petitions of appeal are more or less the same. They basically revolve around the issue of identification, contradictions and or discrepancies in the prosecution case and lastly that their defences were not given due consideration by the Learned Magistrate. By the time the appeal came up for hearing, Kambuga Muriu Ndungire the 6th Appellant had passed on and his appeal consequently abated.

In support of the 1st Appellant's appeal, Mr. Kihara Learned Counsel submitted that PW1 stated that there was electricity light at the petrol station,. However he did not elaborate on the intensity of the light. Nor did he address the question of the distance of the light in relation to the Appellants.

Secondly, PW1 ought to have stated where the Appellants were positioned in reference to the light.

Counsel further submitted that the evidence on record showed that PW1 was ordered to lie down and he complied and thereafter he never looked up again. Later in his evidence he pointed out that the alleged robbers were in the toilet. Counsel submitted that if PW1 did not look up after being ordered to lie down, there was no way he could tell where the robbers went to. As for PW2, Counsel submitted that he did not state in his evidence how he was able to identify the 1st Appellant. He only identified him in the dock. As for PW3, Counsel submitted that he was a watchman at the petrol station. He was on patrol duties when the incident happened. However in his evidence, he did not say how he came to identify the Appellant. He did not say where he was standing, when the incident happened, whether there was light and if so, how strong the light was.

In support of his submissions on the issue of identification, Counsel drew our attention to various Court of Appeal decision in **MOHAMED RAMA ALFAN & OTHERS VS REPUBLIC (CR. APP. NO. 223 OF 2002 (MOMBASA) (unreported)**, **CHARLES ANJARE MWAMUSI & ANOR VS REPUBLIC CR. APP. NO. 226 OF 220 (MOMBASA) (unreported)** and **PAUL ETOLE & ANOR – VS- RE/UBIC CR. APPL. NO. 24 OF 2000 (NAIROBI)** (unreported)

As regards inconsistencies and contradictions in the prosecution case, counsel submitted that PW1 stated that the robbers had items that looked like guns. Later on in his evidence he was apparently able to identify that the 1st Appellant had a toy pistol. Counsel could not understand how PW1 came to know that it was a toy pistol. Secondly PW1 stated that when the Appellants came to the petrol station the 1st Appellant and the 5th accused in the Lower Court (who was acquitted) were the ones who had the Police attire. However PW2 stated in his evidence that in all there were three persons in police attire. Thirdly, Counsel submitted that the Police officers who arrested the Appellants allegedly at the scene of crime recovered nothing from them. This was an enclosed area. There was money, scratch cards and watches robbed from the victims. Counsel submitted that those items ought to have been recovered from some of the Appellants if indeed they participated in the crime failing which it must be presumed that the Appellants were not the robbers. Further PW7 testified that he did not have any money with him at the time of robbery. However the charge sheet indicates that he too was robbed of Kshs.5,000/=. Consequently Counsel submitted that the evidence given by PW2 contradicted the charge sheet. Counsel further pointed out that PW3 stated that the 1st Appellant was carrying iron bar.

This evidence was contradicted by PW1 who stated that the 1st Appellant had toy pistol. Counsel further submitted that PW3 further testified that the robbery took about 5 minutes. Counsel submitted that if this was the case how come the police who arrived at the scene whilst the robbery was in progress were unable to recover any of the stolen items. PW3 further contradicted his earlier evidence when he claimed that they were saved by the police after 30 minutes. PW3 further testified that he was told that the iron bar was found with the 3rd Appellant and not the 1st Appellant. As regards the testimony of PW4 Counsel submitted that the items which were produced in Court as weapons used in the alleged robbery were

found on the ground in the petrol station. There is no explanation as to how he came to conclude that they were with the Appellants. That PW1, PW2 and PW3 stated in evidence that they had been bundled into a toilet by the time the police arrived at the scene. However PW4 contradicted them when he stated that he found the 1st Appellant tying the three Complainants. That PW4 stated that he arrived at the petrol station at 3 a. m. That evidence contradicted the evidence of PW1 and PW2 who stated that the robbery took place at 2 a. m. PW5 also testified that the report of robbery was received at 3 a. m. Further contradicting the evidence of PW1 and PW2. PW5 further testified that he found the implements produced in Court at the toilet.

