REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 64 OF 2016

JOSEPH GITHINJI MUTERU.....1ST APPELLANT

PAUL KAMWARO MUTURI .....2ND APPELLANT

MARTIN KARIUKI NDEGWA .....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Appeal from original conviction and sentence in Othaya Senior Resident Magistrates' Court Criminal Case No. 35 of 2015 (Hon. Ekhubi Benmark, Senior Resident Magistrate) on 18 August 2016*)

JUDGMENT

The appellants were jointly charged and tried of two counts of robbery with violence contrary to **section 296(2)** of the Penal Code cap. 63 Laws of Kenya. The particulars of offence in the first count were that on the 29th day of December 2014 at Giathenge shopping centre in Nyeri south District within Nyeri county jointly, while armed with dangerous weapons namely a pistol and patchet riffle robbed Margaret Wairimu Kihwaga of cash Kshs. 48,200/- and Safaricom scratch cards worth Kshs. 17,500/- all valued at Kshs. 65,700/- and immediately before the time of such robbery threatened to use personal violence to the said Margaret Wairimu Kihwaga.

And in the second count, it was alleged that on the 29th day of December 2014 at Giathenge shopping centre in Nyeri South District within Nyeri county jointly, while armed with dangerous weapons namely a pistol and patchet riffle robbed Patrick Gatungu Ndegwa of mobile phone make Samsung Galaxy Trend valued at Kshs. 14, 999/- and immediately before the time of such robbery threatened to use personal violence to the said Patrick Gatungu Ndegwa.

At the conclusion of the trial the trial magistrate found the appellants guilty on both counts and sentenced them to death. They were dissatisfied with the decision of the learned magistrate and for this reason they filed separate appeals which were consolidated on 6 April 2017. Their grounds of appeal were more or less in the following terms:

1. ***The learned trial magistrate erred in law in failing to analyze the evidence of the prosecution and arrive at the logical conclusion regarding the appellants' involvement in the alleged offence.***

2. ***The learned trial magistrate erred in law by relying on the evidence of PW9 (the investigating officer) who concocted and conjured evidence in order to obtain the conviction of the 1st appellant.***

3. ***The learned trial magistrate erred in failing to find that there was no sufficient or conclusive evidence of where and from whom the 1st appellant allegedly received or made either calls or short messages.***

4. ***The learned trial magistrate erred in facts and in law by failing to take into account the defence of the appellants.***

5. ***The 1st appellant was not assigned an advocate by the state at the state's expense thereby breaching his constitutional rights.***

6. ***The learned trial magistrate erred in fact and in law in failing to appreciate that the evidence of identification was not water tight to allow a safe conviction.***

7. ***The learned trial magistrate erred in fact and in law in using electronic evidence as a basis for conviction when the same was disjointed full of gaps and lacking in cogency that in itself need corroboration in material particulars.***

This being the first appeal, it is incumbent upon this honourable court to consider and evaluate the evidence afresh and come to its own conclusions independent of those arrived at by the trial court but conscious of the fact that the latter court had the advantage of seeing and hearing the witnesses. **(See Okeno versus Republic (1972) EA32).**

The state marshalled a total of nine witnesses in the prosecution of its case; the first of these witnesses was **Margaret Wairimu Kihwaga (PW1),** who was also the complainant in the first count. She testified that on the 29 December 2014, at about 9.00 am she was at her shop at Giathenge Shopping Centre when the 1st appellant entered to ask for a loose change of Kshs. 1,000/-. She didn't have it and so he left only to come back five minutes later to buy airtime worth Kshs. 20/=.

About ten minutes later two men armed with a pistol stormed her shop and demanded that she opens the cash box. A customer, whom she identified as one Mama Nadia was in the shop and they were both ordered to lie down. She testified further that her employer, **Patrick Gatungu Ndegwa (PW2)** walked into the shop and he too was also ordered to lie down and was even slapped by one of the attackers when he attempted to raise his head to see what was happening. She testified that she was able to see the assailants, one of whom asked her to help him put the money in a paper bag. The robbers took cash, credit cards and sim cards.

