



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 45 OF 2016

JULIUS SIMAMA NEGA.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

-consolidated with-

CRIMINAL APPEAL NO. 44 OF 2016

JOSEPH NYAMOHANGA SIGITI.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being appeals from the judgment, conviction and sentence of Hon. P. N. Maina, Principal Magistrate in Kehancha Principal Magistrate's Criminal Case No. 248 of 2014 delivered on 21st September 2016)

JUDGMENT

Introduction:

1. Hardly one hour passed from the time one **THOMAS WANGWI AYUBU** picked two passengers in his motor cycle, commonly known as '**boda boda**', at Isebania Town stage and left for Gwikonge village and the time he was found lying dead near the Chief's office in Gwikonde. I shall henceforth refer to the said **THOMAS WANGWI AYUBU** as '**the deceased**'.

2. Following the deceased's sudden death, **JULIUS SIMAMA NEGA** and **JOSEPH NYAMOHANGA SIGITI**, the Appellants herein, were charged, tried and convicted before the Principal Magistrate's Court at Kehancha with the offence of robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code**, Chapter 63 of the Laws of Kenya. I shall henceforth refer to the said **JULIUS SIMAMA NEGA** and **JOSEPH NYAMOHANGA SIGITI** as '**the first Appellant**' and '**the second Appellant**' respectively.

3. The appellants were subsequently sentenced to suffer death; a result of which they lodged appeals which are the subject of this judgment.

The trial:

4. The second appellant was first separately charged in Kehancha Principal Magistrate's Criminal Case

No. 248 of 2014 and later on the first appellant was also charged in Kehancha Principal Magistrate's Criminal Case No. 256 of 2014. The two cases were then consolidated with Criminal Case No. 248 of 2014 being the lead file and the appellants took fresh pleas. Later on the consolidated charge was amended and again the appellants took fresh pleas. The particulars of the amended charge were as follows:

“On the 5th day of April 2014 at Gwikonge village in Bukira Central in Kuria West District within Migori County jointly with others not before court while armed with dangerous weapons namely knives, robbed THOMAS WANGWI AYUBU a motor cycle registration No. KMDB 167V, TVS Star red in colour valued at Kshs. 87,500/= and immediately before the time of such robbery, fatally stabbed the said THOMAS WANGWI AYUBU .”

5. The prosecution in a bid to prove its case against the appellants herein called a total of 11 witnesses. **PW1** was a fellow *boda boda* rider one **THOMAS CHACHA MWITA** as well as **PW2** one **SAILOMA EDWARD**. **PW3** and **PW4** were a couple who owned the motor cycle which they had given to the deceased to operate on their behalf. They were **GESOBA DAVID NYAMBUNI** and **ELIZABETH MAKUBO** respectively. A nephew to the deceased one **SIMEON WERE MAGATI** testified as **PW5** whereas **JOHN MUTA MAGIGI** testified as **PW6**. **PW7** was one **PETER MATANA MOTONGORI** and **JOSEPH CHUCHUNA MUMBO** testified as **PW8**. The police officer who conducted an identification parade No. 42783 **PATRICK WANGANYA** testified as **PW9**. The deceased's father was also a police officer one No. 42291 **Sgt, GATI WAREMA**. He was **PW10** and the investigating officer No. 66278 **PC MURIITHI MURERE** testified as **PW11**.

6. The facts of the case were that in the evening of the 5th day of April 2014 the deceased, **PW1** and **PW2** were among other riders stationed at the Isebania Town stage (hereinafter referred to as '**the stage**') awaiting to ferry passengers to various destinations. At around 07:00pm two men approached some of the riders asking to be taken to Gwikonge village and offered a very lucrative fare of Kshs. 500/= instead of the normal Kshs. 100/= or Kshs. 200/=. One of the two men first approached **PW1** who had just arrived at the stage from dropping a passenger in Ikerege. As **PW1** had run out of fuel in his motor cycle he declined the offer and asked him to look for other riders. **PW1** then left to fuel his motor cycle.

