REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 179 OF 2012

STEPHEN GATUKIA KAHURA.....1ST APPELLANT

JACKTON OMOA LUPIA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Mukurweini Senior Resident Magistrates' Court Criminal Case No. 560 of 2011 (Hon. Wendy Kagendo, Principal Magistrate) delivered on 17th October, 2012)

JUDGMENT

The appellants were jointly charged with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code cap 63** in that on the 17th day of November 2011 at Gakindu market in Mukurweini district within Nyeri County with others not before court and being armed with offensive weapons namely a knife and a toy pistol, they robbed James Kabecheki Kanyuira of Kshs 100/= a mobile phone, make Nokia 1208, a dark blue motor vehicle registration number KAP 192 E (Toyota Corolla 110 Saloon) all valued at Kshs 332,100/= and at or immediately before or immediately after the time of such robbery they threatened to use actual violence to the said James Kabecheki Kanyuira.

The 2nd appellant was charged with a second count of being in possession of an imitation of fire arm contrary to **section 34 (3)** of the **Firearms Act cap 114, Laws of Kenya**. The particulars were that on 17th day of November 2011 at the Thika Road in Thika district within Kiambu county, the appellant was found in possession of a firearm without a firearm certificate.

Both the appellants were convicted of the offence of robbery with violence and they were accordingly sentenced to death; the 2nd appellant was also convicted of being in possession of an ammunition firearm; however, having been sentenced to death in the 1st count, the learned magistrate discharged rather than suspended the sentence of the 2nd appellant on this particular count. The appellants filed separate appeals against the conviction and sentence; however, since they were tried together their appeals were consolidated into this particular appeal. The grounds upon which they appealed are as follows:

1. The learned magistrate erred in law and in fact in her evaluation of the evidence concerning

identification of the appellants;

2. The learned magistrate erred in law and in fact by relying on the evidence of identification parade which the magistrate herself admitted was flawed;

3. The learned magistrate erred in law and in fact by failing to appreciate that however strong a suspicion is it cannot be a basis for conviction;

4. The learned magistrate erred in law and in fact in linking the appellant with the weapons found in the motor vehicle;

5. The learned magistrate erred in law and in fact by dismissing the appellant's defence without giving any reasons; and

6. The conviction of the appellants was not safe considering the available evidence.

Counsel for the 1st appellant argued that the evidence of identification of the appellant was doubtful because firstly, the complainant did not give the description of his alleged assailants to any of the three police stations of Kiriaini, Gakindu and Mukurweini where he reported the robbery. Secondly, the complainant stated in his evidence that he saw the suspects at the police station before the identification parades were conducted and therefore the identification parade was of no value. In this regard counsel relied on the Court of Appeal decision in **Ajode versus Republic (2004) 2KLR 81**. He submitted that in effect the identification of the appellant amounted to dock identification which ordinarily is worthless.

Counsel also submitted that the identification of the appellants was by a single witness and therefore it was necessary for the trial magistrate to warn herself of the dangers of relying on the evidence of a single identification witness and in this regard, he relied on the position in **Karanja & Another versus Republic (2004) 2KLR 140** and **Roria versus Republic (1967) EA 583**.

On the issue of suspicion, counsel argued that the appellant was convicted on suspicion merely because he emerged from a bush close to where the complainant's motor vehicle was recovered from. Again, there was no link between the knife that was allegedly recovered from the motor vehicle and the appellant. Suspicion, according to the appellant's counsel, cannot be a basis of a conviction and in this regard, he relied on the Court of Appeal decision in **Sawe versus Republic (2003) KLR 364.**

The appellant's defence, counsel urged that it was dismissed without any reasons.

The 2nd appellant argued along the same lines as the 1st appellant's counsel in his handwritten submissions; in particular, he faulted the identification parade from which he was picked urging that it was contrary to the police standing orders on identification parades. The appellant also urged that the learned magistrate did not caution herself on the dangers of relying on the evidence of a single identification witness and cited the case of **Maitanyi versus Republic (1986) 198** at page 201. Like the 1st appellant, the 2nd appellant urged that he was also arrested on mere suspicion. He also argued that despite the fact that he gave sworn evidence which was not challenged by the prosecution, in any event, the same was dismissed by the learned magistrate without any due consideration contrary to **section 169 (1)** of the **Criminal Procedure Code**.