However PW4 stated that the implements had been dropped by the Appellants on the road as they escaped. Counsel submitted that since PW4 and PW5 came to the petrol station together, one of them was not telling the truth. In support of his submissions on the discrepancies and contradictions in the prosecution case, Counsel referred us to the case of **OGAYO VS REPUBLIC (1982 – 88 1 KAR (1043)** where it was held that where discrepancies are unresolved, conviction is not sustainable.

Finally, on the issue of the Appellant's defence having not been considered, Counsel submitted that the Court should have given reasons for rejecting the Appellants defence. That it was surprising that the same Court accepted the defences of 5th and 6th co-accused and acquitted them yet they had admitted that they were with the 1st and the other Appellants when arrested.

For all the foregoing reasons, Learned Counsel for the 1st Appellant urged us to allow the Appeal, quash the conviction and set aside the sentence.

In support of his Appeal, the 2nd Appellant who was not represented by Counsel handed in written submissions with the permission of the Court. He also added orally that none of the Complainant's in counts 1, 2, and 3 ever identified or mentioned him in connection with the offence.

That it was PW4 and PW5 who connected him to the offence. However PW4 did not say where the Appellant exactly was during the robbery at the petrol station. That PW5 under cross-examination said he did not know where the Appellant was arrested. He finally submitted that in his defence, he had explained where he was coming from when he was arrested. However the Learned Magistrate did not give due consideration to the defence.

The third Appellant was similarly unrepresented. He tendered written submission in support of his Appeal. In addition he orally submitted that the trial Magistrate when acquitting the 5th and 6th accused in the Court below said that the two had their hands tied, yet there was no evidence that they were tied. That PW3 in cross-examination said that the Appellant was taken there under arrest.

Consequently, the Appellant ought to have similarly been given the benefit of doubt just like the 5th and 6th accused. Finally the Appellant submitted that he was not at all involved in the robbery, otherwise he could have been found in possession of some of the stolen items.

The fourth Appellant who was also unrepresented handed in written submissions in support of his Appeal. He opted to rely on the same entirely and made no oral submissions.

For the 5th Appellant, Mr. Wandaka Learned Counsel appeared for him. He submitted that there was no positive identification of the 5th Appellant as one of the robbers. The robbery occurred at night. The evidence adduced did not refer to the state of light at the petrol station. Question regarding the position of the electric light, how far PW1 was from the 5th Appellant in order to positively identify him was not addressed. Counsel further submitted that PW3 did not specifically identify the Appellants in Court. He merely said all were present. Counsel further submitted that since no identification parade was conducted, the evidence of identification was dock identification that was worthless. In support of this proposition Counsel referred us to the case of **GABRIEL NJOROGE VS REPUBLIC (1982 – 88) 1 KAR 1124** where it was held that dock identification was worthless without a previous identification parade. Counsel further submitted that the evidence tendered regarding identification was not watertight and should therefore not have been the basis of conviction. Counsel referred us in support of this submission to the

following authorities. OWEN KIMOTHO KIARIE VS REPUBLIC CR. APP. NO. 93 OF 1983. and MAITANYI VS REPUBLIC (1985) 2 KAR 75 in which the Court of Appeal held that identification must be positive and that even in day time, witnesses are usually unable to make positive identification. Counsel further attacked the finding by the trial Magistrate that it was not necessary in the circumstances to conduct an identification parade. To the Learned Counsel, this was a serious misdirection on the part of the Learned Magistrate. Counsel further submitted that the trial Magistrate misdirected himself when he found that the Appellants were identified to the Police officers by petrol attendants. Counsel submitted that none of the witnesses stated that they identified the Appellants to the Police.

Regarding the discrepancies and contradictions in the prosecution evidence, Counsel submitted that due to the said contradictions and discrepancies, the prosecution case was not proved. Upto the point when the police went to the scene, PW1 and other witnesses all along believed that the robbers were police officers. That their compliance to the orders by the robbers was due to that belief. In those circumstances, Counsel submitted that there can be no robbery with violence by trickery.

Counsel further submitted that the robbers were allegedly armed with imitation guns. None of the witnesses was injured. The only thing that came out in evidence was that they feared. Counsel therefore submitted that the elements of robbery with violence were not established. Counsel further submitted that when the court found that the 5th Appellant was one of the robbers, it ought to have convicted him for the offence of simple robbery and not robbery with violence.