The witness participated in an identification parade at Nyeri Police Station on 15 January 2015 but she could not identify any of her assailants. She was, however, able to identify the 2nd appellant on a different identification parade conducted at Othaya Police Station on 9 February 2015. According to her evidence, she identified him because he was tall and slim; she recalled it was him who was armed with a pistol during the robbery.

On the same date of 9 February 2015, another parade was conducted at King'ong'o prison but just like in the first parade, she could not pick out any of her assailants in this parade.

She reiterated that during the attack, she was able to observe the assailants and it is as a result of this observation that she was able to describe them in her statement to the police. As far as the 2nd appellant is concerned, she testified that she saw a tall, slim person and with a brown complexion but she was not sure that it was the 2nd appellant.

On his part, **Patrick Gatungu Ndegwa (PW2),** testified that he was the owner of the shop in which Kihwaga (PW1) operated; the latter was his employee. On the material day, he went to collect cash from the shop; as he approached it, he noticed a green motorcycle, described as of Shineray make, in front of another shop; on it was a rider wearing a jungle jumper. Before parking his motorcycle, he peeped inside his shop and saw his employee and two other people.

After he parked his motorcycle, he found a tall man outside his shop; he wore a rain coat and a cap. One of the strangers inside his shops joined them, and told him, ***"hata wewe kuja hapa kijana".*** He tried to resist but the two assailants brandished pistols and shoved him into the shop where they ordered him to lie down. He testified that one of the assailants hit him on the head when he tried to peep around. The assailants frisked his pockets and took his mobile phone and cash, Kshs. 1,000/-. He heard one of the assailants ordering his employee to put all the cash in a paper bag. It was his evidence that they lost cash and scratch cards all valued at Kshs. 65,700/-.

After the assailants left, he went to the Administration Police Post to report the robbery; he learnt that in fact some other motorists who had seen them lying down and suspicious of what was going on in his shop had already made a similar report. Although the administration police officers pursued the assailants, no arrests were made then. He suspected the 1st appellant to have been involved in the robbery since he had been earlier been monitoring his (the 1st appellant's movements).

On 15 January 2015 he attended an identification parade at the Nyeri Police Station but he could not pick out any of the assailants.

He was able to pick out the 2nd appellant in another similar parade conducted on 9 February 2015 at Othaya Police Station.

At a parade conducted at King'ong'o prison, he identified the 3rd appellant; according to him, it is this appellant who had ordered him to get into the shop. He testified that he knew this appellant before the robbery incident.

On cross-examination by the 1st appellant, he testified that he had seen the 1st appellant before; he had not only served him at his shop but also that he had met him at the shopping centre. He testified that the 1st appellant did not take part in the actual robbery but had been in collusion with the 2nd and 3rd appellants. These two had pointed guns at him and ordered him to get into the shop.

On cross-examination by the 2nd appellant, he testified that the parade from which he picked him out had eight people; he also testified that he recorded two statements; one on 31 December 2014, and the other one on 2January 2015. It was in the latter statement that he gave the description of the assailants. At one point he stated that he recorded his second statement after the identification parade had been conducted. He also testified that the rider of the getaway motorcycle was donning a jungle jacket which he identified in court.

In answer to questions put to him by the 3rd Appellant, he testified that he not only saw the 3rd appellant clearly but that he also identified him from his voice since he was the one who ordered him to get inside the shop. It was also his evidence that the 3 rd appellant was asked to utter the same words during the identification parade.

Corporal Peter Wambugu (PW3) testified that on the 29th December 2014, he received information from members of the public of a robbery at a certain shop. He rushed to the scene together with police constable Kinuthia (PW4), but found when the appellants had already escaped. They later arrested the 1st appellant as a suspect. **Police constable Patrick Kinuthia Ngugi's (PW4's)** testimony was along the same lines that on the 29th December 2014, at around 9.30 am, while at Githenge Shopping Centre, he received information from the public

that an M-pesa shop had been robbed by armed people. He proceeded to the scene where he got information that the 1st appellant had been at the shop before the robbery. Based on the information from the public, they were able to locate and arrest the 1st appellant.

