



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

**CRIMINAL APPEAL 443 OF 2000**

**RAPHAEL LOSIKE EMULIA alias**

**DOMINIC LOTRIM ESOKON.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**CRIMINAL APPEAL 444 OF 2000**

**JOSEPH ETABO LOGECHI alias**

**LOWASA NYAUNDIA.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**CRIMINAL APPEAL 445 OF 2000**

**GABRIEL EKIRU KITAE alias**

**JOSEPH ELIMLIM.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**CRIMINAL APPEAL 107 OF 2001**

**AMOS JOSPHAT FIALAE KERION alias**

**LOKOCHOI (LOKOCHOLO).....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

These four appeals were consolidated for hearing as they all come from Criminal Case Number 1600 of 1999 in the Senior Resident Magistrate's Court, Nanyuki and in this judgment we shall be referring to the

appellants as the First Appellant, Second Appellant, Third Appellant and Fourth Appellant in the respective order in which their names are mentioned on the first page of this judgment. In the lower court, the First Appellant was the Second Accused; the Second Appellant was the First Accused; the Third Appellant was the Fourth Accused; while the Fourth Appellant was the Third Accused. There was a fifth accused who was acquitted. All the five accused persons jointly faced four counts of robbery contrary to Section 296(2) of the Penal Code.

In count one, particulars alleged that on the 14th day of August 1999 at Peaks View Bar in Meru Central District, Eastern Province, the five accused persons jointly being armed with dangerous or offensive weapons namely, an A.K. 47 and a G.3 rifles, rungun, axes and simis, robbed Wilfred Mwebia Mugambi of cash Ksh800/=, one wallet, two bunches of keys, one wrist watch make Seika all valued at Ksh6300/= using actual violence to the said Wilfred Mwebia Mugambi. In count two it was alleged that on the same date at the same place and similarly armed, the accused persons jointly robbed Eunice Muthoni Kathurima of cash Ksh4000/=, two crates of beer, five packets of Embassy cigarettes, five packets of Sportsman cigarettes, three packets of Champion cigarettes, one packet of S. M. cigarettes, 25 packets of Vodka mini-packs, 18 match boxes and a pair of scissors all valued at about Ksh8879/= threatening to use actual violence to the said Eunice Muthoni Kathurima.

In count three the particulars alleged that on the same date at Makutano bar, in Meru Central District, Eastern Province the accused persons similarly armed, jointly robbed Elizabeth Wangui about Ksh8000/=, eight packets of Embassy cigarettes, and six packets of Sportsman cigarettes all valued at Ksh8700/=, and at the time of the robbery, shot dead the said Elizabeth Wangui. In count four, it was alleged that on the same date at Makutano Bar in Meru Central District in Eastern Province, the accused persons similarly armed, jointly robbed Johnson Kithinji of unknown amount of cash money and at the time of that robbery shot dead the said Johnson Kithinji.

In addition the four appellants, without the Fifth Accused, faced jointly two more counts. In count five the four appellants were charged with being in possession of Firearms without firearm certificate contrary to Section 4(1) of the Firearms Act, Cap. 114 Laws of Kenya, particulars alleging that on 8th day of September 1999 at Trench Farm in Laikipia District in Rift valley Province, the four appellants jointly had in their possession two firearms namely one G.3 rifle Serial Number F 90179 and one A.K. 47 rifle Serial Number DH 5644 without firearms certificate. In count six the four appellants were charged with being in possession of ammunitions without Firearm Certificate contrary to Section 4(1) of the Firearms Act, Cap. 114 Laws of Kenya, and particulars alleged that on 8th day of September 1999 at Trench Farm in Laikipia District, Rift Valley Province, the four appellants jointly had in their possession 20 rounds of 7.62 mm ammunitions without Firearms Certificate.

From the evidence on record, the robberies took place at night. Retired Major Wilfred Mwebia Mugambi who was P.W.1 and the Complainant in count one, told the court that on 14th August 1999 at 10.00 p.m. he was in his bar at Peaks View with two customers and a waiter and as the customers and him were seated on stools taking beer facing the counter, he heard a human voice from behind them ordering them to lie down. Looking behind where the voice was coming from, he saw two people armed with guns, one of them looking like a G. 3 gun, pointed at them that were at the counter. P.W.1 and his customers obeyed the order and one of the gunmen stepped on P.W.1's back as the gunman entered the counter where the waiter, Eunice Muthoni, was. The man demanded money from Eunice Muthoni who therefore rose up and gave the man what she had. But the man demanded more money threatening to shoot her and went on to cork the gun and fired but no bullet came out. He did so the second time asking Eunice for the whereabouts of her employer. She replied her employer had gone to town.

The man went where P.W.1 and customers were lying and took from each one of them whatever he had, as one robber outside the bar told others to allow the owner of the bar get into the bar if they saw him return from town. P.W.1 gave the man Ksh800/= and the two customers gave out what they had. The man searched them to take money they may have left on them. He took vehicle keys from P.W.1. The money Ksh800/= had been taken in a wallet. The man subsequently exchanged positions with the second one who was at the door as the second man also went to the counter and searched before the first man went back to the counter and took some bottles of beer and passed it outside. He then gave P.W.1 and the two

customers one free bottle of beer each to drink fast and they did so. They were ordered into the counter where Eunice was and were locked there as the men left. After about five minutes when all was quiet, P.W.1 and the two customers forced the counter open and went out. Each one of the two robbers had a gun. One person was short and the other tall. P.W.1 said he had heard voices of three people speaking from outside but he had not seen them. House keys which had been taken together with vehicle keys from P.W.1 were dropped in the bar.

P.W.1, who said had worked in the Armed Forces for 32 years, told the court that the incident took about 30 minutes and the two guns he had seen with the robbers looked like the ones which were in the court during the hearing. He added that his Seiko watch and postal keys were also robbed. From the bar when he went to his house and tried to contact the Police on telephone from the house, he could not go through. Thought of driving there but heard a gunshot on the lower part of the area and decided against driving. However before long one Kiriinya went to him to seek assistance to take the people injured to hospital explaining that one person had been shot dead and that those to be taken to hospital had also been shot. They drove to the Police Station to report the matter but found a report had reached the Police who accompanied them back to Makutano where P.W.1 saw Kithinji had been shot dead next to his motor vehicle. P.W.1 stayed with the Police till 4.00 a.m. when he left them to continue with investigation. Nothing of his was recovered.

P.W.2, Eunice Muthoni (Eunice Muthoni Kathurima) told the court that she was the waiter at the counter at Peaks View bar serving beer to P.W.1 and Gitari and Kinoti at about 10.00 p.m. on 14th August 1999 when she saw two people enter the bar, the one in front shouting at P.W.2 and those she was serving to lie down. She managed to see that each one of those two people had a long gun. She saw other people at the door armed with clubs before she lay down. The gunman who was in front entered the counter and demanded money from her. She gave him the money she had. He demanded more and when P.W.2 told him that the money she had given was all she had as the rest had been taken by her employer whom she said had gone to town, the gunman in the counter said he would check himself for more money and that if he found it, he would kill P.W.2. The gunman checked and found no money. The gunman searched P.W.1 and the two customers and took money from them. He then emptied a sack in the counter, which contained empty castle cans and he packed beers there and handed them to his colleagues who were outside. He then gave P.W.1 and the two customers each a beer as he gave a soda to P.W.2 and told them to drink as the attackers were also drinking.