Counsel for the state on the other hand opposed the appeal and urged that the appellants were found within the vicinity of the complainant's motor vehicle barely three hours after it had been stolen. He, however admitted that the identification parades were not properly conducted and therefore all that was available to court was dock identification. He submitted further that there was circumstantial evidence sufficient enough to found a conviction for instance, the recovery of a knife in the vehicle that fitted the description given by the complainant and a homemade gun retrieved from the person of the 2nd appellant. As far as the appellants' respective defences were concerned, counsel submitted that that they were considered but were found to be untenable.

Perhaps to appreciate the appellants' and the state counsel's submissions, it is necessary to consider the evidence at the trial; the consideration of this evidence is also necessary because being the 1st appeal, the appellants are entitled to a fresh evaluation of the evidence at the end of which this court may come to a different conclusion from that arrived at by the trial court. This court is, however, mindful of the fact that it is the trial court that had the advantage of seeing and hearing the witnesses. **(See Okeno versus Republic (1972) EA 32).**

The genesis of the prosecution of the appellants was this: the complainant (PW1) was based at Mukurweini where had been engaged as taxi driver by one **Bernard Gichuru Wanyaga (PW6).** The taxi was the latter's motor vehicle registration number KAP 182 E (Toyota 110). The complainant was in the course of his business on 17th November, 2011 at about 8:35 PM when a man approached him for his services. He told him that he wanted to be driven to Itara club at Gakindu. After agreeing on the price, they set off for Gakindu but as they approached Itara bar, about 20 metres from there, his passenger asked him to stop because apparently, that is where he wanted to alight from. He stopped and as he stretched across to open the passenger door for his passenger, he felt a "cold black object" which, according to his testimony, looked like a gun pressed against his neck through the driver's window. Before he could react, his passenger pulled him from his seat and the man with the "black object" entered and took control of the vehicle; he drove off towards Kiriaini. His hitherto passenger took his phone and the Kshs 100/= in his wallet. They later abandoned the complainant in some bush.

The complainant found his way to a road where he was rescued by a motorcyclist. He was driven to Kiriaini police station where he made his report and from where he called one of his colleagues to take him to Mukurweini. He made a similar report at Mukurweini police station. The following day, he met his employer at Gakindu police post where they got information that their motor vehicle had been recovered at Thika. According to the complainant, he gave the police the description of the person who hired the vehicle from Mukurweini; he described him as a light short person. He was able to see him well because they negotiated the price for his services for about 10 minutes; he also saw him clearly in a petrol station which he described as well-lit where he went to refuel his car before they drove off to Gakindu. He testified that he was also able to see the 2nd appellant who forced his way into his car; according to him he was of tall and of dark complexion. With these descriptions, he was able to pick out the appellants from the identification parades.

The complainant also testified that he went to Thika police station with his employer and two other police officers; however, he did not see the appellants. As they were coming from Thika, he was in his employer's car while the appellants were in a police land cruiser. The land cruiser had a tyre burst at Kenol and it is the complainant who removed the damaged tyre for repair. He denied having seen the appellants even as he removed and replaced the tyre.

One of the officers who recovered the complainant's motor vehicle and arrested the appellants was sergeant **Mohamed Adan(PW3);** he testified that on 17th of December 2011 at 11:55 PM he was on patrol together with corporal **Mutua (PW4)** and Administration Police Constable Muriru when they cited the complainant's motor vehicle at Thika flyover. According to him, its driver was standing outside the vehicle. He enquired from him what he was doing and the man answered that he was waiting for someone from Thika. The officer told him to remove the vehicle from there because it was at a dangerous spot. As he drove off towards Thika direction, two men emerged from the bush into the road. The officer asked these people to stop and upon searching them he found a toy pistol on one of them. He arrested them both. He later found the complainant's vehicle abandoned some 30 metres from where he arrested the two men. When they searched it, they found a knife in the vehicle. They then towed the vehicle to Thika police station where they booked it together with the appellants.