Jefferson Okongo (PW5), a chief inspector of police, conducted the identification parade at King'ong'o or Nyeri main prison on 9 February 2015; he had been requested to conduct this parade by corporal Abraham Koech. After he had been given the permission by the officer in charge of the prison, he arranged a parade made up of the 3rd appellant together with other people of similar physical appearances; they were all dressed in prison attire. He informed the 3rd Appellant of all his rights and the procedures related to such a parade and although he participated in the parade, he declined to sign the parade form. As he organised the parade, the complainants were in the office of the officer in charge of the prison. They were summoned to the parade by the prison warders.

The 3rd appellant stood between the 6th and 7th members of the parade and Ndegwa (PW2) identified him by touching on his left shoulder. He also declined to sign the report. Wairimu (PW1), however, could not identify the 3rd appellant.

Inspector Okong'o testified further that on the same day, he conducted another identification parade at Othaya Police Station, where the 2nd Appellant participated. After he informed him of all his rights and procedures involved, the 2nd appellant consented to participating in the parade and chose to stand between the 4th and 5th members of the parade. He testified that Ndegwa (PW2) identified him by touching his shoulder. Like the 3rd appellant, the 2nd appellant also declined to sign the parade report.

Similarly, Wairimu (PW1) was also able to identify the 2nd appellant by touching him on the shoulder but again the 2nd appellant declined to sign the parade form. The members of the parade were eight plus the 2nd appellant.

The officer denied that the investigations officer participated in conducting the identification parades but only filled those parts in the form where he was required to fill.

Contrary to Ndegwa's evidence, he denied that the 3rd appellant was asked to utter certain words during the parade and neither was he aware that Ndegwa (PW2) asked him to do so.

Police constable **Basirn Murungi's (PW6)** testified that upon the instructions of corporal Moffat Ndungu who was his supervisor, he tracked down the 2nd appellant on 8 February 2015 and together they went to the 2nd appellant's house where he conducted a search and recovered a jungle pullover under a mattress. Prior to this occasion, he had known the 2nd Appellant for 6 months. The recovery was made in the house in which the 2nd appellant is alleged to have lived with one Zipporah Wangeci who, according to his evidence, was the 2nd appellant's girlfriend.

Corporal Daniel Hamisi (PW7), testified that he was attached to the Safaricom communications company in the law enforcement liaison office; amongst his duties was processing of call data records and mobile money transactions upon request from law enforcement agencies. It was his evidence that the company was served with a court order dated 28 January 2015 in Othaya Senior Resident Magistrates Court Misc. Appl. No. 6 of 2015 in respect of Safaricom customer numbers **0703235201, 0725610012** and **0721658878.** The first number, according to his evidence was registered in the name of Joseph Githinji Muteru, the 1st appellant, whose identification card number was captured as No. 20290316. He established that there was communication on this line on 29 December 2014 at 9.03 a.m.; it was of an incoming text message nature from a Safaricom service number. The location of the phone was at Karima.

As for line number **0725610012** it was registered in the name of the 3rd appellant, Martin Kariuki Ndegwa identification card number 10503683. There was communication on this line on 29 December 2014 at 9.07.03 a.m. at Gakindu area. There was an outgoing call to number 0771404376 and to line no. 07322217339 at 8.25 a.m.

Line number **0721658878** was established to have been registered in the name of the 2nd appellant, Paul Muturi whose identification card number is indicated as 23619850. On 29 December 2014 at 1533 hours there was communication between this line and the 3rd appellant's line; they are said to have been located at Kiandu and Gatitutu areas.

He also produced two handsets the first of which was a Nokia serial number 355125063376976 which was paired with the line 0725610012. The second handset was a Nokia 1280 serial number 35406058957021 which was paired with the line no. 0703235201 for the 1st appellant.

Dennis Okongo (PW8) testified that he was a software and data analyst at Telkom Orange (K) Limited and his duties included data analysis and business intelligence. While in the course of his duties, he received an affidavit from corporal Koech (PW9) seeking information on a Telekom line No. 0771404376. He established that the line was registered in the name of Alphonce Konga; it was in a Nokia 110 handset IMEI 3572805823454. On 29 December 2014 there was communication between this line and line no. 0725610012 at 4.20 am, 8.21 am and 9.07 am. The calls were made to this line by the Safaricom line.