They also took cigarettes and matches and finally took P.W.1 and the two customers to the inside of the counter where P.W.2 was and locked the four of them in there and left them there. After a while, P.W.1, P.W.2 and the two customers forced the counter open and P.W.1 went to his house to call the Police. P.W.2 told the court that the bar was well lit on the inside and outside with electricity. She added that the gunman who was in the counter tried twice to shoot her but no bullet came out. She also said that after the robbers had gone, one person called Kiriinya went to the premises seeking assistance from P.W.1 to take people who had been injured at Makutano Bar to hospital and reporting that one person had been killed. From the evidence of P.W.2, she accompanied P.W.1 and when they went to the place and found that the injured had been taken to hospital, they went to report the incidents to the Police at Nanyuki Police Station. Police accompanied them back to the scene and on seeing the dead person, P.W.2 was taken to her home and slept. On 20th September 1999, P.W.2 went to Nanyuki Police Station where she was taken to five separate parades to identify a suspect in each parade.

Jane Muthoni Mwangi gave evidence as P.W.5 stating that on 14th August 1999 she was working in the kitchen of the bar of Elizabeth Wangui, the victim in count III, at Makutano. She said she was at the bar near the window watching a T. V. when she heard an order from behind to lie down. Looking, she saw a person with a rifle near her and another person with a rifle followed by three others. As they entered into the bar, she retreated to a room where she was sleeping. Also in the room were one Kiriinya and Elizabeth's son. They locked themselves there and stayed there throughout the incident. She said although they could hear what was being said, they could not see properly what was going on in the bar. They could hear gunshots. After a time, they heard the people go away. When P.W.5 and those she was with went to the bar, they found Elizabeth Wangui had been shot. They had to carry her to the road where they found a motor vehicle, which took her to hospital but by the following day, poor Elizabeth Wangui

succumbed to death. The same evening after the robbers had left, P.W.5 noticed that outside, one person, a man, had been killed outside a motor vehicle and another woman injured next to the man.

P.W.7, Edward Kiriinya Mutwiri was one of the people Jane Muthoni Mwangi told the court she was with in a bedroom in which she went to hide herself after seeing the robbers. P.W.7 told the court that the robbers stormed into the bar at Makutano at about 11.00 p.m. He saw two people armed with guns go to the main bar and issue the order for people to lie down. He went to hide together with Elizabeth's son and an employee of Elizabeth P.W.7 did not name and who must have been P.W.5. P.W.7 said someone locked the door of the bar from outside and went away. P.W.7 heard gunshots from the bar. After the gunshots ended, P.W.7 and those who were with him went out and proceeded to the bar and told those who were there that the robbers had gone away. That is when he saw that Elizabeth Wangui, the owner of the bar, had been shot and there was another lady at the door who had also been shot and one Kithinji had been shot dead outside his motor vehicle.

P.W.7 went to look for assistance from P.W.1 whom he refers to as Major. But found the robbers had also been at Major's bar. But the said Major accompanied P.W.7 back to Makutano where they found the injured ladies had been taken to hospital. So they went to report the matter to the Police at Nanyuki Police Station, who accompanied them back to the scene and the Police carried away Kithinji's body. This witness said that in the short moment he had with the two attackers who had guns, he was able to identify them, as they had not covered their faces although they had hats and long coats. The incident took about 30 minutes. Eunice Kinani Ayub, P.W.4, was the wife of Kithinji who was shot and killed at his motor vehicle at Makutano the evening of 14th August 1999. Eunice Kinani Ayub told the court she was in the company of her husband and they had left their house at 9.30 p.m. going to buy some meat. They were shot after they had just parked their motor vehicle and wanted to alight. Shot by one tall person wearing a coat and a hat covering the face. P. W. 4 became unconscious as her husband died on the spot. P.W.4 was subsequently rushed to hospital regaining consciousness at Kenyatta National Hospital where she remained admitted for two months. The attacker who had shouted "Msipite hapo" had a long gun, which resembled the gun exhibits that were in the court during the trial.

A Clinical Officer, Julius Mugwika, who gave evidence as P.W.8 was the first medical officer to examine Eunice Kinani Ayub at Nanyuki General Hospital only minutes after the shooting and found the victim in a shock and could not speak. He subsequently signed the victim's P3 classifying the injuries, a deep penetrating wound on the right chest and another on the right thigh, as maim. Boniface Wambugu Muriithi, P.W.9, was the son of Elizabeth Wangui, the victim in count three. He was at her mother's bar at Makutano that eventful evening when he saw two people each armed with a gun enter the premises. One going to the bar as the second one went towards the kitchen – the gunmen ordering people to lie down. Boniface Wambugu Muriithi and Gathoni (Muthoni?) and Kiriinya hid in a store (bedroom?), from where this witness claimed to have been hearing what was being said in the bar and went on to say that peeping through openings between timber that formed the wall, he could see some of the things going on in the bar including the shooting of his mother. He also heard a vehicle coming at the front door outside the bar and then a gunshot. After the robbers had left, Boniface went to assist the injured, who included another lady, to hospital. The following day he learned his mother had died. Boniface was one of the people who reported the incidents to the Police.

This witness, P.W.9, claimed in court to have identified the two gunmen saying they were the Second Accused and the Third Accused, who are the First and Fourth Appellants respectively, before us. He said the First Appellant had the grayish cardigan that was before the trial magistrate and the Fourth Appellant had the monkey face hat and jacket that were also before the trial magistrate in the court. But there is no evidence of Police identification parade to back up his identification claim although he told the court he also went to Nanyuki Police Station for that purpose. He did not give the date and told the court the identification parades were held in a room. From what he told the trial court during cross-examination by the Fourth Appellant, it would appear doubtful that he was at such a parade and identified the two Appellants. However, one other thing to note from the evidence of Boniface Wambugu Muriithi is what he said that the only thing that was taken from his mother's bar was Ksh10,000/=. No beers were stolen. He said he assisted his mother in running the bar and that the robbery incident took about 30 minutes.

At this stage, we think it is better to look at the rest of the evidence concerning identification of the appellants before moving further to look at other evidence in these appeals as a whole. We therefore begin with the evidence of P.W.1, Wilfred Mwebia Mugambi who told the court that on 20th September 1999 he was told some suspects had been arrested and he was wanted at Nanyuki Police Station to see whether he could identify the two he had seen. He told the court he found eight people in a parade and was asked whether he could see any of the suspects. He told the court that in the first line he was able to see and identify the person whose voice he had heard coming from behind them when they were in the bar. He said that that person was the Fifth Accused. He told the court he had not known him before and did not see the person that day. But had heard his voice talking and even asking them why they were not raising alarm. P.W.1 added that in the second line (second parade) of also eight people, he was able to pick out the Fourth Accused by his voice. The Fourth Accused is the Third Appellant before us in these appeal proceedings.