As regards the Appellant's defence, Counsel submitted that the Appellant had testified that he was arrested while going home. The trial Court did not give reasons for rejecting his defence. That the evidence of all the Appellants was consistent that they were all arrested and put in a lorry that had many other persons. Counsel submitted that the prosecution did not challenge the fact that the lorry had many people. As regards the charge sheet Counsel submitted that on the face of it, it is alleged that the accused and others not in Court participated in the crime. Counsel submitted that there was possibility that the real robbers were never arrested. PW4 testified that they found the robbery in progress. However when arrested, none of the items allegedly robbed from the Complainants was recovered from the Appellants. It was Counsel's final submission that the 5th Appellant did not participate in the crime and ought not to have been convicted.

In response, Ms. Nyamosi, Learned State Counsel urged us not to be guided by the decision in **CR. APP. NO. 24/2000 (ETOLE'S CASE)** (Supra) as the circumstances in that case could not have been favourable to positive identification since it involved moonlight. In the instant case, there was electricity light.

Learned State Counsel further submitted that this was not a case of dock identification as claimed by the Appellants. The Appellants were caught in the act at the scene of crime. That in any event an identification parade could not have been conducted since it would have been an exercise in futility as the Appellants had been seen by the Complainants. Counsel further submitted that PW1, PW2 and PW3 respectively testified that robbers attacked and robbed them of personal belongings.

Counsel submitted that the trial Magistrate took into account that even though the items were not found at the scene, the witnesses were truthful when they said that the items in the charge sheet were stolen from them. It was Counsel's further submission that there were more than one robbers.

Consequently one of the ingredients of robbery with violence was met. Putting together the evidence of PW3, PW4 and PW5 Counsel submitted that there was no doubt at all that the Appellants attacked and robbed the Appellants. The Learned trial Magistrate therefore came to the right conclusion that the Appellants robbed the Complainants. She therefore urged us to uphold the conviction and confirm the sentence.

In a brief reply, Mr. Kihara submitted with regard to Etole's case, that the Court was dealing with light generally and not whether it was moonlight or not. The issue is still the same in this case.

That electric lights do not all have the same intensity. Distance of Appellants from the source of light was

not addressed. Secondly on identification parade not being necessary, Counsel submitted that PW1, PW2 and PeW3 were ordered to lie down. They complied. They lay facing down and only stood up when the Police came. Counsel submitted that there was no evidence brought to the effect that any of the witnesses never lost sight of the robbers from the time they arrived at the Petrol station to the time the Police arrived.

The 2nd Appellant in reply submitted that there was no dock identification of him. For the 3rd Appellant, submitted that PW3 did not specify who robbed him off his money and wrist watch.

Mr. Wandaka in his reply submitted that the fact that there were more than more than one robber is not sufficient to prove the case of robbery with violence. Counsel urged the Court to be bound by the decision in **MAITHA VS REPUBLIC (SUPRA)**. Counsel further submitted that the defence by 5th Appellant was not given due consideration.

We have carefully considered the submissions both oral and written made herein by the Appellants and the state. We have also perused all the authorities cited herein. This being a first Appeal, it is our duty:

“.....To remember that parties are entitled to demand of the Court of first Appeal a decision on both questions of fact and of law, and the Court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen nor heard the witnesses and make due allowance for this.....”

See **GABRIEL KAMAU NJOROGE -VS- REPUBLIC (1983 – 88) I KAR 1134**. We shall bear the aforesaid injunction when considering the appeal.

In the course of their submissions, the Appellants alluded to the fact that on the basis of the evidence led, the ingredients of the offence of robbery with violence were not met. This ground was not raised in the petitions of appeal filed. However, since it is a matter of law, we allowed the issue to be canvassed. The Appellants argued that because the alleged weapons used in the robbery were imitations and that no physical violence was visited upon any person during the robbery, the ingredients of robbery with violence were therefore not met. At most the offence disclosed by the evidence was one of simple robbery according to the Appellants. The state countered this by submitting that since the robbers were more than one, the ingredients of robbery with violence were met.

