REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NOS 10 & 11 OF 2020 (CONSOLIDATED)

BENJAMIN NZIOKA MAKAU.....1ST APPELLANT

COSMAS MUSYOKI MAKAU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the original conviction and sentence by Hon. I. M. Kahuya Principal Magistrate dated 5th day of December, 2019 in Machakos CM'S Court Criminal Case Number 289 of 2018*)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

BENJAMIN NZIOKA MAKAU.....1ST ACCUSED

COSMAS MUSYOKI MAKAU.....2ND ACCUSED

JUDGEMENT

1. The appellants herein, **Benjamin Nzioka Makau** and **Cosmas Musyoki Makau**, were charged in the Chief Magistrate's Court at Machakos in Criminal Case No. 289 of 2018 with the offence of Robbery with Violence contrary to section 296(2) of the ***Penal Code***. The particulars were that the accused on the 4th June 2018 at Kitooni village, Mithini sub-location, Masii location in Mwala Sub County within, Machakos County, jointly with another not before court while armed with rungus robbed **Geoffrey Muthui Ikusi** cash Kshs. 700, a driving licence and Kenya Commercial Bank pepea master card and immediately before such robbery beat the said **Geoffrey Muthui Ikusi** on his right eye.

2. After hearing the case, the Learned Trial Magistrate convicted the appellants herein and proceeded to sentence them 13 years imprisonment.

3. Aggrieved by the said decision the appellants have preferred this appeal based on the following grounds:

> **1. The Learned Trial Magistrate erred in law and in fact by not considering that there was a grudge between the appellants and the family of the complainant.**
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> **2. The Learned Trial Magistrate erred in law and in fact by not considering that the evidence tendered was hearsay.**
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> **3. The Learned Trial Magistrate erred in law and in fact by not considering their defences which were cogent and not giving their witnesses an opportunity to adduce their testimonies.**
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> **5. The Learned Trial Magistrate erred in law and in fact by not considering the contradictions and inconsistencies in the**

matter.

6. That the Learned Trial Magistrate erred in fact and in law in convicting the appellant on the evidence of a single identifying witness when the circumstances were not favourable for positive identification.

7. That the Learned Trial Magistrate erred in fact and in law by failing to find that the prosecution had failed to prove their case to the required standards in law.

8. That the Learned Trial Magistrate did not give any reasons why the defence was disregarded.

4. At the trial, the prosecution called 5 witnesses.

5. According to the complainant, **Geoffrey Muthwa**, who testified as PW1, on 4th June, 2018, at about 9 pm, after closing his workshop where he was working/repairing a motor cycle, he started walking home and on the way to Howaini he met the 2nd appellant who was walking towards him. As the distance between them narrowed, the 1st appellant appeared from the side bushes armed with a *rungu*. Apprehensively, the complainant turned back but came face to face with one **Mwendo Muindi** and he was then sandwiched between the 3 men.

6. According to the complainant, as there was sufficient moon light he identified the attackers and called out the 2nd appellant by name i.e. "Nzioka", "what are you trying to do?" not knowing that by so doing he was making a mistake and also called out the 1 st appellant **Musyoki** once. It was his evidence that both the appellants were known to him since childhood and that they studied in the same primary school and even used to bath together by the river and were circumcised at the same time.

7. Immediately the complainant called out the 2nd appellant's' names, the 2nd appellant hit him on my right eye with the club, the impact causing him to fall down. The 1st appellant then hit him at the head with the club he had with him. While on the ground, the 1st appellant searched his pocket and took out some of his personal belongings before both the appellants fled leaving him injured. Afraid that the atackers might return for him, he hid in the thicket till 5.00am when he walked home where he met his grandmother, PW2 and narrated to her the incident. PW2 discouraged him from approaching the attackers' family and instead advised him to report the matter to the police which he did at Masii Police Station. At the said Police Station, he was advised to seek treatment at Masii Level 4 Hospital which he did and was referred to Machakos Level 5 Hospital where it was confirmed that he had sustained head injuries. After getting better, he recorded his statement on 8th June, 2018 and was issued with a P3 Form filled.