Further, P.W.1 said there was a third line (third parade) from which he picked out the Second Accused, who is now the First Appellant before us. P.W.1 said this is the person who entered the counter with a gun to take money and that he was wearing black shoes with strips and that the shoes were in the court as MF1 4. He had a bluish jacket not in the court. P.W.1 explained that the First Appellant was the one who corked the gun and fired but no bullet came out. This witness added that although the two men who had guns had jackets, they had not covered their faces and as there was light, he was able to see the two clearly. The First Appellant was stepping on the witness's back as the Appellant entered and left the counter because P.W.1 was lying next to the counter door. During cross-examination by the First Appellant, P.W.1 replied that his bar was well lit with electricity and that he had been able to identify the First Appellant at the Police identification parade when the First Appellant was made to talk at the parade. He had seen the First Appellant before he (P.W.1) lay down. It means at the identification parade, P.W.1, combined the voice and appearance to identify the First Appellant.

Concerning the others, identification by P.W.1 was by voice only as the other person he may have identified by voice as well as by appearance was the person whose voice P.W.1 said heard from behind and when P.W.1 looked before he lay down, he saw the person pointing a gun at them at the counter. P.W.1 said that person was the Fifth Accused who is not among the Appellants before us. But note what P.W.1 said in re-examination: He said: "I was not able to see the second person among the two who entered with guns during the parade." That is not consistent with what he said in his evidence in chief and cross-examination and therefore destroyed his evidence against the Fifth Accused.

P.W.3, Inspector Alfred Okiring, the Deputy O.C.S. Nanyuki Police Station who conducted the Police Identification Parade told the court that in the first parade P.W.1 asked each member individually to say the words "leta pesa", and as a result P.W.1 was able to pick out the Second Accused, now the First Appellant, as the one P.W.1 had heard saying "leta pesa". P.W.3 said that Eunice Muthoni, P.W.2, also identified the same suspect who had remained in the same position in the parade. P.W.2 used the same method of asking each parade member to say the words "leta pesa" separately. Jane Muthoni Mwangi P.W.5 identified the First Appellant simply by appearance. There are remarks that the suspect was seen outside. Lastly Kiriinya, or Edward Kiriinya Mutwiri, identified the First Appellant by voice. P.W.3 said the First Appellant did not complain about the conduct of the parade.

The witness said the First Appellant said he was satisfied and signed the parade form, which P.W.3 also signed and produced as exhibit 5. But despite that statement there is no clear indication on exhibit 5 that the First Appellant expressed such satisfaction. There was thumb print and not signature. Concerning the identification parades involving the Third Accused, now the Fourth Appellant, P.W.3 had the same five witnesses. P.W.1 was unable to identify the appellant although P.W.1 in his testimony claimed to have identified the Fourth Appellant. P.W.2, Eunice Muthoni Kathurima identified the Fourth Appellant by his appearance. P.W.5 Jane Muthoni Mwangi, identified the Fourth Appellant by his appearance. P.W.7 Edward Kiriinya Mutwiri failed to identify the Fourth Appellant. The relevant parade form was produced as exhibit 6. The form was thumb printed with no remarks as to whether or not the suspect was satisfied.

The Fourth Accused, now Third Appellant was the suspect in respect of exhibit 7. P.W.1 identified him by voice. P.W.2 identified him by appearance. P.W.5, Jane Muthoni Mwangi, failed to identify the Third

Appellant as P.W.7 Edward Kiriinya Mutwiri also failed to identify the Third Appellant. Remarks in the relevant remarks column where the Third Appellant thumb printed suggests he was satisfied with the conduct of the parade. During cross-examination, P.W.3 did not accept the claim of the First Appellant that he forced the First Appellant to participate in the parade and that he had passed the First Appellant where witnesses were and that he had gone for the First Appellant from the cells. P.W.3 said that other members of the parade were from the cells and that they looked like the suspects and that it was easier that way because it would have been difficult to get, from outside the cells, people who looked like the suspects who were all Turkana. He said one Police Officer was calling suspects while a different Police Officer called witnesses as he waited for them at the parade area.

From the mouth of P.W.2, Eunice Muthoni Kathurima, she said she identified the Fourth Accused, that is the Third Appellant, at the Police identification parade, by his voice after asking him to talk. That was in her second identification parade and this was the suspect in respect of exhibit 7 where, according to the evidence of the parade officer Inspector Okiring, P.W.3, the witness Eunice Muthoni Kathurima identified the suspect by appearance and that differs from what P.W.2 herself said – that it was by his voice. The witness agreed she had not seen the Third Appellant physically at the scene of crime. She had only heard the voice and that the second time she heard that voice was at the Police Station on the parade. Clearly from that piece of evidence, what Inspector Okiring told the court could not be true because P.W.2 could not have identified the Third Appellant physically when she had not seen the Third Appellant at the scene of crime or somewhere else.

Concerning her third parade, P.W.2 told the court that she identified the Second Accused, now the First Appellant before us. The Prosecution was not keen in bringing out clearly whether that identification was by appearance or by voice; although P.W.2 said she identified him as the one who had entered the counter with a gun, demanded money from her and took it and also took money from P.W.1 and the two customers. Threatened to kill her and tried to shoot her twice but no bullet came out. Gave her a soda to take as he gave a bottle of beer each to P.W.1 and the two customers. She said she had noted his voice was like that of a person with missing teeth. It was during cross-examination by the First Appellant that P.W.2 was made to say that at the parade she had asked him to talk and he talked and as a result she remembered his voice which came out like that one of a person with missing teeth. This was the suspect in respect of exhibit 5 where the parade officer, P.W.3, told the court that Eunice Muthoni used the voice test to identify the First Appellant. Concerning the Fourth parade, P.W.2 told the court she did not identify anyone.

But went on to say there was the fifth parade where she identified the Third Accused, now the Fourth Appellant before us. From the evidence of the parade officer, P.W.3, there were four parades in respect of each witness. It is not clear how P.W.2 had five parades. It was not revealed to the court who the suspect was in the fourth parade where P.W.2 said she did not identify the suspect. Concerning the Fourth Appellant, however, she told the court she identified him as the second person who entered her bar with a gun and stood near the door on the inside as the First Appellant went into the counter. She claimed the Fourth Appellant had blackish shoes with faint white strips like those she was seeing in the court marked MF1 3. She said she was able to see the First and Fourth Appellants as they entered because she was facing the door through which they entered. The incident took about 30 minutes. She said when the First and Fourth Appellant's entered and shouted "lala chini", she first thought they were Police Officers. But looking at them, she realized they were not Police Officers, and as they continued to demand that P.W.2 and those others at the counter should lie down, she did lie down having noted their faces which were not covered as the hats they had only covered the hair on their heads.