To our mind, Section 296 (2) of the Penal Code creates the capital offence of robbery with violence. Under that Section a robbery with violence is committed in any of the following circumstances, to wit:-

1. If the offender is armed with any dangerous or offensive weapon.
2. If the offender is accompanied with one or more other person or persons or
3. If at or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses any other form of personal violence to any person

We are of the view that an offence under the section can be committed in any one of the three circumstances set above. If the offender is armed with a dangerous or offensive weapon he need not be in the company of other people; nor need he wound, beat, strike or use any other form of violence against the victim. The fact that the offender is armed with a dangerous or offensive weapon at the time of the robbery constitutes a complete offence under the section. Again even if the offender is not armed with a dangerous or offensive weapon, but is, at the time of the theft, accompanied by one or more other persons or persons, that being so accompanied constitutes a complete offence under the Section. Finally, if at the time of the robbery, the offender wounds, beats, strikes or uses any other form of personal violence to any person, that is also a complete offence even if the robber is not armed with a dangerous or offensive weapon or he is just alone. See

1. JOHANA NDUNG’U VS REPUBLIC CR. APP. NO. 116 OF 1995 (NAIORBI)

2. SAID BAKARI ALI & ANOR VS REPUBLIC (MOMBASA) CR. APP. NO. 90 OF 2003

3. ERICK WAMBULWA MUCHOCHO & ANOR VS REPUBLIC (NAKURU) CR. APP. NO. 24 OF 2003
4. ORALA ALFRED OCHIENG VS REPUBLIC (NAIROBI) CR. APP. NO. 228 OF 2003.

In this case the robbers were many. Indeed they numbered eight. The evidence of PW1, PW2, PW3 and PW4 and PW5 attests to this. To our mind therefore the offence of robbery with violence under Section 296 (2) was complete even if the robbers were armed with imitation guns and used no violence in the course of the robbery. The ingredient being that the robbers were more than one. In a bid to persuade us that the ingredients of robbery with violence is only committed if violence is visited on the victim of the robbery, Counsel for the 5th Appellant referred us to the case of **JACKSON MAITHA VS REPUBLIC, CR. APP. NO. 78 OF 1995 (UNREPORTED)**. We have carefully studied the said authority. Contrary to what the Learned Counsel submitted the authority does not say that robbery with violence is only committed if violence is visited on the victim. Indeed the authority is in agreement with the other authorities aforesaid when it comes to the definition and ingredients of the offence of robbery with violence. The only distinction being that in the latter case, the prosecution had alleged in the particulars of the charge that immediately before the robbery, the Appellant and his confidants had used personal violence on the victim. The Court stated:

“.....The prosecution was entitled to make that averment but having done so, they had to prove beyond reasonable doubt that the Appellant in fact used personal violence against PW1 or against any other person who was with PW1. That would be the only way to bring the charge under the provisions of Section 296 (2) of the Penal Code.....”

All the Court of Appeal was saying in our view is that if you allege in the charge sheet that during the robbery, violence was visited on the victim, the prosecutor must prove that fact and it will not be enough to merely show that the victim was threatened with violence. The Court of Appeal did not say that in every case of robbery with violence, there must be violence for the offence of robbery with violence to be complete as argued before us by the Learned Counsel for the 5th Appellant. In the result we agree with the Learned State Counsel that the offence was complete the moment the robbers who raided the petrol station were more than one. This ground of Appeal therefore has no merit and is dismissed.

As regards the question of identification, according to the evidence of PW1, PW2 and PW6 the robbers struck at about 2 a. m. The robbers confronted them suddenly at gunpoint and ordered them to lie down on the ground. PW1 testified this:

“.....We served a customer. After the customer left we were ordered to lie down. Some had items that looked like guns. I did not look up again.....”

As for PW2 he testified as follows on the issue:

“...After the vehicle I was serving left, they ordered us to lie down.

Three of them were in attire that resembles that of the Police. I lay on ground as ordered.....”

From the foregoing, it is clear that the victims were confronted and immediately ordered to lie down by the robbers who posed as policemen. In these circumstances, some or indeed all of them must have been scared, shocked or even in a state of fear and panic. It is doubtful whether in those circumstances they could have been in a position to register any positive or reliable identification of the robbers. This observation is supported by the fact that none of the Complainants were able to notice or see who robbed them of their money, wrist watches e.t.c. or say which robber did what. One would have expected that if indeed PW1, PW2 and PW3 identified the robbers they would have told the police officers (PW4 and

PW5) who came to the scene immediately and when the robbery was still in progress the role played by each robber. They were not even able to tell who among the robbers was wearing the police attire. We may add that the mere fact that some of the robbers were wearing police attire may even have compounded further, the witnesses ability to identify them knowing how our people deal and relate with the police. It is our view therefore that the circumstances obtaining at the scene as outlined above did not favour positive identification of the Appellants by the Complainants.