8. The complainant insisted that the appellants were the people who attacked him that night and he was able to identify them by their appearance as a result of the moonlight and from the 2nd appellant's voice when the latter asked him, "do you think your mother is here". However, the 1st accused didn't say anything but was the one who pick-pocketed him. It was the complainant's belief that the 2nd appellant thought he had a lot of money since he opened my business on 29th May, 2018 and the attack was a week later. He however stated that they had never quarrelled before.

9. It was his evidence that apart from the Kshs 700/- the attackers also took a driving licence, KCB PePee Card and Green Box all of which were marked for identification. He also identified the treatment notes and P3 Form.

10. In cross-examination, the complainant admitted that there was no eye witness except from himself. Referred to his statement, he admitted that the same talked of 10.30pm as the time he closed his shop as opposed to around 9.30 pm. He also admitted that his statement did not disclose any name and that in the said statement it was indicated that he could not identify **Muendo**, the other attacker who was still at large. His reason for stating this was because the said **Muendo** approached from behind and later on he lost consciousness briefly and could not recall him. According to him, the 1st person to hit him was the 2nd appellant, followed by **Muendo** and when he fell down, the 1st accused joined in the attack. He however admitted that in his statement it was indicated that when I fell down, he did not know who assaulted him and that he was not present when the items were recovered but they were found next to **Muendo's** home by a pupil who picked them up and handed them over to a shopkeeper who in turn gave it to the village elder. The complainant insisted that the 2nd appellant spoke to him but conceded that it was not so indicated in his statement.

11. **Alice Nthenya Wangui**, the Complainant's grandmother testified as PW2. According to her, on the said date, she was at home around 10pm when she heard dogs back continuously but ignored and went to bed. In the morning at around 7pm, PW1 appeared at her door with a swollen right eye and a bleeding mouth and explained to her that he had been assaulted by **Nzioka** and **Musyoki** who had taken his personal documents and 700/=. So she advised him to report the incident at Masii Police Station and he proceeded thereto. Later on, he was referred to Machakos Level 5 Hospital while PW2 contacted his mother and wife and reported to them the matter. It was her evidence that the Complainant's major injury was on the head. Upon recovery, the Complainant approached all is family for an out of settlement but they refused. When the Complainant's personal documents were later recovered, she was informed and she went to collect them and she identified them in Court. It was her evidence that the appellant's were from her village and were known to her and that they had never quarrelled before.

12. In cross-examination she insisted that the Complainant informed her that the appellants were the ones responsible but admitted that in her statement it is only written that **Nzioka** and other unknown person attacked the Complainant.

13. PW3, **Jonathan Makenzie**, the Village Manager, was on the said date 4th June, 2018 at 11am in his house when PW2 went to his home and reported that PW1 had been assaulted and robbed the previous night as he walked back home at about 9 pm. When he visited the Complainant at his place of work at Kitooni, he observed he had a red right eye and further pains on his legs and upon interrogating him, the Complainant informed him that the two appellants together with a 3rd person had assaulted him. Later, PW2 took to him PW1's personal

effects which had been stolen from him during the attack.

14. PW5, **Musyoka Daniel**, a clinical officer at Matuu Level 4 Hospital testified in behalf of **Dr Mutunga** with whom he worked and who filled in the P3 form. According to the said form, the Complainant had a history of assault of 3 men known to him and the injuries suffered were on the right eye, scratch mark on the stomach and face though the major injury was the fracture of the right obit of the eye. The P3 Form was dated on 21st June, 2018 with the degree of injury classified at main and he produce the P3 Form as exhibit.