She also noted the voices. P.W.2 told the Fourth Appellant during cross-examination that she also saw him when he took a battery torch to the First Appellant who wanted to go with her to her house but when she told the First Appellant that her house was far, and the First Appellant gave up, the Fourth Appellant retreated with the torch. From the evidence of P.W.3 the Officer In Charge of the parade, P.W.2 identified the Fourth Appellant on the parade by physical appearance. The relevant parade form is exhibit 6, which shows that P.W.1 failed to identify the Fourth Appellant on the parade. The evidence of P.W.1 suggested that apart from the First Appellant armed with a gun in the counter, the other person who was armed with the gun was the Fifth Accused. On that fact therefore, the evidence of P.W.1 is not consistent with that of

P.W.2 who told the court that the other person was the Fourth Appellant. P.W.5 said light in the bar was from pressure lamp and she had chance to see the five attackers. She said Ksh.8000/= was stolen from the counter plus cigarettes and hot drinks. Nothing from the kitchen. She said she did not get the voices of those people but saw them well. She claimed the robbers had stayed for about one hour in the premises.

She told the court that at Police identification parade on 20th September 1999, she was able to identify all the five accused persons. She added: "Other than the two who had guns who are 2nd and 3rd accuseds in the dock I did not notice what the three other had." We would have thought it was easier to notice a weapon someone is armed with, if they are rungs, axes and simis, than to identify the person's face in circumstances of robbery where the witness in question has told the court: "We could hear what was being said but we could not see properly what was going on in the bar." However, during cross-examination, P.W.5, told the First Appellant that she was sure he was one of the two people who were each armed with a gun. She said she identified him by his appearance at the identification parade. P.W.3, the Parade Officer's evidence agrees with that of P.W.5 that she identified the First Appellant by appearance. That is in the identification form exhibit 5 which has remarks against the identification by Jane Muthoni Mwangi – that "he was seen outside the crime premises – "

written by the Parade Officer. It is not clear whether he was writing what he himself observed or was writing what the First Appellant told him by way of dissatisfaction with the conduct of the parade. Although such a complaint does not feature in the cross-examination of P.W.5 by the First Appellant, it featured in the cross-examination of P.W.3 by the First Appellant who was claiming P.W.3 passed with him, the First Appellant, in front of the witnesses outside the crime office before the parades started. P.W.3 denied it. Continuing with the evidence of P.W.5, she told the Fourth Appellant during cross-examination that she had seen him with a rifle, which was longer than that the First Appellant had. He had entered with the gun held at ready as he proceeded into the bar. She denied the challenge that she had been taken to the cells to see the Fourth Appellant. The Parade Officer Inspector Alfred Okiring's evidence agrees with what P.W.5 told the court that she identified the Fourth Appellant by appearance.

But although evidence of Inspector Alfred Okiring is that Jane Muthoni Mwangi failed to identify the Third Appellant on the parade, Jane Muthoni Mwangi told the court that she also identified the Third Appellant at the parade. She said although she noted the Third Appellant's face, she could not note his dress or the weapon he was carrying. According to the evidence of P.W.5, the robbers found her at the door or corridor on their way to the bar, pointing their guns in the ready and issuing an order for people to lie down. They reached her and she was not lying down. Instead she was looking at them. But they just passed by her and entered the bar where they harassed whoever they got and even fatally wounded the bar owner. P.W.5 retreated into an adjacent bedroom from where, with Elizabeth's son and one Kiriinya they could watch and hear what was going on in the bar. Her evidence does not explain the opening through which they watched what was happening in the bar. The Prosecutor did not care to bring this out in the evidence.

We note that contrary to what Jane Muthoni Mwangi told the court that together with those who were hiding in the room with her they could see what was going on in the bar, P.W.7 Edward Kiriinya Mutwiri told the court that he could not see what was happening in the bar after they hid themselves in the room in which they were. He, however, explained that the bar was lit with a pressure lamp. On 20th September 1999, P.W.7 was one of the witnesses at the Police identification parade and he told the court he was able to identify two suspects only. They were the two he said he had seen with guns going into the main bar. He said he identified them by appearance and by their voices. He said they were the Second and Third Accused persons, and those are the First and Fourth Appellants respectively, before us.

He said the shorter one who is the First Appellant, had the A.K. 47 while the taller one who is the Fourth Appellant, had the G.3 rifle. He said the First Appellant proceeded to the bar as the Fourth Appellant went towards the witness who was where son of Elizabeth and Jane Muthoni Mwangi were and the three ran away and hid themselves in a rear room. He denied the Police had shown him the two suspects. He explained that before he ran away to hide, he had taken a few seconds to look at the two gunmen. The evidence of Inspector Alfred Okiring, the officer in charge of the parade is that P.W.7 identified the First Appellant by voice. Inspector Alfred Okiring added that P.W.7 failed to identify the Fourth Appellant.

The relevant parade forms are exhibit 5 and exhibit 6 respectively. P.W.7's evidence to the effect that he identified the Fourth Appellant at the parade is false. Moving on to other evidence, Dr. Macharia of Nanyuki District Hospital who gave evidence as P.W.17, performed a postmortem on the body of Elizabeth Wangui on 20th August 1999. Found a bullet hole at the area below the right shoulder and exit hole at the lower armpit. Serious damage at the right posterior. A second bullet entry point on the left stomach area and exit point at the right rear side. Injury to the right apex of the lung and damage to the nerves.

The doctor formed the opinion the deceased had died due to severe bleeding due to the auxiliary nerve damage. He produced exhibit 28. On 27th August 1999 at the same hospital the same doctor performed a postmortem on the body of Johnson Githinji and found the body had eight bullet wounds with five arterial entry points for the bullets all on the front chest area. Another bullet entry point at the left side of the stomach. The bullets had exit points at the back of the chest and stomach. The right upper lobe of the lungs were damaged – and the heart had been perforated. The doctor concluded the cause of death was severe bleeding due to injuries caused and damage to the heart and the lungs. He signed the report exhibit 29. The body of Elizabeth Wangui was identified to Dr. Macharia by her father Francis Muriuki Githiui and a Police Constable Peter Wekesa from Nanyuki Police Station. The body of Johnson (John) Kithinji was identified to the doctor by Police Constable Paul Mwaura from Nanyuki Police Station and the deceased's father Rukaria Mugambi.

The postmortems were done after Sergeant Wafula of the scene of crime Nyeri had visited the mortuary where the bodies were and had taken photographs he produced in exhibit number 24. Police Constable Peter Wekesa, P.W.12, told the court that he was on duty at Nanyuki Police Station with P.C. Kariuki when they learned of the robberies at Makutano. They notified their O.C.S. and C.I.D. Personnel and went to the scene. They found one Kithinji had been shot dead. They learned two ladies had been shot and taken to hospital. He subsequently was at the mortuary to identify the body of the lady who died to Dr. Macharia for postmortem. Reports concerning the robberies were made at the Police Station by several people. Corporal David Kiriinya of the C.I.D., P.W.3, said he was at the Police Station that 14th August 1999 at about 11 p.m. when he learned of the robberies at Peaks View bar and Makutano Bar. He was one of the Police Officers who went to the scene and found one person had been shot dead.