In cross-examination, the officer testified that he found the 2nd appellant by the roadside. He also testified that according to his statement, the vehicle in which he was travelling stopped to pick the two men who told him that they were waiting for vehicle. He agreed that his statement did not show that the two men emerged from the bushes.

Corporal Charles Mutua (PW4) who was with **Mohamed Adan (PW3)** testified that as they drove behind the complainant's motor vehicle, the vehicle slowed down to pick the appellants who he alleged, emerged from the bush. As the police vehicle approached, the vehicle sped off leaving the appellants behind. According to him, the complainant's vehicle was recovered abandoned a kilometer away from where they arrested the appellants. Upon his cross-examination, he said that the appellants were actually by the roadside and that when they enquired where they were from they told the police officers that they were from a construction site, nearby; he however, admitted that he did not include this information in his statement.

Having been suspected to have hijacked the complainant and robbed him of his properties including the motor vehicle, the appellants were subjected to two identification parades from which the complainant is said to have identified them.

The officer who conducted the identification parades from which the appellants were picked out was police constable **Salesio Nyaga (PW5);** he conducted the parades on 19th November, 2011. The complainant picked both of them out by touching their shoulders. According to this officer the appellants were satisfied with the way the parade was conducted and they signaled their satisfaction by signing the parade forms which he produced as evidence in court.

The evidence of the complainant's **employer (PW6),** was relevant to the exercise of conducting the identification parades; he testified that once he received the information that his motor vehicle had been recovered and it was at Thika, he went to that station together with the complainant (PW1) and two police officers from Mukurweini police station. While in Thika, he saw the appellants being removed from the cells; he was emphatic that he was shown the suspects by the arresting officers. As at that time he was with the complainant, who was to later pick out the same suspects in the identification parades as the people who had robbed him.

Also relevant to the question of identification was the evidence police constable **Morris Odhiambo (PW7)** who apparently received the complainant's report at Mukurweini police station on 17th January, 2011. He narrated what the complainant told him when he reported the robbery incident but added that although complainant gave him the description of the people who robbed him he did not include that aspect of his complaint in his statement.

On his part, the investigations officer police **Constable Benjamin Mumo (PW8)**, by and large reiterated what the complainant reported. He testified that the complainant gave him the description of the 1st appellant but, just like the officer who received the complainant's report, he did not reduce that information in writing. As far as the 2nd appellant is concerned he said that the complainant did not give him his description.

The 1st appellant gave sworn evidence and testified that he worked at the construction site in Juja and on 17th November, 2011 he arrived from that site at 9 PM. The vehicle in which he travelled from Juja did not take him and his co-appellant to Thika town; it dropped them at the junction connecting Thika town to the main highway. It is while they were walking towards Thika town that they attempted to hike a lift from the vehicles that passed by; one of these vehicles was a police vehicle which stopped. Two officers alighted, searched them and recovered a phone and money from them. They told these officers that they worked at Juja.

After they drove for about a Kilometre, they found a stationery vehicle parked beside the road; the police stopped and called for a breakdown which towed it to the police station. The appellants were then put in cells; they were not told the reason behind their arrest and custody. On the following day, they were driven from Thika to Othaya in a police land cruiser. They were followed from behind by a salon car with three occupants. Somewhere along the way, the vehicle in which the appellants were travelling got a puncture and one of the occupants in the saloon car removed the punctured tyre for repair and that it was the same person who came to identify them on the identification parade. This appellant was shocked to hear the charges against him and in particular that he had stolen his own mobile phone Nokia 1211. He

denied having had any pistol and all he had when the police arrested him was an LG phone, his national identification card, a wallet and Kshs 500/=.