15. PW4, **PC Alfred Kisei**, the Investigating Officer, who was based at Masii Police Station testified that on 5th June, 2018, at 1 pm he was in the office when PW1 went and reported that he had been robbed the previous night by 3 people, 2 of whom he positively identified as the appellants while the 3rd person attacked from behind and hit him. When he fell down, the 1st appellant searched through his pockets and stole 700/= and personal effects. In the morning, he gained consciousness, went home briefly before reporting the incident to the police. Seeing his injuries, especially on the eye, PW4 caused him to seek for treatment at Machakos Level 5 Hospital. From there, PW4 and 2 of his colleagues visited the scene and searched around for any exhibit left behind but found none. Later that day, PW3 took to him the recovered documents that had been given to him by PW2 who had in turn been given by a shopkeeper that received them from a pupil that had picked them up on her way to school. A month later, PW1 contacted him stating that he had spotted the 2nd appellant in a local bar drinking and they arrested him. Similarly, the 1st appellant was spotted at the bus stage ready to board a motor vehicle and was also arrested. It was his evidence that the Complainant was able to identify the accused persons through their voice and face since there was moon light and the two sides were well known to each other since childhood. He proceeded to produce the exhibits which had been marked.

16. Upon being placed on his defence, the 1st appellant gave evidence on oath and testified that he knew the Complainant as his neighbour and childhood friend. However, on 4th June, 2018, he was at home when, being a driver, he was engaged to go to Meru for some work. They left with his employer and proceeded to Meru where they spent the night. The next day, being a Tuesday, they loaded the motor vehicle with their cargo and started their journey back to Masii. In short, he was not in Machakos County at mid-night of 4th June, 2018 as alleged.

17. In cross-examination he stated that on 4th June, 2018, at day time, he was at home with his family members. It was his evidence that he drove motor vehicle registration no. KCL 530 M lorry for commercial use and that they arrived in Meru at about mid-night and spent the night in a lodge though he had no proof of this as it was his employer who footed the bill.

18. On his part the 2nd appellant testified that the Complainant is his neighbour and a distant relative. On 4th June, 2018, he was working at Masii area sinking a septic tank, having left the house at 7 am and returned home at 5 pm. On 13th July, 2018, he was from work when he was arrested by a police Officer and was taken into custody and while there, he learnt that the Complainant had reported him as having robbed him. It was however his testimony that he was shocked because he doesn't stay away from home beyond 5 pm hence it didn't make sense that he was out at mid-night. Similarly, the Complainant is his neighbour whom they see each other daily, yet for over a week the Complainant never said anything to him.

19. In cross-examination, he stated that the 1st appellant was his young brother and on 4th June, 2018, he was working at Ngilu's compound but left for home at 5 pm. After work, he stopped a bit at Masii town before heading home. As such at the time of the offence, he was in his house sleeping. Though he had never quarrelled with PW1 before, he recalled that there was a land boundary dispute between them.

20. The 2nd appellant called **Prisca Syombua**, DW3, his wife as a witness. According to her, the 1st appellant was her brother in law and on the material night, the 2nd appellant went home at 7 pm and stayed through the entire night and as such, could not have committed this offence. Later he was arrested with other drunkards and when she followed up at Masii police station, she learnt of the present charges.

21. In cross-examination she stated that on that day she went to sell her fruits and returned home at 6 pm. She insisted that the 2nd appellant remained in the house all night. She confirmed that the Complainant is their neighbour and well known to them and that they had never quarrelled before with him hence he has no reason to fabricate this case.

22. In their submissions the appellants expounded on their grounds of appeal and cited authorities in support thereof.

23. On behalf of the Respondent, it was submitted through the Learned Prosecution Counsel, **Mr Ngetich**, that the pertinent question is whether the ingredients of the offence of Robbery with violence were proved. He relied on ***Woolmington vs. DPP*** and ***Johana Ndungu vs Republic criminal appeal no.116 of 1995*****.** It was submitted that there was evidence that the people who attacked the Complainant were armed with a club (*rungu*) and that they were three people in number. Further, he stated in his evidence that as he was hit on his right eye with a *rungu* by the first appellant while the 2nd appellant ransacked his pockets and took away his valuables. The clinical officer corroborated this and produced a P3 form for PW1 which showed that the complainant had suffered a fracture of the orbit right eye amongst other injuries.