He was Kithinji lying outside his motor vehicle. He learned two ladies had been shot and rushed to hospital. After Kithinji's body being taken to hospital, P.W.13 and others started looking for the robbers. But later learned that one of the two lady victims died at Cottage Hospital. The first person to be arrested was the Fifth Accused on a tip off. On questioning at the Police Station the Fifth Accused denied having been involved although he revealed his involvement in a different robbery at Tharua. On 7th September 1999, an informer was leading P.W.13 to Kambi Mbuzi Village where suspects in the Peaks View Bar and Makutano Bar robberies were said to have been seen, when on the way near a slaughter house the informer saw two people and pointed them out to the Police and the Police, who included P.W.13 and P.C. Mureithi, P.C. Kimondo, P.C. Mutuma and P.C. Ndirangu, arrested the two people who were the First and Second Accused Persons, now the Second and First Appellants respectively, before us.

The following day the First and Second Appellants agreed to lead the Police to the place where the guns they had used were. They led the Police to Isuga behind prison's farm where they said they had hidden the guns. The guns were not found there. The two told the Police that the guns could have been relocated by Gabriel and Amos who had been with the First and Second Appellants and knew the First and Second Appellants had been arrested. On their way back, the First and Second Appellants spotted Gabriel and Amos and pointed them out to the Police who arrested Gabriel and Amos as they tried to run away. Following that arrest, Gabriel and Amos led the group to a place near the sewage and fence to Laikipia Air Force where the Fourth Accused, now Third Appellant Gabriel, showed some place with grass where they went and found the A.K. 47 rifle No. DH 5654, exhibit 1.

The Third Accused, now Fourth Appellant Amos, led the Police to an area about 20 metres away where the G. 3 rifle No. G.3 C of 90179 was recovered with its magazine containing nine rounds of ammunition. The G. 3 form had also one round of ammunition making a total of 20 rounds of ammunition. The G. 3 rifle was produced as exhibit 2. The ammunitions, exhibit 3. This witness talked of other exhibits like

clothings, shoes, a pair of boots, a monkey hat, attributing each to a particular accused person as the owner, but we find it difficult to accept that part of P.W.13's evidence because that evidence is apparently hearsay. For instance when he says: "We were also told that one of the robbers had worn a jacket during the incident which is greenish and which we found 3rd accused wearing." The question is who told who and when and did those people say so before the trial magistrate? Same question may be asked in respect of the statement. "We had also been told 3rd accused had a black pair of shoes MF1 (19) which we took as exhibit."

Otherwise Corporal David Kiriinya further told the court that he took the two rifles and rounds of ammunition to a ballistic expert for examination and as a result he received a report which he produced as exhibit 22 on behalf of the ballistic expert – under Section 77 of the Evidence Act. The report says that the A. K. 47 rifle, as well as the G.3 rifle, were each in fair general condition complete with all the component parts and capable of being fired. Each was successfully test-fired by the Firearms Examiner. Each was a firearm in terms of the Firearms Act, Chapter 114 Laws of Kenya. The twenty rounds of ammunition were in calibre 7.62 X51 MM – equivalent of 308 – inch Winchester. They were suitable for use in firearms such as the G. 3 rifle. He picked three of them at random and successfully test-fired them from the G. 3 rifle. He found that each of the exhibit rounds of ammunition was live and capable of being fired from firearms of the appropriate calibre.

Concerning the four fired military rifle cartridges in calibre 7.62 X39 MM the Ballistic Expert said a comparative microscopic examination showed that they were fired from one gun. These were the exhibits sent to him as D. When he examined and compared microscopically each of the same cartridge-cases in conjunction with each of the three test cartridge cases he had fired from the A. K. 47 rifle, he did not find sufficient markings to enable him form a conclusive opinion. However, he formed the opinion that the A. K. 47 rifle could have been used to fire the four cartridge-cases which had been sent to him marked D1 to D4. Concerning the four fired military rifle cartridges in calibre 7.62 X51 MM the Ballistic Expert said a comparative microscopic examination showed that they were fired from one gun. These were the exhibit sent to him as E, and when he examined and compared microscopically each of the same cartridge cases in conjunction with each of the three test cartridge cases he had fired from the G. 3 rifle, he found sufficient matching breach face markings and firing pin markings to convince him that the G. 3 rifle Serial Number F 90179 had been used to fire all the four cartridge cases sent to him and marked E1 to E4.

Concerning the exhibit sent to him marked F, a fired military rifle bullet in 7.62 MM calibre, the Ballistic Expert said that the bullet did not bear any distinctive rifling data and that fact therefore rendered it difficult to identify in the condition in which it was. However, he found the nature of rifling markings on it consistent with the rifling markings on bullets that he had fired from rifle Serial Number F. 90179. Basing on that analysis, he formed the opinion that the G. 3 rifle Serial Number F 90179 could have been used to fire the bullet which was sent to him marked F. Further, in connection with the evidence on guns, we should mention that Wilfred Mwebia Mugambi who said had worked in the Armed forces for 32 years, told the court that the incident took about 30 minutes and that the two guns he had seen with the robbers looked like the ones which were in the court during the hearing, exhibit 1 and exhibit 2. Eunice Muthoni Kathurima, P.W.2, who said the bar was well lit on the outside and inside with electricity, also told the court that the guns she saw with the robbers looked like the ones which were in the court during the hearing. Edward Kiriinya Mutwiri, P.W.7, said the same thing.

P.C. Muriithi of the D.C.I.O.'s office, who gave evidence as P.W. 20, was in the group in which Corporal David Kiriinya was. Visiting the scene and thereafter looking for the robbers when the Fifth Accused was first arrested. He was in the group of Policemen who arrested the First and Second Appellants and subsequently the Third and fourth Appellants and recovered the two guns. What he said on those issues is similar to what Corporal David Kiriinya said. The two Police Officers also told the court that the fired cartridges were recovered from scene of the robberies. To conclude the Prosecution's case, we now look at the evidence from charge and caution statements or statements under inquiry said to have been recorded by the Police from the appellants. Inspector Abdikadir Ahmed who gave evidence as P.W.10 took a charge and caution statement from the First Appellant on 23rd September 1999. The statement was admitted in the evidence without objection. It is exhibit 14. Cross-examination by the First Appellant sometimes comes out as if the Appellant was trying to show he did not give the statement voluntarily but

that is contradicted by his statements to the effect that he gave the statement in an effort to cheat Inspector Abdikadir.