7. When **PW1** left, two men approached **PW2** who was at the stage and asked to be taken to Gwikonge. Since **PW2** was not the first in the line, he directed them to the first motor cycle in the line which was ridden by the deceased. In full glare and hearing of **PW2** the two men negotiated with the deceased and agreed on the fare at Kshs. 500/=. The deceased however first left to and fuelled his motor cycle. He then returned and picked his two passengers and left towards Gwikonge. **PW2** also got a passenger to ferry across to Tanzania and left the stage.

8. **PW1** did not take long to return to the stage. On return **PW1** saw his colleague rider, the deceased, with two passengers on the deceased's motor cycle and readily recognized one of them as the one who had talked to him earlier on. **PW1** identified that man before the trial court as the first appellant in the current appeal. (The first appellant herein was the second accused person before the trial court). As the deceased was about to leave with his two passengers, **PW1** managed to get another passenger who wanted to be taken to Taragwiti village. The said Gwikonge and Taragwiti villages were in the same general direction from the stage and the riders usually used the same road but Gwikonge village was ahead of the Taragwiti village. **PW1** then followed the deceased and he was very curious about the passengers who had offered an extremely high fare to be taken to Gwikonge. While the two riders were on the way and as **PW1** was closely behind the deceased, **PW1** shone the headlights of the motor cycle he was riding on the passengers who were on the motor cycle ridden by the deceased. On doing so the first appellant who was seated at the rear turned his head, removed a cap he wore and looked at the headlights and **PW1** again saw him. **PW1** then reached his destination at Taragwiti and left the deceased proceed further towards Gwikonge with his two passengers.

9. Shortly thereafter some people heard some screams from the general direction of the Isebania-Taragwiti-Gwikonge road. They were **PW6** and **PW7**. According to **PW6**, while he was at a nearby house he heard someone shouting for help in respect of a motor cycle that had been stolen. He immediately left

the house using a motor cycle whose rider was one Machugu (not a witness) and approached the direction the noise was from. On reaching the Isebania-Taragwiti-Gwikonge road near the Gwikonge Chief's office PW6 saw a man struggling and saying that his motor cycle had been stolen. PW6 noted that the man was injured and was bleeding from the left side of the head. He then immediately called a Doctor one Magige to assist in stopping any motor cycle which would be heading towards the direction where he was. As PW6 returned to the scene to see he would assist the man further, he found the man dead. PW6 however found a motor cycle which had been abandoned at some distance from the scene but in a ditch and had its ignition key in place. He took custody of the key and reported the matter to the Area Chief. He then surrendered the ignition key to the Chief.

10. On his part, PW7 was attending his father's funeral when he heard screams from the road. He immediately armed himself and proceeded to the road where he saw two people whom he knew screaming that their motor cycle had been stolen. He then found an abandoned motor cycle in his farm.

11. PW8 was walking home from seeing one of his friends and as he approached Gwikonge Primary School he met someone who had fallen with a motor cycle and was trying to lift the same. He however did not recognize the person. He passed him and on going ahead he met two people screaming and who told him that a motor cycle rider had been killed and his motor cycle stolen. PW8 told them about the person he had just seen fallen with a motor cycle and they raised alarm. They later found the motor cycle abandoned at a nearby home. On returning to where the injured rider was, PW8 saw the lifeless body of the rider whose clothes were soaked in blood.

12. Word went round about the killing of the rider and many villagers turned up to see what happened. Among them included PW1, PW3, PW5 and PW11. PW1 was called by his employer and told that the deceased was dead. PW1 rushed to his employer's home and then went to the scene where he saw many people having gathered there. He confirmed that indeed the deceased was dead. He keenly observed the body and noted several knife wounds on the mouth, neck and sides. He also saw the deceased holding a jacket which PW1 recognized to be the one which the first appellant had when he met him at the stage. PW1 did not see the motor cycle the deceased was riding at the scene.

