REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL 373 OF 2010

STEPHEN MUOKI MUSYOKI……..……...……1ST APPELLANT

VERSUS

REPUBLIC……..……
RESPONDENT

AS CONSOLIDATED WITH

CRIMINAL APPEAL 372 OF 2010

SAMUEL KURIA IRUNGU……..……...……..2ND APPELLANT

VERSUS

REPUBLIC……..……
RESPONDENT

AND

CRIMINAL APPEAL 375 OF 2010

DAVID KIBUE MUCHEKE……..……...……3RD APPELLANT

VERSUS

REPUBLIC……..……
RESPONDENT

AND

CRIMINAL APPEAL 374 OF 2010

LAZARUS KANGETHE NJOROGE……..……...……4TH APPELLANT

VERSUS

REPUBLIC……..……
RESPONDENT

(An Appeal arising out of the conviction and sentence of Mr. G. Mutembei CM in Criminal Case No. 991 of 2009 delivered on 30th June 2010 in the Chief Magistrate's Court at Nairobi)

JUDGMENT

The Facts

The Appellants were charged with 3 offences. The first offence was that of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that on the 15th day of May 2009 along Koinange Street Nairobi within the Nairobi Area Province, they jointly robbed Josphat Mweu Mutua of cash amount of 15,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Josphat Mweu Mutua.

The second offence was that of impersonating a public officer contrary to section 105 (b) of the Penal Code, the particulars of which were that on the 15th day of May 2009 along Koinange Street Nairobi within the Nairobi Area Province jointly falsely presented themselves to be persons employed in the public service namely Police Officers and assumed to arrest Josphat Mweu Mutua. The last count was that of unlawfully possessing Government stores contrary to section 324(3) of the Penal Code. The particulars of this offence was that on the 15th day of May 2009 along Processional Way in Nairobi within Nairobi Area Province they were jointly were found in possession of one jungle jacket, one jungle trouser, one Barret and a pair of handcuffs the property of Kenya Government.

The Appellants were arraigned in court on 25th May 2009 and they all pleaded not guilty to the charges against them. They were tried, convicted of all offences and sentenced to death for the offence of robbery with violence. No sentence was passed for the other offences in light of this sentence of death. The Appellants being aggrieved by the judgment of the trial magistrate have appealed both their conviction and sentence.

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called six witnesses. PW1 was Josphat Mweu Mutua who was the complainant. He testified that on 15th May 2009 at about 10.00 am after withdrawing Kshs 15,000/= from the Equity Bank at Koinange Street, he was called by people who accused him of being a member of Mungiki, and told him to enter into a motor vehicle. He stated that there were two men at the front of the motor vehicle and two men in the rear seats. He also stated that one of the men wore a police uniform, while another carried a walkie talkie. He testified that his face was then covered with a blanket, and the motor vehicle driven away as he was being interrogated. PW1 further testified that upon reaching State House, his face was uncovered, and they were all ordered by the police to alight and lie down on the ground. He thereupon reported to the police that he had been hijacked and was taken to Kamukunji Police Station, while the other 4 persons were left under the guard of the police.

PW2, Joseph Maina Kamanthi testified that he runs a car hire business called Evolution Car Hire and Tools Limited at Hurlingham, Nairobi, and that on 12th May 2009 he was contacted by a person who called him on his telephone and said that he wanted to hire a motor vehicle. PW2 further stated that he then met two persons on 14th May 2009 who hired motor vehicle registration number KAU 147 X being a Rav 4 green in colour for 2 days, and paid him Kshs 9,000/=. He testified that the persons did not return the motor vehicle after the two days, and that he was later called to the Kamukunji Police Station where he found the motor vehicle and identified the 4th Appellant as one of the persons who had hired the car.

PW3, CPL. Daniel Wambua, testified that while on patrol on 15/5/2009 on Uhuru Highway, they received information that a person had been kidnapped in a green Rav 4. They saw a Green Rav 4 on Koinange Street going towards University way, and followed it. Upon reaching Processional Way they blocked the said motor vehicle and ordered all persons in the motor vehicle to surrender, whereupon 5 persons alighted from the motor vehicle and lay on the ground. PW3 testified that one of the persons called Mutua (PW1) told them that he had been hijacked and robbed of Kshs 15,000/=. Upon searching the motor vehicle PW3 stated that they recovered a dark suitcase in the boot of the car, wherein they found a

jungle jacket, jungle trouser, barret, and handcuffs. Further, that they recovered a mobile walkie talkie under the driver's seat, and Kshs 15,000/= from the 1st Appellant. PW3 further testified that they then handed over the 5 persons and motor vehicle registration number KFU 143 X, a green Rav 4, to the Kamukunji CID Officer.