Finally, the investigation officer, **corporal Abraham Koech (PW9)** testified that on the material day at around 9.30 a.m. Chief Inspector of Police, Naomi Muli, summoned him and informed him of a robbery at Giathenge shopping centre. They went to the scene and established that indeed a robbery had taken place; it involved three robbers one who remained on the motorcycle while two others entered a shop from which they robbed.

They also established that Wairimu (PW1) had lost Kshs. 48,200/- and airtime valued at Kshs. 17,500/-. Ndegwa (PW2) lost his mobile phone valued at Kshs. 14,999/-. The robbers sped off on a motor-cycle after the robbery.

The officer testified further that that they were later called by the officer in charge of Witima Police Station and informed that the public had arrested the 1st appellant. He also testified that he recovered two cell phones from the 1st appellant. It was also his evidence that the 1st appellant was overheard saying that "the area was ready for action".

He also established in the course of his investigations that there was a customer in the shop identified as Agatha Wambui Kaburu; she was threatened but nothing was stolen from her. She declined to participate in the identification parade for fear of her life; she even moved out of the area.

It was his evidence that he was asked to release the 1st appellant by his senior but he did not do so since the villagers had threatened to lynch him. He suspected that the 1st appellant was in collaboration with the other appellants since, the 1st appellant had been contacted by the owner of the line 0725610012.

He added that the 3rd Appellant had been arrested and charged at Gichira area for a burglary case before a Nyeri court; while the 2nd Appellant was arrested at Kiandu at his girlfriend's house, after tracking his phone, where they recovered a jungle jacket and the Shineray Motorcycle Registration Number KMDC 999C, which he stated were used during the robbery. They also recovered a mobile phone from the 2nd appellant.

He added that the 1st appellant used the Orange and Safaricom lines in one handset.

When they were put on their defence, the 1st appellant gave a sworn statement. He stated that on the material date, he went to a "*Mama Mugo*" kiosk to purchase milk with a Kshs. 1000 note but she did not have change. It is then that he proceeded to Githenge shopping centre to purchase airtime at the only open M-pesa shop. The attendant did not have change so he proceeded to another shop where he found change, thereafter he went to buy milk and tissue paper then returned to the M-pesa shop to purchase airtime. He testified that he left for home and upon reaching *mama mugo kiosk* he bought a cigarette which he started smoking with *baba mugo.* He testified further that while he was at the shop, he heard screams from the direction of the shopping centre and one *Janja aka Sungura* shouting that the people riding the motorcycle were thieves. He visited the scene where police officers interrogated him. Later in the day when he returned home, he was arrested.

When he was cross examined, he denied ever calling the 3rd appellant or knowing him.

His witnesses, Henry Ndungu (DW1) and Jecinta Wambura Muchira (DW2) (*Mama Mugo*) reiterated his testimony. Ndungu (DW1) stated that the 1st appellant was his neighbor and customer and that on the material day at around 8.30 am, the 1st appellant purchased milk at his shop. Muchira (DW2) testified that on that same day, the 1st appellant went to her shop at around 8.am to purchase a cigarette but she did not have change. He then left for Githenge and returned later at around 9.00.a.m. She testified that while she was talking to the 1st appellant, they heard one *Mboku* shouting while pointing to the people at the motorcycle that they were thieves.

The 2nd appellant similarly testified on oath and **t**old the court that on 27 December 2014, he was in his village at Kangatita where he visited his friend, one Simon. Thereafter, he went back to where he operated a motor-cycle transport business. He testified that on the 8 February 2015, he was arrested. A search was done in his house but nothing was recovered. The arresting officers then took him to another house in Kiandu shopping centre that belonged to a certain lady who was then with a man inside. They searched the house and recovered a jungle jacket and iron bar. They were all arrested. He contended that the following day, before an identification parade was conducted, he was taken by the investigation officer at the Criminal Investigation Office, Othaya Police Station, where his photographs were taken. While on his way back to the cell, he saw Wairimu (PW1) and Ndegwa (PW2) at the reception. His witness, **Anthony Nderitu Kuyu (DW3)** testified that on the material date, he was with one Martin Gathara and the 2nd appellant at the latter's home constructing a house for him.