13. The police later arrived and took away the deceased's body to Pastor Machage Hospital Mortuary for preservation and post mortem examination. The body was later released to the family members for burial. The police began their investigations and the two appellants were arrested and charged with the robbery. The second appellant was however arrested in Tanzania and brought over to Kenya. PW9 conducted an identification parade at Kehancha Police Station and PW11 produced various exhibits.

14. At the close of the prosecution's case the appellants were placed on their defences where they both opted to give an sworn statements and the second appellant herein called three witnesses who were his wife one **MARGARET BOKE (DW3)**, his neighbour one **SAMMY MAGESI SINDA. (DW4)** and his mother one **ESTHER MURUGA (DW5)**.

15. The first appellant denied committing the offence and mainly explained how he was arrested by PW10 who was his uncle who was in the company of three other people. He was taken to Isebania Police Station and later transferred to Kehancha Police Station where he learnt of the issue of the robbery which he knew nothing about.

16. The second appellant also denied committing the offence and raised an *alibi* that during the time of the commission of the alleged offence he was at his home recuperating from injuries he sustained out of an accident. The *alibi* was corroborated by DW3, DW4 and DW5.

17. By a judgment delivered on 21/09/2016 the trial court upon evaluation of the evidence was satisfied that the charge had been proved beyond any reasonable doubt. The appellants were then found guilty, convicted and accordingly sentenced to suffer death.

The Appeal:

18. Being aggrieved by the conviction and sentence, the appellants lodged separate appeals in persons. The first appellant filed a Petition of Appeal on 03/10/2016 in **Criminal Appeal No. 45 of 2016**. The second appellant also filed a Petition of Appeal on 03/10/2016 in **Criminal Appeal No. 44 of 2016**. The two appeals were consolidated by an order of this Court and Criminal Appeal No. 45 of 2016 became the lead file thereby **JULIUS SIMAMA NEGA** becoming the first appellant and **JOSEPH NYAMOHANGA SIGITI** being the second appellant.

19. The appellants preferred almost similar grounds of appeal but for purposes of ease of consideration and clarity I will reproduce their respective grounds as under:

The first appellant's grounds of appeal:

- 1. That the learned trial magistrate grossly erred both in law and facts in taking into the account the evidence and convicting and sentencing I the appellant without considered that I pleaded not guilty and plea of not guilty entered.***
- 2. That the learned trial magistrate grossly erred both in law and facts in convicting and sentencing I the appellant when the salient ingredient of the offence charged was not proved beyond any reasonable doubts by the respondent.***
- 3. That the learned trial magistrate further grossly erred in both law and facts to miss Pre-headed the tenor and otherwise extend the nature of the offence when the circumstances evidence or was free from error of mistaken identity of I the appellant.***
- 4. That the learned trial magistrate further grossly erred in both law and facts in convicting and sentencing I the appellant without considering that the key witness was not recalled to prove the alleged recovered jacket as per the court ordered.***
- 5. That the learned trial magistrate further grossly erred in both law and facts in convicting and sentencing I the appellant inn a contradiction evidence of the respondent case which has no probative value to sustain such harsh conviction and sentence against I the appellant.***
- 6. That the learned trial magistrate further grossly erred in both law and facts in convicting and sentencing I the appellant without compliance with the evidence on record in the required proceeding and his judgment.***
- 7. That the learned trial magistrate further grossly erred in both law and facts in convicting and sentencing I the appellant without considered that the omission and commission of the offence charged was and liable of after thoughts evidence.***
- 8. That the judgment of the trial magistrate judgments are misconceived and bad in law in disapprove my defense evidence.***

The second appellant's grounds of appeal:

- 1. That I the appellant herein pleaded not guilty to the offence charged and plea of not guilty entered.***
- 2. That the learned trial magistrate grossly erred both in law and facts in convicting and sentencing I the appellant without considered that the circumstantial evidence relied upon was not water tight to uphold conviction.***
- 3. That the learned trial magistrate grossly erred both in law and facts in convicting and sentencing I the appellant on the respondent evidence which were not proved beyond reasonable doubts.***

4. That the learned trial magistrate further grossly erred both in law and facts in convicting and sentencing I the appellant on the contradictory evidence of the respondent case.