PW4 was PC Edward Muhia who was attached to the Scene of Crimes Nairobi Area, and testified that on 8th June 2009 he was shown a motor vehicle registration number KAU 147X, a Toyota Rav 4, at Kamukunji Police Station which was an exhibit in a robbery case. Further, that he took two photographs of the front and rear views of the motor vehicle, which were processed and printed under his supervision. He also testified that he gave a certificate to that effect, which he produced in court together with the photographs.

PW5 CI Jackson Owino was attached to the Flying Squad Pangani, and testified that he was on mobile patrol in the company of other police officers on 15/5/2009 at about 12 noon. He stated that they received information that four suspicious persons had been seen forcing another into a green Rav 4, and that one of them was wearing a jungle jacket similar to those worn by Administration Police. He confirmed the testimony of PW3 as to what transpired thereafter, leading to the arrest of the Appellants.

The last prosecution witness was PW6, who stated that he was attached to the Criminal Investigations Department at Kamukunji Police Station, and that on 23rd May 2009 at around 9.00 am he was instructed to open files in respect of the Appellants who were in police custody. He was shown the items and motor vehicle allegedly recovered from the Appellants and he also later received a statement from the complainant.

After the close of the prosecution case the trial magistrate found that the Appellants had a case to answer and they were put on their defence. The 1st 2nd and 3rd Appellants gave unsworn statements and all stated that they were on Processional Way going to various destinations when they heard gunshots and orders to lie down. They testified that upon lying down the police searched them and took their identification documents, wallets and money. They were then taken to Kamukunji Police station, where they stayed for 10 days before being charged on 25th May 2009.

The Fourth Appellant also gave an unsworn statement and stated that he was a in a hired car and was driving towards State House when he heard gunshots and decided to turn back. He stated that he was blocked by another vehicle and he was ordered to alight and lie down on the ground together with others. He testified that he was searched and his phone and wallet was taken, whereupon he was taken to Pangani Police Station before being taken to Kamukunji Police Station 2 days later, and charged with the offences after 10 days.

The Grounds of Appeal

The 1st and 2nd Appellants' Case

The 1st and 2nd Appellants were represented by G.K. Kamau Advocate who submitted that the said Appellants had four grounds of appeal. Firstly, that there was insufficient evidence adduced to support the charges and conviction of the Appellants. It was submitted in this regard that on the charge of robbery with violence, PW1 who was the complainant did not state that any violence was used on him and stated that the robbers did not have any weapons. Further, that on the charges of falsely presenting themselves to be persons employed in the public service namely Police Officers and of unlawfully possessing Government stores, there was no evidence adduced that the Appellants stated that they were police officers. It was also submitted that no evidence was called to show that the items allegedly found with the Appellants were government stores.

The second ground of appeal was that the evidence adduced by the prosecution was inconsistent and contradictory. It was submitted that PW1 stated that the suitcase in which the uniform, barret and handcuffs were found was recovered from the passenger seat, while PW3 and PW5 stated that it was

recovered from the boot of the car. Further, that PW1 stated that the money he had been robbed was found in the passenger seat, while PW3 stated that he recovered the money from the shirt pocket of the 1st Appellant.

The counsel for the 1st and 2nd Appellants also submitted that the amount that PW1 stated he was robbed of was Kshs 15,000/= made up of 14 currency notes of Kshs 1000/=, one currency note of Kshs 500/=, two currency notes of Kshs 200/= and one currency note of Kshs 100/=. However that the evidence of PW3 and PW5 was that they recovered Kshs 15,000/= all in currency notes of Kshs 1,000/=. Lastly, it was submitted PW1 did not see the registration number of the car he was hijacked in, while PW3 and PW5 gave five different registration numbers of the said motor vehicle.