24. It was therefore submitted that that the evidence on record, the prosecution proved all the essential ingredients for the offence of robbery with violence.

25. As regards identification, the Respondent relied on ***Karanja & Another vs. Republic*** **(2004) 2 KLR 140, 147** and ***Kiilu & Another v Republic*****, (2005) 1 KLR 174**.

26. It was submitted that from the evidence the incident took place at around 10 pm and that there was sufficient moon light and that the two assailants were well known to the Complainant since childhood. He exchanged some conversation with the appellants and he called the Appellants by their names before the appellants attacked and robbed him. The complainant was able to identify the appellants as they were neighbours and he knew them very well hence identification by recognition was safe.

27. Regarding the defence of alibi, the Respondent relied on **Charles Anjare Mwamusi vs. R CRA No. 226 of 2002** and **Victor Mwendwa Mulinge vs Republic,**

28. It was submitted that its trite law that the correct approach is for the trial court to exhaustively examine the entire prosecution evidence in totality and weigh it against that of the appellant and make a finding supported by reason that the prosecution case displaced the defense raised by the appellant. According to the Respondent, when the Appellants were placed on their defense, they gave a sworn statement but that their explanation was vague and couldn't match the overwhelming evidence by the prosecution and there was no alibi adduced by the appellant at the trial court. The learned trial magistrate after considering the evidence adduced by both parties found that the Appellants could not exonerate themselves from the offence. Therefore, the trial magistrate went ahead and dismissed it and convicted them as the prosecution had proved their case beyond reasonable doubt.

29. It was therefore contended that the trial prosecutor proved her case beyond any reasonable doubt as the evidence tendered was credible, consistent and well corroborated and that the appeal should be dismissed, and both the conviction and sentence of the trial court be upheld.

Determinations

30. This being a first appeal, the court is expected to analyse and evaluated afresh all the evidence adduced before the lower court and draw my own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

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

31. Similarly, in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows: -

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

32. In **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

33. In this case, the complainant's case in summary was that on the 4th June, 2018 at around 9.00pm he was walking home from his workshop when along the way he met the appellants who were in company of one **Muendo**. The trio attacked him and robbed him of Kshs 700/00 and his personal belongings. In the process he sustained injuries. In the morning he managed to go home where he informed PW2, his grandmother of the incident after which the report was made at the local police station. It was his evidence that at the time of the attack there was moonlight and the attackers were his neighbours who were well known to him from childhood and that he even exchanged some words with them.

34. After reporting the matter to the local police station he was treated both at the local Hospital and at Machakos Level 5 Hospital. His documents were later recovered and the appellants were arrested though the said **Muendo** was never arrested.

35. On his part the 1st appellant testified that he was away in Meru on the night of the incident and could not have committed the offence. The 2nd Appellant on his part stated that he was sleeping at home that night and did not venture out and his evidence was supported by that of his wife, DW3.

36. It is therefore clear that the only evidence against the appellant was that of recognition. The Court of Appeal in the case of **Wamunga vs. Republic (1989) KLR 426** stated as under; -

> **"It is trite law that where the only evidence against a defendant is evidence of 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 conviction."**

37. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

38. In **R vs. Turnbull & Others (1976) 3 All ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> **"The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

39. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs. Republic (unreported)** had this to say on the evidence of recognition at night: -

> **"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."**

40. The learned trial magistrate, in her judgement found that the Complainant's evidence was never challenged in cross-examination and that the appellants did not put their case to the Complainant during cross-examination as regards the allegation that the complainant was drunk and that there existed a land boundary dispute between the two families. According to the learned trial magistrate, the scene of crime was well illuminated by moonlight and the Complainant called the appellants by their names hence it was the positive identification of the appellants that led to the arrest of the appellants a month later.