In his sworn statement, the third appellant also told the court that on the material date, he was in *Muthinga Market*, working for one Hellen Wangechi Njeri (DW4). That he worked from 8.00am until 2.00pm. He testified that it was while he was on his way to Nairobi on the following day that he was arrested and charged with various offences in Nyeri court. It was also his testimony that he took part in an identification parade on 9 February 2015; he faulted it because it was conducted by the investigating officer. He also denied ever having called the 1st Appellant or knowing him.

Wangeci Njeri (DW4) testified that on the material day, the 3rd appellant worked in her house, decorating it, from 8.30am until 1.00pm. During cross examination, she acknowledged that at the time the 3rd appellant was working at her house, she made several calls to him as was seen on the Safaricom call data.

That is as far as evidence went.

The offence of robbery is defined in section 295 of the Penal Code, but the ingredients of a crime of robbery with violence and the penalty thereof are prescribed under section 296(2) of the Code.

Section 295 of the Penal Code states;

> ***295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***

Section 296(2) of the Code defines when robbery escalates into the offence of robbery with violence; it says: -

296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

Thus, an accused will be convicted of the offence of robbery with violence if the prosecution will prove that the robbery victim was not only robbed but also that at the time of the robbery any of the following circumstances were brought to bear: -

(a) The accused was armed with any weapon or instrument that may deemed to be dangerous or offensive;

(b) The accused was in the company of one or more persons;

(c) Immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to any person.

The evidence of Wairimu (PW1) and Ndegwa (PW2) is sufficient enough to show that indeed the offence of robbery with violence was committed. They were not only attacked by more than one assailant but also that the assailants themselves were armed and threatened to use violence on them; as a matter of fact, Ndegwa (PW2) was assaulted in the course of the robbery. The evidence that they also lost cash and other valuables as a result of the attack was not disputed. In short, I am satisfied that the prosecution proved beyond all reasonable doubt that the offence of robbery with violence as understood under section 296(2) of the Penal Code was committed.

The main bone of contention is whether the appellants perpetrated this crime; the prosecution case is that they were the culprits but the appellants say otherwise. When I consider the evidence and the submissions by both the appellants and the state, I gather that prosecution case revolved around the question of whether the appellants were properly identified and whether there was sufficient circumstantial evidence from which an inference of guilt on the part of the appellants could be made. It is these two issues that, in my humble view, are central to determination of the present appeal.

As far as identification of the appellants is concerned, the evidence of Wairimu (PW1) and Ndegwa (PW2) was crucial. The two attended three different identification parades; one conducted at Nyeri police station on 15 January 2015 and two others conducted on 9 February 2015 at Othaya police station and Kingo'ngo or Nyeri main prion respectively. The complainants could not pick out any of their assailants in the first parade. It is not clear from the prosecution evidence whether any of the appellants participated in this first parade.

The two, however, picked out the 2nd appellant in the parade that was conducted at Othaya police station; according to Wanjiru, she picked out the 2nd appellant because he was tall and slim, a description she had given to the police in her statement. She recalled that the 2nd appellant was armed with a pistol during the robbery.

In answer to a question put to her during cross examination by the 2nd appellant, her answer is recorded as "I am sure if it was you". This answer did not make sense, at least a grammatical one, and so I had to resort to the original handwritten record to confirm whether that was what was recorded. The handwritten version of the answer is recorded as "I am not sure if it was you"; the word "not" is crossed by double lines but it is still legible. However, the crossing is not countersigned and therefore it is impossible to tell whether it was a deliberate act by the learned magistrate to correct an error or it was an act of some other person.

The cancellation puts the integrity of the record into question on the very crucial question of identification of the 2nd appellant by the first complainant. I need not belabour the point that in a matter such as the present appeal, this court entirely relies on the record from the subordinate court to ascertain what was said in the course of the trial in that court; its task of evaluation and assessment of the evidence is based on the evidence as recorded. Where it is in doubt as to what was said and recorded, that doubt can only be resolved in favour of the appellant. It follows that, in the face of the uncertainty of the Wanjiru's answer, this court cannot proceed as if she asserted in no uncertain terms that she was sure that the person she picked out on the identification parade was the appellant.