5. That the learned trial magistrate further grossly erred in both law and facts convicting and sentencing I the appellant without considering that the identification parade tendered in the entire proceedings was not supported by the provision of Chapter 46 police force standing order.

6. That the learned trial magistrate further grossly erred in both law and facts in law and facts in convicting and sentencing I the appellant when the salient ingredient of the offence charged was not withstanding and the nature of the offence in the required proceedings.

7. That the learned trial magistrate further grossly erred in both law and facts in convicting and sentencing I the appellant without compliance the evidence on the required proceeding against the judgment.

8. That the learned trial magistrate further grossly erred in both law and facts to disapprove my defense evidence which could have led to acquittal against the offence charged.

9. That the learned trial magistrate grossly erred both in law and facts convicting and sentencing I the appellant on the after thoughts evidence has no probative value which leads to conviction”.

20. When the appeal came up for hearing before this Court, the appellants appeared in person and wholly relied on their filed written submissions. The second appellant however re-emphasized that no parade was conducted for him on 28/04/2014 as alleged by PW9 since by then he was at the Migori GK Prison awaiting the trial of his case.

21. The State opposed the appeal and relied on the evidence on record.

Analysis and Determinations:

22. As this is the appellants' first appeal, the role of this Court is well settled. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

23. In discharging the above duty, this Court will consider the grounds of appeal and culminate with an exposition as to whether the charge of robbery with violence was proved as against the appellants.

On the identification of the appellants:

24. Both appellants denied taking any part in the commission of the offence. In this matter the identification of the assailants was by way of direct evidence which was followed up by identification parades. I will therefore consider the evidence on the identification of each of the appellants separately.

25. As to whether the first appellant was properly identified, I will revisit the record. The evidence on the identification of the first appellant was led by PW1 and PW2. According to PW1, he had never seen the first appellant before the 05/04/2014. He first met him at the stage when he approached him posing as a customer to be ferried to Gwikonge and offered to be pay an albeit high fare of Kshs. 500/=. That was around 07:05pm and since it was already dark, PW1 had put on the motor cycle headlights of the machine he was riding. That customer who wore a blue jacket and a cap stood about 3-4 metres away as the two spoke. It was PW1's testimony that he noted the customer's face at that point in time by the help of the light from the motor cycle headlights. He however did not carry him as he had run out of fuel and he asked him to look for another motor cycle. He then rushed to refill before returning to the stage.

26. PW1 again had an opportunity with the said customer on return to the stage. This time round PW1 saw the customer having been carried by the deceased and he recognized him as the one he had talked with. They were two customers on the deceased's motor cycle and that particular customer was seated at the rear and was in a cap. The deceased was the first to leave the stage and PW1 followed him shortly towards the same direction. PW1 was generally curious about these customers for the fares they had offered. The motor cycles sped off and at a certain point PW1 who was behind the deceased's motor cycle illuminated his motor cycle's full lights upon the deceased and his customers. That action triggered the customer who was seated at the back to turn and look behind. He also removed his cap and again PW1 saw him and that he had a trendy cut.

27. When PW1 eventually learnt of the deceased's death and rushed to the scene he saw a blue jacket which he recognized to be the one the customer whom he had met at the stage wore. The jacket was by then held by the deceased by his chest.

28. That was the evidence of PW1. I have also noted from the record that the prosecution sought and was allowed to recall PW1 to give evidence on an identification parade he attended but that did not happen.