41. The question that arises is whether a consideration of the totality of the evidence supports this finding. In cross examination, the Complainant admitted that in his statement to the police he did not give any name and in fact stated that he could not identify the said **Muendo** who approached from behind and later on, he lost consciousness briefly and could not recall him. Though he insisted that the 1st person to hit him was 2nd appellant, followed by **Muendo** and when he fell down, the 1st appellant joined in the attack, he admitted that in his statement it is written that when I fell down, he did know who assaulted him. While it was his evidence that the appellants spoke to him, he admitted that it was not so indicted in his statement.

42. According to PW2 to whom the information was passed hours after the incident, the Complainant disclosed that he was attacked by the appellants. Apparently there was no mention of the said **Muendo**. She however admitted that in her statement to the police, it is only written that **Nzioka** and other unknown persons attacked the Complainant.

43. According to PW3, the Village Manager, the report he received from the Complainant was that the Complainant was attacked by the appellants together with a 3rd person.

44. In this state of evidence, can it be said that the Complainant properly identified his attackers as the appellants? It is clear from the foregoing that in his first statement to the police, the Complainant did not mention the attackers. In her statement to the police, PW2 only mentioned the first appellant while PW3 stated that the only people against whom a report was made were the appellants. From the evidence, it is clear that the appellants were well known to the Complainant since their childhood. They were neighbours and according to the 2nd appellant, the Complainant was a distant relative. One would have thought that the Complainant would not have missed that important aspect when he made his first report to the police that he knew the appellants very well as his childhood friends and neighbours and would have even taken the police to their homes. The importance of the first report was restated in **Tekerali s/o Korongozi & 4 Others vs. Rep (1952) 19 EACA 259** where it was held that:

> **"Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."**

45. The same position would apply to the evidence of PW2 who in her statement only mentioned that she was informed that the Complainant was attacked by the 1st appellant? Being people from the same area, how could she forget to mention the 2nd appellant. Her evidence in Court as regards the identification of the 2nd appellant is therefore doubtful and as was held in the case of **Ndung'u Kimanyi vs. Republic [1979]**

KLR 282:

> **"A witness in Criminal Case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence".**

See also **Alicandioci Mwangi Wainaina vs. Republic Criminal Appeal No. 628 of 2004** and **David Kariuki Wachira vs. Republic [2006] eKLR.**

46. The learned trial magistrate does not seem to have addressed her mind to this aspect of the case before she found that the Appellants were positively identified by the Complainant.

47. The incident in question took place at night and the only source of light was moonlight. While it is true that the Prosecution's evidence was based on recognition, as was appreciated in **R vs. Turnbull & Others (1976) 3 All ER 549**:

> **"The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? *In what light*? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even *when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made*."** [Emphasis added].

48. The evidence adduced did not show the brightness of the moonlight that night. In **Criminal Appeal No. 24 of 2000 - Paul Etole & Reuben Ombima versus Republic**, the Court of Appeal reiterated the need for caution by holding that:

> **"The appeal of the 2nd appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. *It is true that recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made*. All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case the danger of mistaken identification is lessened, but the poorer the quality the greater the danger. In the present case, neither of the two courts below demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. *There was no enquiry as to the nature of the alleged moonlight or its brightness or whether it was a full moon or not or its intensity. It was essential that there should have been an enquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size and its position the vis-à-vis the accused would be relevant.*"**

49. In **David Mwangi Wanjohi & 2 Others vs. Republic [1989] eKLR** it was held by the Court of Appeal that:

> **"The quality of the evidence has to be considered. Does starlight afford a means of illumination for observing the shape or features of a person to such a degree that proof can be had beyond reasonable doubt, or is it a state of darkness richer in imagination than fact? There is no doubt that starlight *per se* affords no scientific means of illumination at all. It may purport that there was a clear sky, against which there might be seen the semblance of a human being. But it is not an assured basis, such as moolight, for observing the details of the features of a person. Indeed Nelson could not tell what clothes the appellant was wearing, however close the latter was to Nelson. It is plain that Nelson could not see details, and the appellant did not speak, nor move in any special way, or indicate any special feature. We are bound to say that the quality of the evidence was precarious at best, and that it was a misdirection for the High Court to conclude that the conditions for "identification were not unsatisfactory." However long Nelson had known the appellant, if there was no light by which to see the appellant, nor other means of recognition, Nelson could only have guessed at the identity of the man near him, and in that event the failure to put the cardinal question, could Nelson have been mistaken, was a grave error. It is also surprising to find that the High Court felt that mistaken identify was not raised by the defence. The appellant had said that he had not been present. Is that not raising the issue of mistaken identity? It is said that he did not cross-examine Nelson on mistaken identity. Was that not suggested by the question to which the answer was "no, I could not recognize the clothes you were wearing when I was attacked." But in any case, upon whom was the burden of proof? Was it not upon the prosecution who were relying on improbable evidence?"**