The 2nd appellant also gave a sworn testimony and said that he together with the 1st appellant arrived at the Thika junction from Juja at 9.00 PM. They stopped a police vehicle for a hike to Thika town; they informed the officers in that vehicle where they were from when they enquired. After conducting a search on their persons, they asked them to board the police vehicle. After about a kilometer from where they were arrested police found a stationery motor vehicle which they towed to the police station. The following day they were driven to Nyeri; the vehicle that had been towed to the police station the previous day was right behind them as they travelled to Nyeri. The person who drove it was the same person who fixed the punctured tyre of the motor vehicle in which they were travelling and they were surprised that it was that person who purported to pick them out in the identification parades. He denied the charges against them.

The appellants' appeal, their respective submissions in support of the appeal and the submissions by the learned counsel for the state in opposition thereto have to considered in the context of the foregoing evidence and the law the basis of which the appellants were charged.

Starting with the law, the offence of robbery is defined in **section 295** of the Penal Code, Chapter 63 Laws of Kenya 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** 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) prescribes the circumstances or conditions that elevate simple robbery into aggravated robbery or 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.***

The complainant was accosted by two people who were armed with a knife and toy pistol; these in my view were dangerous or offensive weapons, in the circumstances; some sort of violence was also used against the complainant. His attackers stole his money, a phone and a car. The complainant's evidence in this regard was not challenged and there was no reason not to believe that he had been robbed in the circumstances in which he described. With this evidence, there is no doubt that the offence of robbery with violence was committed; at least two of the ingredients of this offence, one of which was sufficient to establish it, were proved. I agree with the learned magistrate's finding, that it was proved beyond reasonable doubt, that the offence of robbery with violence was committed.

The question that follows is whether this offence was committed by the appellants. In considering this question, it was up to the trial court to bear in mind that other than the complainant's evidence on the identification of the appellant, there was no evidence linking them with the with the robbery. The arresting officers, of course, attempted to link the appellants with the complainant's motor vehicle which they found abandoned off the road; however, for reasons that will become clearer later in this judgment, that piece of evidence was too remote as to provide any evidence even circumstantially that the appellants must have been the people who robbed the complainant.

As much as I can gather, the prosecution case largely turned on the identification of the appellants and the primary question which the trial court ought to have concerned itself with is whether the appellants were so identified as to leave no doubt that they were the culprits in the crime perpetrated against the complainant.

The evidence of proper visual identification normally calls into question the conditions or circumstances under which the suspects were identified; what amounts to favourable conditions normally vary from one case to another depending on the peculiar circumstances of each particular case although ordinarily, the most common ones include the conditions of lighting at the material time; for instance, if it was at night or in the dark, was there sufficient light for a person to identify another? The time the victim and his attackers spent together in the course of the commission of the crime also matters; the more time a victim spends with a suspect the more he is likely to identify him. But again, this also depends on the circumstances of each particular case since it may not matter how much time a victim spends with his attackers if, for instance, he is put in such condition that he is not able to see his assailants.

Where the conditions are favourable, the next question is whether the victim was able to see the suspect or suspects so clearly that he cannot be mistaken in singling them out if he saw them again. The test of whether the suspect or suspects left some impression on the victim's memory is his ability to remember their appearance or description. If the suspects are complete strangers to the victim, his ability to describe them will normally be the basis of an identification parade from where he is accorded the opportunity to pick them out. If, on the other hand the suspects are people he is familiar with, then his is a case of recognition and such a parade will not be necessary.

Coming back to the appellants' case, the evidence of the prosecution was that two appellants were strangers to the complainant. It was the complainant's own evidence the two accosted him at different times and places and therefore under different circumstances. The 1st appellant approached him not as a robber but as any other client interested in his taxi services. He spent some time with him negotiating the price for his services. He was with him at a petrol station where he went to refuel his car. According to him the fuel station was well lit. I am of the opinion that, the conditions for a proper identification in these circumstances were favourable.