29. PW2 also gave evidence which touched on the first appellant. PW2 was also recalled for further cross-examination. It was his testimony that he was at the stage on the material day and at around 06:40pm he was approached by two would-be customers who wanted to be taken to Gwikonde. Although PW2 did not carry them as he was not the next in line, he observed the customers. One was short with a gap on his teeth and had shaved his beard on a thin line style and the other was tall. PW2 led the customers to the deceased who was the first one on the queue. The customers talked and agreed on the fare with the deceased. The deceased then left the customers at the stage as he went to refuel. When the deceased returned he picked his customers and they left. PW2 also got a customer and went towards Tanzania.

30. Evidence on the identification of the second appellant was tendered by PW2 who testified that he managed to identify both appellants. Before PW2 attended some identification parades, his testimony was that the two customers he saw were that one was short with a gap on his teeth and had shaved his beard on a thin line style and the other was tall.

31. PW2 attended some identification parades. They were two of them in total. But before the parades took place there are some events that occurred involving the second appellant and PW2 which are worth revisiting. PW2 was once called by the Chairman of the Community Policing of Tarime District in Tanzania and was told that a Kenyan had been arrested at Korotembe village in Tarime in Tanzania and it was suspected that he was not a law abiding person and since PW2 was the Chairman of the Community Policing for Bukira West location within Migori County in Kenya, he was asked to go and see if he had anything to do with the person. PW2 went and on seeing the person he readily recognized him as one of the two persons whom he had seen at the stage leaving with the deceased. That was the short one with a gap on his teeth and a shaved beard with a thin line style. PW2 identified the man as the second appellant herein before the trial court. The second appellant was then brought to Kenya and was first held at the border station of Isebania Police Station.

32. On 20/04/2014 PW2 was called to the Isebania Police Station. On reaching there he was asked to attend an identification parade and pick out the person(s) who left the stage with the deceased. The parade had five people and PW2 picked out the man he had seen at Korotembe who was the second appellant herein. The details and the evidence of how the parade was conducted were however not tendered before the trial court.

33. The second parade was conducted at the Kehancha Police Station on 28/04/2014. According to PW2 when he first testified before the trial court on 21/08/2014 he stated as follows:

“I identified accused 2 because he had a scar on the left side of his nose starting from the nostrils.

I identified accused 1 because of his height, features and style of shaving beard and gap in his

teeth.”

34. When PW2 was recalled for further cross-examination on 15/04/2015 and on being examined by first appellant herein he stated that:

“I did not conduct an identification parade for you I only did one for the accused 1.”

35. PW9 is the police officer who conducted the parade at Kehancha Police Station. He stated that he had been requested by PW11 to so conduct the parade in respect to one Julius Simama, the first appellant. When PW9 testified he however appeared to have been confused on what exactly happened and stated that he ended up conducting the parade for Julius Simama whom he identified in court as Joseph Nyamohanga Sigiti, the second appellant. He then called the suspect and informed him of the parade and asked him if he wanted anyone from his side to attend. The suspect indicated that he had no one he wished to be present during the parade but agreed to the parade. PW9 then looked for 10 other members who had like features with the suspect and conducted the parade. According to PW9 there were 11 members in the parade and the suspect was asked to chose where he wished to stand in the parade. He chose the 11th position. He was then identified by touching and as he had no objection to the way the parade had been conducted he voluntarily signed the parade forms.

36. I have carefully perused the Identification Parade Form and seen that the same was for the first appellant and not the second appellant as alleged by PW9 in court. At page 3 thereof there are 11 names of the members who attended the parade. The first appellant's name is the 11th. Whereas PW9 correctly stated that the suspect was the 11th in the parade what appears at page 4 of the Form is different. It is instead stated that the suspect was between the 5th and 6th members; that is between one SAMSON MARWA and one JACKSON MUNIKO.

37. That being so, it ought to be noted that when PW2 first testified before the trial court he only gave the description of the first appellant as '**a tall man**' but on being recalled PW2 gave a further description of the first appellant as '**he had a scar on the left side of his nose starting from the nostrils.**' One therefore wonders when PW2 came to see the generally visible scar on the face of the first appellant since he never mentioned that before. Further PW2 changed his mind on being recalled and stated that he never attended any parade where he identified the first appellant, Julius Simama altogether.