50. Similarly, in the present case, the caution and the necessary inquiry was not made before the trial court.

51. In this case the arrest of the appellants was effected a month after the incident. There is no allegation that they went into hiding between the said period. In fact, according to the 2nd appellant, they were always together with the Complainant and the Complainant never mentioned the incident to him. The unexplained arrest of the appellants in the circumstances of this case creates some doubt as to whether the Complainant positively identified his attackers as the appellants.

52. The Appellants' defence was that they were not at the place of the incident on the material night. According to the 1st appellant he was far away in Meru while the 2nd appellant was sleeping in his house, a fact which was corroborated by his wife, DW3. That was alibi evidence. *In the case of* ***Patrick Muriuki Kinyua & Another vs. Republic Nyeri Criminal Appeal No. 11 of 2013 (UR)*** *the Court held that:*

> ***"an alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged."***

53. In **Wang'ombe vs. The Republic [1980] KLR 149**, **Madan, Miller and Potter, JJA** held that:

> **"…in *Ssentale vs. Uganda [1968] EA 365, 368* [Sir Udo Udoma CJ]…said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion…The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible. On the other hand, however punctilious the prosecution or police, it throws upon them an unreasonable burden when the alibi is pleaded for the first time in an unsworn statement at the trial, out of the blue. Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it…In England, in order to distribute the burden of the prosecution fairly, the Criminal Justice Act, 1967, section 11(1), provides that on a trial on indictment the defendant may not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi. Under section 11(8) 'the prescribed period' means the period of seven days from the end of the proceedings before the examining justices. Section 11(1) applies where the defendant alone is to testify that he was elsewhere at the material time; see R vs. Jackson and Robertson [1973] Crim. LR 356…The alibi was considered by both courts below, the High Court saying (as we have already set out) that it needed to be weighed with the evidence of the prosecution, particularly that of the complainant and his wife, and the fact that the appellant denied knowing Lucy, and particularly with Lucy's evidence. To weigh one set of evidence with another set of evidence is not to remove the burden of proving that which has to be proved from the party charged with the proof of it. To marshal, analyse and dissect evidence in order to weigh it to determine its value and veracity is a basic function of judicial officers. They do not have to pendantize. What other approach is there? Judicial officers are not clairvoyant!"**

54. In **Victor Mwendwa Mulinge vs. Republic [2014] eKLR** the Court of Appeal stated thus:

> **"It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution. See Karanja v Republic [1983] KLR 501 this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigations and thereby prevent any suggestion that the defence was an afterthought."**

55. In **Elizabeth Waithiegeni Gatimu vs. Republc [2015] eKLR** where the Nigerian case of **Ozaki & Another –vs- The State** was relied, where it was held that:

> **"Thus it is settled law that the defence of ALIBI must be proved on balance of probabilities and that for it to be rejected it must be incredible…"**

56. In **Uganda vs. Sebyala & Others, [1969] EA 204** the learned Judge citing relevant precedents had this to say:-

> **"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."**

57. In the case of ***Adedeji vs. The State [1*****971]1All N.L.R 75** it was held that:

> ***"failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed."***

58. The South African case of **Ricky Ganda vs. The State, {2012} ZAFSHC 59**, Free State High Court, Bloemfontein provides useful guidance. In the said case it was held:-

> **"The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true…the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses…it is acceptable in totality in evaluating the evidence to consider the inherent probabilities…The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."**