The purpose which that cheating was to serve is not clear. Reading the charge and caution statement, each count was handled separately by Inspector Abdikadir Ahmed and the First Appellant, confessed to each one of the six counts and went on to implicate all his co-accused persons. Chief Inspector Gedion Karani who gave evidence as P.W.6 took a charge and caution statement from the Second Appellant, Joseph Etabo Logechi on 23rd September 1999. The statement was admitted in the evidence, without objection, as exhibit 9. Chief Inspector Gedion Karani told the court that the Second Appellant had a self recorded, signed and thumb printed statement which, this witness said, constituted page 7 of the 8 page statement the witness recorded. During cross-examination by the Second Appellant, he tried to show he had been tortured before he was taken to Chief Inspector Gedion Karani for the statement. But the Chief Inspector did not agree arguing that if that were the position, the Second Appellant could have complained of it when before the Chief Inspector. The Appellant raised no such a complaint and never even included it in his self-recorded part of the statement, where the Second Appellant ought to have included the torture allegation.

Reading the charge and caution statement, all the six counts were read to the Second Appellant one after the other up to the end before the Second Appellant was asked whether he wished to make a statement or not. His reply is in the middle of page seven of the statement and states: “25 Isiolo Catholic Mission Mimi Joseph Etabo Nemekumbali makosa yote sita Nimesomea katika charge sheet na episa ya police kwa lugha hile naelewa nikaonelea niandike kwa Kiswahili. Ni hayo to sana mengi.” It is then signed and thumb printed and dated 23rd September 1999. That was a confession to all the charges. He did not implicate co-accused persons in that charge and caution statement which was recorded at 4.55 p.m.

Earlier the same day at 2.30 p.m., the same Second Appellant, whose name is variously written, Joseph Etabo Logechi alias Lowasa Nyaundia or Joseph Etabu or Joseph Etapo Logechi alias Lowasa Nyaundia, had had his statement under inquiry recorded by Inspector Francis Weru at the same Nanyuki Police Station. The statement, exhibit 25, was admitted in the evidence without objection as exhibit 25. Although Inspector Francis Weru, who was P.W.16, said in court that he told the Second Appellant the offences he (the Inspector) was investigating, that is not apparent from exhibit 25. What is apparent is that Inspector Francis Weru simply told the Second Appellant that he, the inspector, was investigating “an offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. I have reasons to believe that you Joseph Etapo Logechi is connected with the offence or you have some information that can assist me in my investigations.”

He then went on to ask the Appellant whether he wished to say anything and proceeded to administer a caution without giving particulars of even the single offence he indicated he was investigating. That alone started off the Second Appellant who went on to give a detailed statement and one wonders how the Second Appellant came to single out the particular offences he talked about in his statement especially when one realizes that the statement was recorded by Inspector Francis Weru and is not therefore a self-recorded statement. The statement recorded in Kiswahili, was not translated into English – the language of the court. In any case, in the statement the Second Appellant is recorded to have said that he was born at Rotiki Village in Isiolo District and that his business while at Isiolo was to buy and slaughter goats. But had come to learn that there is better business in buying and selling guns. It was with that knowledge that he bought the two guns an A. K. 47 and a G.3 that had been recovered by the Police. He came with them to Nanyuki looking for a buyer. He had 27 G. 3 ammunition and 30 A. K. 47 ammunition in addition to the two guns. At Nanyuki he met fellow Turkanas who included Losike Emulia, Amos Josphat Fialae, Gabriel Ekiru Kitae and Jimmy Ebei (Toto). They all lived at Kambi Ya Mbuji in Nanyuki Town.

His colleagues advised him that before he sold the guns, he should let all of them use the guns to get money. He agreed and as a result they first went to Peacks View where they stole about Ksh.3000/=. They went later to Makutano Bar where they fired several shots and two people were killed. Raphael Losike Emulia was the one using the G. 3 gun while Amos Josphat Fialae was using the A. K. 47 gun. The rest of them were using rungun. They ordered everybody to lie down and took money from their pockets before they ran away and went back to Kambi Mbuji. After the events of that day, Losike Emulia

and Gabriel Ekiru went to Kangaita on another day, armed with the two guns. But they were not successful in getting money. On 7th September 1999 he met Losike who could not tell him where the rest were. The Second Appellant and Losike started looking for their colleagues. As they were walking, they met with Police Officers near a slaughter house and the police arrested them and took them to Nanyuki Police Station where the two were subsequently charged.

The Second Appellant repeated that he was the owner of the two guns but was allowing Amos Josphat Fialae and Gabriel Ekiru to use the guns so that they give him some money for that use. The Second Appellant went on to say that during the investigation by the Police, he and Losike had accompanied those Police Officers when they met Amos Fialae and Gabriel Ekiru near the slaughter house and the two were arrested. The two, Amos Fialae and Gabriel Ekiru, led the group to where the two, Amos Fialae and Gabriel Ekiru, had hidden the two guns and produced the guns from where the guns had been hidden near the Sewage. The Police took all of them to the Police Station. We note that after Inspector Francis Weru had produced the statement of the Second Appellant and all the accused persons had been given opportunity to cross-examine him and concluded, the prosecution told the court he was recalling Inspector Francis Weru in respect of a charge and caution statement of the Fifth Accused.

The court accepted the application and Inspector Francis Weru continued in the witness box where he was. That statement was admitted in the evidence, without objection, as exhibit 26, the witness having told the court that he was with the Fifth Accused on 24th September 1999 at 8.00 a.m., and that the Fifth Accused was self-recording his statements. After all accused persons had been given opportunity to cross-examine Inspector Francis Weru, the witness was again recalled to produce another charge and caution statement from the Fourth Appellant, Amos Josphat Fialae Kerion which he said he recorded on 23rd September 1999 at 4.30 p.m. the said statement was admitted in the evidence, without objection, as exhibit 27. This time Inspector Francis Weru dealt with the charge in each count separately reading each offence and its particulars to the Fourth Appellant and requiring the Appellant to respond and recording the Appellant's response before moving to the next count in the order in which they are set out in the charge sheet. The Fourth Appellant's response to each count amounted to a confession.

Concerning the first count, the robbery at Peaks View bar, the Fourth Appellant implicated all his co-accused persons. But, like in respect of other confessions where they were implicated, when given the opportunity to cross-examine, the accused persons left cross-examination to the owner of the statement alone. Chief Inspector Peninnah Kinyua, P.W. 19, took a charge and caution statement from the Third Appellant Gabriel Ekiru Kita on 23rd September 1999 at 5.30 p.m. The statement was admitted in the evidence, without objection, as exhibit 30. Chief Inspector Peninnah Kinyua dealt with the charge in each count separately, reading each offence and its particulars to the Third Appellant and requiring the Third Appellant to respond and recording the Appellant's response thereof before moving to the next count in the order in which they are set out in the charge sheet.