The 2nd complainant is recorded to have identified both the 2nd and the 3rd appellants. He picked out the 2nd appellant as the person whom he found standing outside his shop on the material day. He described him as a tall, slim and brown person and he gave this description to the police when he recorded his second statement on 2 January 2014.

As far as the 3rd appellant is concerned, the 2nd complainant testified that he identified him from two perspectives the first of which was his physical appearance while the second one was the appellant's voice. He recalled that this appellant is the one who emerged from the shop and uttered the words "hata wewe kuja hapa kijana"; it is out of these utterances that he identified his voice. However, although he testified during cross-examination by the 3rd appellant that the latter was asked to say these words and he did speak them out as part of the identification process, inspector Jefferson Okongo (PW5) who conducted the identification parade was categorical in his evidence that neither himself nor the second complainant ever asked the 3rd appellant to say or speak any word for voice identification.

If the evidence of the Wanjiru (PW1) on identification of the 2nd appellant is taken out of the equation for reasons I have given, what emerges is that the identification of the 2nd and 3rd appellants is based on the evidence of a single identification witness. Such evidence is treated with caution and most importantly, whenever a trial court has to convict based on the evidence of a single identification witness, it must warn itself of the dangers of relying on such evidence if it is the only evidence upon which the conviction is based. There is a raft of decisions by the Court of Appeal reiterating this point and I will do well if I could cite a few of those decisions here. Speaking of the evidence of identification generally the Court had this to say in **Wamunga versus Republic (1989) KLR 424:**

It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

But on the particular issue of the evidence of a single identification witness, the court acknowledged in O**geto versus Republic (2004) KLR 19** that while a fact can be proved by a single identification witness that evidence must be admitted with care where circumstances of identification are found to be difficult; it noted as follows:-

> ***It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.***

As to the dangers of relying solely on the evidence of a single identification witness the Court of Appeal for East Africa stated in **Roria versus Republic (1967) EA 583 at page 584** as follows:

> ***A conviction resting entirely on identity invariably causes a degree of uneasiness…***
>
> ***That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.***

The court also cited its own decision in **Abdala bin Wendo & Another versus Republic (1953), 20 EACA 166** where it held:

> ***Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.***

The complainants were robbed at about 9 am, in broad daylight, so to speak. the 2nd and 3rd appellants confronted the 2nd complainant when he approached his shop and so, as he testified, he was able to see them clearly to the extent that he could, and he did give their description to the police. I am persuaded that the circumstances for a positive identification were favourable.

But favourable circumstances for a positive identification is one thing; it is another thing altogether to pick out the person that is alleged to have been identified from an identification parade. It is in this regard that I find the evidence of the 2nd complainant concerning the 3rd appellant to be doubtful. It is doubtful because while he insisted in his evidence that he asked the 3nd appellant to speak out aloud certain words, the officer who was in charge of conducting parade denied that he or the complainant ever asked the 3rd appellant to make any utterance.

Voice identification is, no doubt, an important and acknowledged aspect of evidence of identification. As a matter of fact, standing order 6(iv) h of the Police Force Standing Orders on identification parades, is clear that if the witness desires to hear the accused/suspected person speak, amongst other actions, it should be done and where it happens the whole parade should do likewise.

For the complainant to state that he identified the 3rd appellant by his voice when the officer in charge of the parade was categorical that this aspect of identification was not taken into account in the identification and, in any event, there is no such evidence on the parade form, it can only mean that either the witness was not credible or he did not identify the 3rd appellant at all.

Being a single identification witness, his evidence with regard to identification of the 3rd appellant should have been treated with caution and if this had been done, the trial court would not have had difficulties in coming to the conclusion that the evidence of identification of the 3rd appellant was insufficient and it was not safe to convict the appellant based on such evidence.

Apart from the evidence of identification, the other evidence upon which the state relied upon was largely circumstantial. In this regard phone records were produced to show that the appellants were in constant communication on or about the time the robbery took place and to this extent the evidence of corporal Daniel Hamisi (PW7) from Safaricom Ltd and Dennis Okongo (PW8) was crucial.