As far the 2nd appellant is concerned, he waylaid the complainant and attacked him unexpectedly; the complainant testified that he placed what looked like a gun on his neck as he was faced the opposite direction from where a was being attacked. It was his evidence that the 1st appellant pulled him from the driver's seat before he could react. It is logical from his own explanation that he could not have had sufficient time and space to see this second attacker. Moreover, there was no evidence of the state of lighting at the time of the attack and therefore the trial court could not proceed on the presumption there was sufficient light at the place of attack.

There was also no evidence of the positioning of the complainant in the vehicle after he was hustled from the driver's seat; again, without such evidence it could not be assumed that the he was positioned in such a way that he could see this second attacker when they were all in the car.

My assessment of the complainant's evidence with respect to identification of the second attacker is that the conditions for a proper identification were not favourable.

Now, whether the conditions for a proper identification were favorable is one thing but it is another thing altogether for the victim to go further and provide the description of his assailants. It matters little that the conditions for a proper identification are favourable if the victim cannot provide the description of the suspected criminal or criminal. This appears to have been the Achilles heel in the prosecution case.

Although the complainant himself testified that he was able to describe the appellants and he gave their description to the police when he recorded his statement, it emerged from the officer who took his statement and the investigations officer that they either did not record the description given to them or, as the investigations officer himself confirmed, they were not given the description at all. Several possibilities arise from these inconsistencies; the complainant might not have been able to describe the appellants or, the appellants' descriptions might not have been given. Either way, these possibilities should have created some doubt in the mind of the trial court that the appellants were properly identified; whenever such doubt arises it is, of course, to the benefit of the accused person.

If the court were to adopt the possibility that the description of the appellants was not given, then the

evidential value of the identification parade from which they were purportedly picked was substantially diminished though the parade itself may not, merely for that reason, have been rendered invalid (see the Court of Appeal decision in **Nairobi Criminal Appeal No. 176 of 2006, Nathan Kamau Mugwe versus Republic (2009) eKLR)**. In **Ajode versus Republic (2004) 2 KLR 81** the same Court held that it is trite law that before an identification parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade. See also **Maitanyi versus Republic (1986) KLR at page 198** where the Court of Appeal held:

> ***There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made…if a witness receives a very strong impression of feature of an assailant; the witness will usually be able to give some description.***

The court proceeded to hold further that:

> ***In this case J admitted that she did not give the description of the 1st appellant before he was arrested and before she identified him when he was brought into the police station. We are of the considered view that J's evidence on identification ought to have been tested by her first recording her initial statement indicating whether she could identify her attackers and giving their descriptions.***

An equally substantial concern which the appellants raised with the identification parades was that the complainant saw them before the parades were conducted; the evidence on record appears to have been on their side on this. According to the owner of the motor vehicle (PW6) he was accompanied by the complainant when he went to collect his motor vehicle from Thika police station where it had been towed. It was his evidence that he did not just see but that the arresting officers showed him the appellants who had been booked at the same station. He was categorical that he was with the complainant at the material time.

The complainant himself was at hand to remove the punctured tyre from the motor vehicle in which the appellants were being driven; no doubt, his intervention to assist the police in fixing their vehicle provided him yet again with an opportunity to see the appellants at a close range.

It is possible therefore that in these circumstances, the complainant simply picked the appellants from the subsequent parades not necessarily because they attacked him but because he had seen them at the police station and on their way back to Mukurweini where the offence is alleged to have occurred. If that be the case, then the identification parades flouted one of the basic rules for such parades which is that a witness must not see the accused person or persons before the parade is conducted. In **Githinji versus Republic (1970) EA 231,** it was held *that "once a witness knows who the suspect is an identification parade is valueless."* It has also been held that in such a case where police force standing orders in respect of conduct of identification parades are flouted the value of evidence of identification depreciates considerably. In **Nairobi Criminal Appeal No. 117 of 2005 David Mwita Wanja & others versus Republic (2007) eKLR** the Court of Appeal noted thus:

> ***The purpose for, and the manner in which, identification parades ought to be conducted have been the subject 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 to this Court emphasised that the value of identification as evidence would depreciate considerably unless an identification parade was held within the scrupulous fairness and in accordance with instructions contained in Police Force Standing Orders.***

The court proceeded to site its own decision on this question in **Njihia versus 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 would be difficult, if not impossible, for the witness to dissociate himself from his identification of the man in the parade, and reach back to his impression of the person who perpetrated the alleged crime.