We now turn to consider the issue of light at the petrol station. It was the prosecution case that there was electric light at the petrol station that enabled the Complainants allegedly to identify the robbers. On the other hand it is the case of the Appellants that it was not just a question of availability of the electricity. The Magistrate ought to have made inquiries so as to satisfy himself that the light was bright enough as to afford the Complainants opportunity to identify the Appellants. On the recorded evidence it is only PW1 who said that there was electricity light out of all those who claimed to have been robbed at the petrol station. He testified thus:-

“.....There was electricity light at the petrol station.”

Even the Police officers who came to the scene as the robbery was in progress did not testify as to the availability of light. Even if we were to accept that there was light, it would appear that the trial Magistrate did not address the question of sufficiency and or intensity of the available light.

In the case of **MOHAMED RAMA ALFAN (SUPRA)** the Court of Appeal held:-

“.....Where the evidence relied on to implicate an accused person is entirely of identification the evidence should be watertight to justify a conviction.....”

Further in the case of **CLEOPAS OTIENO WAMUNGA VS REPUBLIC, CR. APP. NO. 20.1989**, the Court of Appeal held:-

“.....Evidence of visual identification in Criminal Cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.

Whenever the case, against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the Defendant in reliance on the correctness of the identification. The way to approach the evidence was succinctly stated by Lord Widgery C. J. in the well known case of REPUBLIC VS TURNBULL (1970) 3 ALL E.R. 549”

In the instant case, the intensity of the electricity light was not addressed. Neither was the position of the Appellants in relation to the source of light inquired into. Further the trial Magistrate did not inquire as to how long the Complainants kept the Appellants under observation as to able to identify them. Finally the robbers were eight in number. It is improbable that they just came and stood as a group in one position. The evidence on record suggest that they split into groups. It is important to bear in mind that the that the Complainants were suddenly attacked and ordered to lie down on their stomachs, harassed and thereafter locked in the toilets. Taking all the foregoing into account we are persuaded further that the prevailing conditions were such that the Complainants could not have been in a position to identify the Appellants. Had the Learned trial Magistrate made inquiries in terms aforesaid, he may have come to a different conclusion other than that the Appellants were positively identified at the scene of crime as stated in his Judgment.

We would hold as indeed was held in **PAUL ETOLE & ANOR VS REPUBLIC CR. APPL. NO. 24 OF 2000** (unreported) that:-

“..... In our Judgment, the quality of the identification evidence in this case was

very poor and that there was no evidence of the nature to which we have referred which can be said not support the correctness of identification. It follows in our Judgment, that this was a serious non direction by the Lower Court.....”

It is noteworthy that the petrol station is surrounded by a wall. When PW4 and 5 came to the scene of crime they are alleged to have shot in the air and the robbers scattered towards the toilets. The alleged robbers then surrendered. They were all searched but none of the items allegedly stolen from the Complainants and enumerated in the three counts in the charge sheet were recovered from any of the Appellants. This is strange bearing in mind that from the recorded evidence none of the alleged robbers aforesaid managed to escaped the Police dragnet. Had any of the items robbed from the Complainants been recovered from the Appellants, then it would have provided the necessary corroboration to the evidence of PW1, PW2, PW3 and PW6 all of whom claimed to have been robbed of money and wrist watches. In the absence of such recovery, there must be some doubt as to whether really the Appellants were the ones who were involved in the alleged robbery. The Police used the word scatter. They stated that the robbers upon hearing the gunshot scattered towards the toilets.

According to Collins Concise Dictionary the word “Scatter” means:-

“To separate and move or cause to separate and move in various directions.....”

If this be the case isn't possible that the real robbers could have run in different directions and escaped. That possibility exists. Perhaps this was a case where the Court ought to have visited the locus in quo so as to satisfy itself as to the nature of the wall, where the toilets were and whether there was no other escape route.

As regards the toilet, there is evidence on record that both PW1, PW2, PW3 and PW6 were all pushed into the toilet in the course of the robbery and before PW4 and PW5 came to the scene. There is also evidence that once PW4 and PW5 shot in the air as they condoned off the scene, all the robbers are alleged to have run and hid in the toilet. It would appear therefore that there was a total of 11 people in the toilet. The Court was not told whether the said toilet could hold that number of people.

Perhaps, if the trial Magistrate had visited the locus as aforesaid again, an answer to this doubt would have been provided.