Corporal Daniel Hamisi's (PW7's) evidence that Safaricom lines, **0703235201, 0725610012** and **0721658878** were respectively registered in the names of the 1st appellant, the 3rd appellant and the 2nd appellant was not disputed. He established that there was an incoming text message to from Safaricom company to the 1st appellant's line on 29 December 2014 at 9.03 AM.

As for the 3rd appellant's line number **0725610012** he called lines 0771404376 and line no. 07322217339 at 8.25 am on 29 December 2015.

Line number **0721658878** was established to have been registered in the name of the 2nd appellant. On 29 December 2014 he said to have called the 3rd appellant at 1533 hours.

According to **Dennis Okongo (PW8)** a telekom line No. 0771404376 was registered in the name of Alphonce Konga and was used in a Nokia 110 handset IMEI 3572805823454. It was his evidence that on 29 December 2014 there was communication between this line and line no. 0725610012 at 4.20 am, 8.21 am and 9.07 am. The calls were made to this line by the Safaricom line.

It is not clear what the state intended to achieve with this evidence but if it was to show that the robbery was an execution of a conspiracy amongst the appellants then this evidence fell short of proof beyond reasonable doubt that this was the case.

While it was established that the Safaricom line 0725610012 belonged to the 3rd appellant and he communicated to one Alphonce Konga, it was not established who this person was and whether he participated in the robbery perpetrated against the complainants. There is nothing to suggest that 3rd appellant's calls to him had anything to do with the offence against the appellants or any of them.

The 2nd and 3rd appellants are also said to have communicated after 3 PM on the material day; again, there was no evidence that this communication had anything to do with the robbery that had taken place earlier.

The other aspect of circumstantial evidence upon which the prosecution case was based is the recovery of what was referred to as a jungle pullover or jumper from the 2nd appellant's house. The inventory produced in court shows that this piece of apparel was recovered in the house of one Zipporah Wanjiku. The 2nd appellant denied that he had anything to do with that house and with this denial it fell upon the prosecution to call Zipporah Wanjiku to shed some light on whether she was related to the 2nd appellant in any way or to such an extent that the appellant would keep his property in her house.

Again, there is doubt as to whether the jungle jumper or pullover could be tied to the 2nd appellant because Ndegwa (PW2) testified that the person who was wearing this cloth was the rider of the getaway motorcycle and not the 2nd appellant.

The 1st appellant on the other hand was arrested not for any other reason but because he happened to have been at the complainant's shop moments before the robbery. There was no evidence that he was in communication with the robbers at any time before or after the robbery. The investigation officer's evidence that he alerted the robbers that the area was clear (for them to execute their mission) was also not supported by any evidence. there is nothing to suggest that the learned magistrate took his defence into account; had he done so, he would have found it plausible or at any rate, that it created some reasonable doubt that the 1st appellant was involved in the robbery.

The law on circumstantial evidence is that it must be narrowly examined before drawing any inference of guilt on the part of the accused. The court must be satisfied that the circumstances are such that no other inference can be drawn from them other than that of guilt on the part of the accused person. It has been so stated in **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715.**

In **Republic versus Kipkering Arap Koske & Another**, the Court of Appeal for Eastern Africa, quoting Wills **on Circumstantial Evidence,** held as follows:

> ***In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.***

In **Simon Musoke versus Republic**, this principle was extended when the same court cited with approval a passage from the decision of the Privy Council in **Teper versus Republic (1952) AC 480** where it was held at page 489 that: -

> ***It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.***

As far as the prosecution case is concerned, I am not satisfied that there was circumstantial evidence sufficient enough for the court to draw an inference of guilt on the part of the appellant. The co-existing circumstances that would weaken or destroy that inference were too prevalent to ignore.

In the final analysis I am inclined to come to the conclusion that there was no basis upon which the appellants could be safely convicted; I am satisfied that they have made out a case for allowing their appeal. Accordingly, I hereby allow the appeal; quash their conviction and set aside their sentences. Unless they are lawfully held, they are set at liberty. It so ordered.

Dated, signed and delivered in open court this 17th day of January, 2020

Ngaah Jairus

JUDGE