Similarly, in the trial against the appellants, the complainant could dissociate himself from the identification of the appellants in an identification parade that was conducted in breach of the police force standing orders. Taking cue from the decision of the Court of Appeal, his evidence on identification was simply unreliable and couldn't be the basis for a safe conviction.

The court suggested that having discounted the evidence of an improperly conducted identification parade, the trial court could still convict based on some other evidence of identification; I cannot find any such other alternative evidence in the trial against the appellants.

One other thing that the trial court appears to have overlooked and ended up misdirecting itself on the law is that the complainant was a sole identification witnesses. As a such witness the trial court needed warn itself of the danger of relying upon the identification evidence and if possible look for some other corroborative evidence. The record shows that there was no such a warning. The Court of Appeal for East Africa discussed the danger of relying on such evidence without warning in **Roria versus Republic (1967) EA 583 at page 584**.

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 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 need for the trial court to warn itself of the dangers of relying on the evidence of visual identification by a single witness is an issue that was taken up in the Court of Appeal in **Kisumu Criminal Appeal No. 20 of 1989 Cleophas Otieno Wamunga versus Republic** where it noted that evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger. The court proceeded to state further that whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant based on the evidence of the identification.

Again, in **Criminal Appeal No. 24 of 2000 Paul Etole & Reuben Ombima versus Republic**, the Court of Appeal reiterated the need for caution. It stated as follows;

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.

The common denominator in all these decisions is that the trial court must not only take precautions before accepting and acting on the evidence of a single identification witness but it must be seen to have taken such precautions. Without evidence of warning itself against such a danger a conviction based on the evidence of a single identification witness would be unsafe.

Counsel for the appellants also submitted that the appellants were arrested and charged on mere suspicions that were not supported by any evidence. The sum total of the evidence of the arresting officers showed that this was probably the case; in their evidence, they said they arrested the appellants because they were at a place they described as a "dangerous spot" and it happened that the motor vehicle which later turned out to have been robbed from the complainant was at the same spot. The evidence shows that his motor vehicle was being driven by somebody else whom the arresting officers themselves asked to drive it away. It is only when they found it abandoned ahead of them that they suspected the appellants to have been linked to it. Their evidence as to the distance between the place they arrested the appellants from and where they recovered the vehicle was contradictory; while **corporal Mutua (PW4)** testified that the motor vehicle was recovered a kilometre away from where they arrested the appellants, his colleague Sargeant **Mohamed Adan (PW3)** said that the motor vehicle was recovered thirty metres away from where they arrested the appellants. Seargent Adan himself admitted in his evidence that according to his statement the police vehicle stopped to pick the appellants which evidence appears to have been consistent with that of the appellants' that indeed they stopped the vehicle, to take them to Thika town. The appellants ended up being charged merely because soon after they were picked by the police, the latter stumbled on what turned out to be the vehicle that the complainant had been robbed of. Their arrest and subsequent prosecution were based on unfounded suspicions.

On this question, all I can say is what the Court of Appeal said in **Sawe versus Republic (2003) KLR 364** where the appellant was charged and convicted of the deceased's death; the Court of Appeal held that there was no link between the appellant and the deceased death except mere suspicion and suspicion alone, however strong it might be, cannot be a basis of inferring guilt which must at all times be proved by evidence. The prosecution must prove its case beyond any reasonable doubt. I cannot say with any sense of conviction that there was such a proof in the trial against the appellants.

For all I have said, I am persuaded to come to the inevitable conclusion that the appellant's appeal is merited and it is hereby allowed. Their convictions are quashed and the sentences set aside. The appellants are set at liberty unless they are lawfully held.

Signed, dated and delivered in open court this 13th day of January, 2017

Ngaah Jairus

JUDGE