We now wish to deal with the contradiction and inconsistencies in the prosecution evidence.

We must from the onset state that the discrepancies and contradictions are so glaring as to cast doubt to the credibility of the Prosecution witnesses. In the case of **ALI MOHAMED ALI & ANOR (SUPRA)**, the Court of Appeal in dealing with the evidence that was contradictory and which the state submitted was minor and not fatal stated:-

“.....With respect we cannot agree. This was a capital offence where the High Court was required to evaluate the evidence with care. In our view the discrepancies in the evidence of the Complainant and P.C. Daniel Mbogua being the only two material witness, were very material as they reflect on the credibility of the whole of the prosecution case. And these discrepancies considered together with the finding that the Complainant's evidence was scanty, imprecise and exaggerated, in our view render the conviction of the 1st Appellant unsafe.....”

In the instant case, the witnesses were not in agreement as to the time when the alleged crime was committed. Whereas PW1 and PW2 claimed that the robbery occurred at about 2 a. m. PW4 and PW5 claimed that they were alerted of the on going robbery at 3 a.m. Further whereas PW1, PW2 and PW6 testified that the robbery took about 5 minutes, PW3 testified that:-

“We were saved in 30 minutes....”

Yet there is evidence that the Police came to the scene as the robbery was in progress. As regards the items exhibited in Court, PW4 the arresting officer stated:-

“These items had been dropped on the ground.”

On the other hand PW5 who was together with PW4 stated as follows:-

“.....Some items were found under the vehicle, some inside the vehicles and some in the toilets....”

PW4 contradicted his colleague PW5 as regards where they were when they received the report. PW5 claimed:-

“I was with other officers on crime stand by – we were in a vehicle.....”

On the other had his colleague PW4 stated:

“....On 3. 12. 2001 at 3 a. m. I was at the station on crime standby.....”

There are further contradictions in the testimony of PW1 and PW2. PW1 testified that after he had served a customer some people approached them and ordered them to lie down. This was contrary to the testimony of PW2 who stated that:

“....They went to the battery charging area.....”

Further when the police came to the scene PW6 stated that he had gunshots and saw those people running in different directions. This was contrary to the evidence of PW2 who testified that when he had gunshots, the robbers came towards the toilets. As regards the police attire, PW1 stated that when the robbers came to the petrol station only two had the police attire. Whereas PW2 testified that three of the robbers were in police attire. Further PW1, PW2 and PW3 testified that they had been bundled into the toilet by the time the police arrived at the scene. However PW4 contradicted this testimony, when he sated that he found the 1st Appellant tying the three Complainants.

Bearing in mind the aforesaid contradictions and defences put forth by the Appellants, we think that the Appellants are right in stating that the prosecution witnesses were not credible.

As regards the Appellants’ defences, all were based on an alibi. They all stated how, where, when and why they were arrested. This was before the robbery. Most of them were leaving Atlantic Day and night club. The trial Magistrate does not seem to have given much thought to these defences.

As was stated in the case of UGANDA VS SEBYALA & OTHERS (1969) EA 205

“The accused does not have to establish that his alibi is reasonably true.... All he has to do is to create doubt as to the strength of the prosecution case.....”

In the instant case, the prosecution did not even bother to investigate the alibis. They did not even bother to find out whether such day and night club existed and if indeed some of the Appellants had been patrons there on the night of the alleged robbery. When the Appellants were arrested, they were bundled in the lorry. The recorded evidence does not show how the Police lorry came to scene.

The Appellants claim that they were victims of a police swoop. This was a possibility which the Learned trial Magistrate ought to have considered.

In the case of SEKITOLEKO VS UGANDA (1967) EA 531 it was stated thus:-

“.....If the evidence in support of the alibi raises reasonable doubt as to

the guilt of the accused person, it is sufficient to secure an acquittal....”

In our view the alibi defences raised by the Appellants were plausible and the Learned trial Magistrate ought to have carefully considered them. As a whole we think that the defences were dealt with in a very perfunctory manner. That ought not to have been the case.

In the result, we think we have said enough to show that this Appeal has merit and ought to be allowed. In consequence thereof the Appeal is allowed, convictions of the Appellants and each one of them quashed and the sentences imposed set aside.

The Appellants and each one of them are set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 30th of September, 2005.

.....

J. LESIT

JUDGE

.....

M. S. A. MAKHANDIA

JUDGE