The Third Appellant's response to each count, like his co-appellants, was a confession. He was also implicating co-appellants. Here again, cross-examination was left to the owner of the statement although all the accused persons were given the opportunity to cross-examine. Just as with other statements produced in the evidence in this trial, cross-examination did not prove effective and did completely nothing to shake the evidence which was produced in the statement as well as what the witness producing the statement said. That concludes our survey of the evidence adduced by the Prosecution as recorded by the trial magistrate. We now move to the defence of the appellants. In their defence, each appellant elected to give an unsworn statement. The First Appellant told the court that he went to Nanyuki from Rumuruti on 6th September 1999 to look for his brother. He learned his brother had gone to Nyeri. He slept at Nanyuki and on 7th September 1999 as he was walking towards Isuga to Nyeri, a motor vehicle, which had people armed with guns stopped where he was. After the Policemen in the motor vehicle questioning him, they ordered him to get on to the motor vehicle slapping him and taking Kshs.4700/= from him.

He told them he had bought his property to get that money, but they could not listen. He was taken to the

Police Station where he was beaten seriously while in a garage until he became too confused to understand what was going on. He went on to say that Corporal Kiriinyo asked him about the parade and when the Appellant told the corporal that he, the Appellant, could not participate because he had injuries, the corporal beat the Appellant and forced the Appellant into a line with eight people after parading the Appellant before members of the public. The Appellant protested before the Parade Officer Alfred, P.W.3. When being taken to court, he was told that unless he admitted all the charges, he would be beaten more. He said nothing had been found on him at the time of his arrest and that he was joined in this case with the people he did not know before. He said his pair of shoes was brought in the court and that he had signed the confessions so that he is taken to court to avoid further beatings at the garage. He said he had no gun or anything else at the time of his arrest.

The Second Appellant told the court in his defence that the Police arrested him on 7th September 1999 as he walked along the road. The Police beat him seriously and he bled from mouth and nose but the Police still sat on him as they drove on. He was taken to a garage where he was beaten with whips and clubs and stepped on before he was taken to the cells. The following morning he was returned to the garage, tied with a chain to the roof. He was seriously beaten and left there for two hours before being returned to the cells where he was served with tea and bread but could not swallow. His remand colleagues offered him medicine. He was joined by other people he did not know and beaten again at the garage and such beatings were repeated every day. He claimed there was a parade on 21st September 1999. Nobody picked him. Same on 22nd September 1999. On 24th September 1999 he was taken to court and complained about beatings, his tooth having been broken and that the court's orders that he be taken to hospital were not complied with.

He wondered why he was connected with these offences yet the witnesses who gave evidence said they did not know him and Police said no gun was found with him. He claimed to have denied contents of his statements on the ground that he had said and signed what was recorded because of beatings and the O.C.S. could not assist him. The Third Appellant in his defence told the court he had come to Nanyuki from his home area, Lake Turkana, because people in his area were attacked and killed. In Nanyuki, his work was to escort cows for tycoons. He said that on 7th September 1999, his wife died in hospital and on 8th September 1999 as he was on his way from the area chief for a permit to moan, he was arrested by the Police who beat him up seriously while questioning him. Corporal Kiriinya produced two rifles and asked him whether he knew the owners. He replied that he thought guns belong to the Police. He was taken to Police Station. He criticized the complainants in count one and count two who claimed they identified him by his voice. He stated they ought to have produced the voices they claimed to have heard because there are four different types of voices such as base and soprano and others. He said P.W.2 told lies when she claimed she had identified him at the parade yet she had not. As to his statements recorded by the Police, he said he is illiterate and therefore when papers were taken to him, he just thumb-printed them. He said he should be treated as a brother and father by the court and not like a wild animal.

The Fourth Appellant, told the court he had come to Nanyuki on 5th September 1999 looking for his brother who was working there but learned the brother had gone to Western Province. He started looking for money to travel home and on 8th September 1999 at 2.00 p.m. while walking on a road, Police in civilian clothes stopped their vehicle near him and ordered him to stop. He was arrested and put on the Police motor vehicle where he found other people he did not know. At the Police Station they were beaten and seriously tortured being questioned about a gun. Yet he had no gun when arrested. He denied Police evidence about his having led them to where the G.3 gun was recovered. He said Corporal Kiriinya is the one who produced the A. K. 47 gun from grass cover and added that the Police are the ones who knew where the two guns came from. He said the witnesses told lies when they claimed he went to their premises. He singled out P.W.1 posing a question that if others were robbed, how is it P.W.1 was not and was left unharmed? He argued that if pressure lamp was being used in the bar of P.W.1, that was not sufficient light to see properly what was going on. He claimed P.W.1 did not identify any of the two robbers he talked about.

The Fourth Appellant claimed that on 9th September 1999 he had been taken outside the cells and was seen by the people who were there. One officer Gituma, had told the people that they, the Turkana, were the robbers. He claimed that even when being escorted to the parade or being questioned, members of the

public could see him. He asked the court to ignore the evidence of the parade arguing that when they were taken from the cells to the parade, they were dirty and had injuries and could therefore easily be identified from other members of the parade who had not come from the cells. He claimed this case is fabricated against him. He said he did not understand how he signed the statement attributed to him. What he remembers he did was thumb-printing some papers without knowing what was written in those papers. He claimed he does not know how to read and write. That marks the end of our survey of the whole evidence recorded by the trial magistrate in this case. From that evidence, although some mistakes may have been made during the handling of the case by the prosecution and the trial court, we have no doubt that each of the four alleged robberies took place.

We have no doubt that in each robbery, the robbers were more than one and were armed with dangerous weapons which included rungas, an A. K. 47 rifle and a G. 3 rifle. We have no doubt that in each of the robberies not only was there threat to use actual violence but also there was use of actual violence upon the victims and as a result two of the victims, namely, Elizabeth Wangui and Johnson Kithinji, perished that same night, the latter on the spot, while a third victim, Eunice Kinani Ayub, escaped death only by a whisker and had to be hospitalized for a long time thereafter in addition to her having lost her beloved husband, poor Johnson Kithinji. Other victims like Wilfred Mwebia Mugambi and Eunice Muthoni Kathurima were being trampled upon by two of the robbers as the victims lay down on the floor in obedience to orders from the robbers who kept on scaring stiff the said victims by corking and firing one of the guns which luckily failed to fire at that time. We have no doubt that during the incidents, money and other items mentioned in counts one to four in the charge sheet, were robbed.

During each robbery, which witnesses said was taking about 30 minutes, the robbers appear to have been liberal in talking and exposing their faces in bright lighting either from pressure lamp or from electricity. As a result P.W.1, P.W.2, P.W.5 and P.W.7 were able to identify some of the robbers at the scene of robbery, though in difficult conditions. After the Appellants had been arrested, some of the witnesses like P.W.1 and P.W.2 had, in addition to what they thought they could remember by way of appearance, to seek voice assistance in order to identify a suspect at the Police identification parade. That way P.W.1 was able to pick the First Appellant from the Police identification parade relying on appearance and voice. Eunice Muthoni, P.W.2, also identified the First Appellant the way P.W.1 had identified the same Appellant at the Police identification parade. Other witnesses who identified the First Appellant were Jane Muthoni Mwangi, P.W.5, who relied on appearance only and Edward Kiriinya Mutwiri, P.W.7, who relied on the voice identification.