38. But how was the first appellant arrested? According to PW10 who was the deceased's father and a police officer then working at Maralal, he is the one who used his informers and learnt that the appellants herein were the perpetrators of the offence. He later got information that the second appellant had fled to Tanzania whereas the first appellant was at Isebania. He waylaid the first appellant, arrested him and took him to Isebania Police Station. PW10 did not disclose who his informers were and how the informers came to know that the appellants were the perpetrators of the alleged offence.

39. From the foregone it is clear that PW1 allegedly identified the first appellant whereas PW2 allegedly identified the second appellant. Their evidences therefore turn out to be those of single witnesses. Since PW1 and PW2 also met the alleged assailants for their first time and it was at night, their evidences are to be treated with caution as errors in identification could possibly arise. Courts have previously dealt with the issue and in the *locus classicus* case of **R -vs- Turnbull & Others (1973)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 recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

40. 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.”

41. 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.

42. The above does not however mean that there cannot be safe recognition even at night. The Court of Appeal in Douglas Muthanwa Ntoribi vs Republic (2014) eKLR in upholding the evidence of recognition at night held as follows:-

“On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”

43. Again 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.”

44. Turning to the conduct of the identification parades, I need not re-emphasize its importance in cases of identification especially when the suspects are not known to the witnesses before. The Court of Appeal in the case of David Mwita Wanja & 2 others –vs- Republic- Criminal Appeal No. 117 of 2005 as referred to in the case of John Mwangi Kamau vs. Republic (2014) eKLR dealt with how parades ought to be conducted and had the following to say:

“15. Identification parades are meant to test the correctness of a witness’s identification of a suspect. See this Court’s decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68 & 69 of 2008.....

The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as

evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwangi s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -

“It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

“6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -

(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;”

44. In this case the witness who attended the second parade at the Kehancha Police Station had seen the suspect twice before that parade. That was PW2. The first time was in Tanzania and the second time was at the Isebania Police Station. That in itself was contrary to **Force Standing Order 6(iv)(c)** which provides that:

“The witness or witnesses will not see the accused before the parade”.

45. It is also very crucial for the officer conducting the parade to keenly and correctly fill in the Parade Form once the identification exercise is over. In this case whereas PW9 indicated that the first appellant opted to and stood at position 11 in the parade, the parade form provides otherwise. According to the form the person who was picked by way of touching by the witness stood between members 5 and 6 and was not the 11th. That therefore means the one who was picked could not have been the first appellant. Looking at the way PW9 appeared confused on whose parade he conducted coupled with the contents of the parade form which are at variance with the evidence of PW9 and given that PW2 had previously twice seen the suspect before the parade, I find that the parade as conducted was so irregular and contrary to law such that it necessitated being disregarded in the light of the circumstances of this case.

46. Having disregarded the evidence on the identification parade, the only evidence touching on the identification of the appellants now remains that of PW1 and PW2. On subjecting the evidence of PW1 and PW2 to the caution as expounded on the foregone binding judicial precedents, this Court is not satisfied that the uncorroborated identification evidence of PW1 and PW2 passed the test so as to be free from error. I hence find that the prosecution failed to discharge its burden in proving that the two people

who left the stage on 05/04/2014 with the deceased were the appellants herein.

47. With the foregone finding, I am of the very considered view that a consideration of the other grounds of appeal will not aid the prosecution case much in this appeal. Today I choose not to venture into such a consideration in this matter.

Conclusion:

48. I therefore come to the conclusion that both appeals succeed and the convictions are hereby quashed, sentences of death set-aside and the appellants are hereby set at liberty unless otherwise lawfully held.

49. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 24th day of January 2017.

A.C. MRIMA

JUDGE