59. It was however appreciated in **R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145**, the former Court of Appeal for

Eastern Africa upheld a decision of the High Court in which it was stated:

> **"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."**

60. In **Festo Androa Asenua vs. Uganda, Cr. App. No. 1 of 1998** the Court made the following:

> **"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."**

61. In this case, however, the 1st appellant not only testified to his whereabouts on the night of the incident, but called his wife as his witness who corroborated his evidence. That there is no inherent objection to a relative testifying in support of an accused was appreciated in **Keter vs. Republic [2007] 1 EA 135** where it was held that:

> **"Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not. There is no principle of law which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused."**

62. In my view, this was a clear case in which the Respondent ought to have taken advantage of the provisions of section 309 of the ***Criminal Procedure Code*** which provides as follows:

> ***If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.***

63. In the case of ***Adedeji vs. The State*** **{1971} 1 All N.L.R 75** it was held that:-

> ***"failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed."***

64. In the case before the trial court a reading of the judgement seems to indicate that the Court having been satisfied as regards the evidence of the prosecution turned to consider the defence case. In **Nguku vs. Republic [1985] eKLR**, it was held that:

> **"Quite obviously when analyzing the facts and the opposing evidence in a trial the individual facts and the assessment of the relative credibility of the witness thereon come first. It is incumbent on the trial magistrate or judge to consider the evidence in its respective stages and then arrive at a general conclusion on the totality of the evidence after doing so. In this case Mr Menezes' contention regarding the second ground is borne out by the record of the judgment, which shows that the general conclusion was arrived at in advance of the individual analysis of the facts. We do not think that this point was fully appreciated by the learned judges of the High Court on the first appeal for after reciting ground two of the memorandum, which is similar to ground two in the one to this court, they said simply that on their own reading of the file and the judgment they took the view that the allegation was unjust in relation to it. If the course taken in this case is followed the point is almost bound to be taken on an appeal that the directions of this court's predecessor in Okethi Okale v Republic [1965] EA 558 at page 559, which was cited to us by Menezes and which we now set out,**
>
> > **'He submitted that the passage suggests that the learned judge first accepted the case for the prosecution and then cast upon the appellants the burden of disproving it or raising doubts about it. We think with respect that the learned judge's approach to the onus of proof was clearly wrong, and in Ndege Maragwa v Republic (10), where the trial judge had used similar expressions this court said:-**
> >
> > > **"…. We find it impossible to avoid the conclusion that the learned judge has, in effect, provisionally accepted the prosecution case and then cast on the defence an onus of rebutting or casting doubt on that case. We think that is an essentially wrong approach: apart from certain limited exceptions, the burden of proof in criminal proceedings is throughout on the prosecution.**
> > >
> > > **Moreover, we think the learned judge fell into error in looking separately at the case for the prosecution and the case for the defence. In our view, it is the duty of the trial judge, both when he sums up to the assessors and when he gives judgment, to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think no single piece of evidence should be weighed except in relation to all the rest of the evidence. (These remarks do not, or course, apply to the consideration whether or not there is a case to answer, when the attitude of the court is necessarily and essentially different)."**

We think that the observations of this court in that case apply with equal force to the present appeal' have not been complied with.

It is true that in that case there had been an acceptance of the prosecution case followed by an indication that the burden was cast on the appellant to rebut it, which is not the complaint here, but we nevertheless think that the direction given in that case should always be observed."

65. I have considered the totality of the evidence adduced before the trial court, subjected it to a re-evaluation and it is my finding that the conviction of the appellants was unsafe.

66. In the premises this appeal succeeds, the conviction of the appellants is set aside and the sentence against them quashed. They are set at liberty unless otherwise lawfully held.

67. It is so ordered.

68. This Judgement is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic.

Judgement read, signed and delivered in open court at Machakos this 12th day of October, 2020.

G V ODUNGA

JUDGE

In the presence of:

Appellants vide Skype.

Mr Ngetich for the Respondent

CA Geoffrey