Concerning the Fourth Appellant, the first witness P.W.1 failed to identify him. But P.W.2, and P.W.5 identified the Fourth Appellant relying on physical appearance. P.W.7, like P.W.1, failed to identify the Fourth Appellant. When it came to the Third Appellant, he was identified by P.W.1 who relied on the voice, and P.W.2 who relied on physical appearance. The other three witnesses failed to identify him. The relevant evidence on identification suggests there was no Police identification parade in respect of the Second Appellant. We note that the robberies had taken place on 14th August 1999 and the identification parades were held after a full month had passed on 20th September 1999. To remember an unfamiliar physical appearance and or voice could have been difficult especially where, like in this case, conditions were unsettled and full of threat to limb and life. But we also recognize that where more than one witness pick out one suspect from their separate parades, that is something not to be ignored by the court. That is something to hold on to as we look for other independent evidence to lend support to the evidence of identification as a whole.

Moving on to the circumstances of arrests, arresting officers particularly Corporal David Kiriinya, P.W. 13, and P.C. Muriithi, P.W.20, talked about the Fifth Accused and an informer interchangeably, Corporal David Kiriinya speaking as if the real person who enabled the Police to arrest the appellants was the informer while the position of P.C. Muriithi was half half. But whether it was by assistance of the Fifth Accused, who had been arrested earlier because of other offences, or the assistance of an informer, the Police met and arrested the First and Second Appellants together. Following interrogation after that arrest, the two appellants volunteered to lead the Police to where the two Appellants knew the A. K. 47 rifle and the G. 3 rifle were hidden. That meant that the two appellants were connected with the two guns or knew something about the guns. When they took the Police to the place where the guns were supposed to be

and failed to find the guns, the two appellants told the Police that they suspected the Third and Fourth Appellants, who had learned of the arrest of the First and Second Appellants, had removed the guns and hidden the guns somewhere else. Indeed, that is what turned out to be the truth and that clearly linked all the four appellants together to the guns.

When the Police, assisted by the First and Second Appellants were looking for the Third and Fourth Appellants, the First and Second Appellants spotted the Third and Fourth Appellants and pointed the Third and Fourth Appellants out to the Police who immediately apprehended the Third and Fourth Appellants. From there, the Third and Fourth Appellants led the group to where the two guns were hidden some two or so kilometers away from where the First and Second Appellant originally knew the guns were hidden. The Third Appellant led to the place where the A. K. 47 rifle was hidden and it was therefore subsequently recovered, while the Fourth Appellant, led to the place where the G.3 rifle was found. Following those recoveries of the two guns and 20 rounds of ammunition, counts five and six were included in the charge sheet which the prosecution confronted the Appellants with before the Senior Resident Magistrate, in the Senior Resident Magistrate's Court at Nanyuki. It means that even if the two guns belonged to one person, at the time the Police recovered the guns those guns were in the joint possession of the four appellants who seem to have been using the guns interchangeably.

In the court during the hearing, witnesses Wilfred Mwebia Mugambi, Eunice Muthoni Kathurima and Edward Kiriinya Mutwiri, each identified the two guns as resembling the ones he/she had seen with the robbers during the robberies alleged in this case. More than that, the Prosecution produced a report of the Ballistic Expert which stated that four of the eight fired cartridges which had been taken to the Ballistic Expert by the Police as exhibit E had been fired from the G.3 rifle while the remaining four which had been marked as exhibit D could have been fired from the A.K. 47 rifle. The eight fired cartridges had been recovered by the Police from the scene of the robberies. The report said that each gun was a firearm in terms of the Firearms Act, in a fair general condition complete with all the component parts and not only capable of being fired but each was successfully test-fired by him. Similarly the 20 rounds of ammunition were suitable for use in firearms such as the G. 3 rifle and picking three of them at random, he successfully test-fired them from the G. 3 rifle. Each ammunition was live and capable of being fired from firearms of the appropriate calibre. The report of the Ballistic Expert was properly admitted in the evidence under Section 77 of the Evidence Act.

From the foregoing therefore, we hold the view that the evidence relating to the circumstances of arrests of the appellants coupled with the evidence of recovering the two guns, rounds of ammunitions and fired cartridges as well as the evidence of the Ballistic Expert's report provide good and sufficient evidence to corroborate the evidence concerning identification of the appellants both at the scene of the robberies and at the Police identification parade and we think the totality of that evidence is sufficient to support conviction of each appellant.

However, in case that is still found to be inadequate, we add the evidence relating to statements recorded by the Police from the appellants. That evidence needed no corroboration as there were no repudiations or retractions. However, if corroboration is needed we think the other evidence we have discussed above comes in as corroborative evidence. Concerning the statements therefore, there was a charge and caution statement from each appellant. In addition, there was a statement under inquiry from the Second Appellant. As already seen earlier, each one of those statements amounted to a confession covering all the six counts. With the exception of the charge and caution statement recorded from the Second Appellant which implicated the maker of the statement alone, each charge and caution statement implicated the maker as well as all co-accused persons who are now co-appellants before us.

The Second Appellant self-recorded part of page seven of his statement which was produced as exhibit 9. Otherwise in his statement under inquiry which was detailed and wholly recorded by Inspector Francis Weru, the Second Appellant implicated himself as well as all his co-accused who are his co-appellants now. He revealed clearly in that statement that the A. K. 47 rifle and the G. 3 rifle were his and that the two guns were used by all the appellants during the robberies in question in this appeal on 14th August 1999. Each one of those statements, that is charge and caution statements as well as the Second Appellant's statement under inquiry, was admitted in the evidence without objection from the maker and

there were therefore no trials within the trial in this matter. When given the opportunity to cross-examine Police Officers who recorded respective statements, the appellants even where implicated, were leaving all cross examination to the maker of the relevant statement only, and in all the cases, none of those crossexaminations would shake the recording Police Officer's evidence.'

In the light of the totality of all the above therefore, it has become clear to us that what each Appellant came to say during his defence after the close of the Prosecution's case, making various claims and allegations which were not made and put to relevant Prosecution witnesses when they were in the witness box, were after-thought; claims and allegations which this court should not accept especially in view of the weight of the Prosecution's evidence on record in this matter. On our own analysis of that evidence we have come to the same conclusion as the learned trial magistrate that there was sufficient evidence to sustain the conviction of each appellant on each one of the six counts in the charge sheet in this matter.

The sentence on each of the first four counts being only one and mandatory as rightly stated and imposed by the learned trial magistrate and the sentence of two years imprisonment, imposed on each Appellant in respect of counts 5 and 6, to run concurrently, having been right and merited and having been already served, we do hereby dismiss the appeal of each Appellant against his conviction and sentence on each count in its entirety.

**Dated at Nyeri this 28th day of October 2005.**

**J. M. KHAMONI**

**JUDGE**

**H. M. OKWENGU**

**JUDGE**