The third ground of appeal put forward by the 1st and 2nd Appellants' counsel was that there was no proper identification made. It was argued that the complainant was only able to identify the robbers who were sitted next to him in the car, and that he did not give a description of the said robbers. Further, that since more than 20 people were arrested after the robbery, an identification parade ought to have been conducted, and the trial magistrate relied on dock identification which is not free of error.

The final ground of appeal by the 1st and 2nd Appellants was that the judgment of the magistrate's court did not comply with section 169 of the Criminal Procedure Code as it did not indicate the ingredients of the offence and ignored the Appellants' Defence.

The 3rd Appellant's Case

Mr. Wandugi Advocate appeared for the 3rd Appellant, and stated that his grounds of appeal were the same as those of the 1st and 2nd Appellants, and that he was adopting the submissions made by Mr. Kamau. On the first ground of Appeal of insufficient evidence, Mr. Wandugi added that the onus was on the prosecution to prove the charge of robbery with violence, and PW1 was the only witness of the robbery and was specific that the Appellants did not threaten him and did not have any weapons. He also submitted that the trial in the judgment shifted the burden of proof to the Appellants by stating that he found no weight in their claims. The counsel also claimed that the issues as framed by the trial magistrate in his judgment did not reflect the ingredients of a charge of robbery with violence.

The counsel on this ground of appeal also submitted that no reasons were given as to why the Appellants were convicted of the other two charges of impersonating a public officer and of unlawfully possessing Government stores. He further submitted that on the charge of possessing government stores it was incumbent for the prosecution to prove that the items recovered were government stores, which they did not do.

Mr Wandugi reiterated the submissions made by Mr. Kamau on the contradictory evidence given on where the briefcase was found in the motor vehicle, on the currency denomination of the Kshs 15,000/= recovered from the Appellants, and the description of the motor vehicle. He added that items were produced in court which PW5 in his testimony did find at the scene of crime and notably exhibits 1, 9 and 11. It was his contention that these exhibits were planted by PW6 to frame the Appellants.

Lastly, Mr. Wandugi submitted that the trial magistrate was under a mandatory obligation to comply with the provisions of section 200 and 211 of the Criminal Procedure Code as the trial was first heard by Mr Mutembei, then by Mrs Wamae and Mrs Ngenye who disqualified herself, before the matter came back to Mr. Mutembei. Further, that the failure to comply prejudiced the Appellants.

The 4th Appellant's Case

The 4th Appellant appeared in person and relied on his amended grounds of appeal, his written submissions and the submissions given by the counsel for the other Appellants. His grounds of Appeal are that he was erroneously charged with robbery with violence, the prosecution did not prove their case beyond reasonable doubt, he was not positively identified, he was not found in possession of the items

recovered, and that no due consideration was given to his defence.

On the grounds that he was erroneously charged with the offence of robbery with violence, and that the prosecution did not prove its case, the 4th Appellant reiterated the arguments that PW1 testified that no violence was used on him, and he argued that the Appellants ought to have been charged only with impersonating police officers. He also argued that there was contradictory evidence on the recovery of the handcuffs and the government stores. He further submitted that the evidence of PW3 and PW5 stated that the registration of the motor vehicle used in the robbery was KFU 143 X, and not the motor vehicle he rented which was KAU 147 X. He alleged in this regard that the number plates of the said vehicle were changed to frame him.

The 4th Appellant submitted that he was not found in possession of the recovered items and that PW6 testified that the complainant stated that the suitcase recovered in the motor vehicle belonged to him. However, that the prosecution did not disprove that the items found in the suitcase did not belong to the complainant. He also submitted that the said suitcase was recovered in a different motor vehicle namely KAV 147 as stated by PW6 in his testimony, and not in the motor vehicle he rented which was KAU 147X.

On the ground that he was not positively identified, the 4th Appellant argued that PW1 testified that his face was covered, and that the said witness could not have identified the persons seated next to him after his face was uncovered at State House, as there is a short distance from State House to Processional Way where the Appellants were arrested. Lastly, the 4th Appellant submitted that there was violation of sections 169 and 329 of the Criminal Procedure Code, as his defence that he had alighted from the motor vehicle he was driving was not separately evaluated, and that he was denied his right to mitigate.

The State's Response

Mr. Karuri for the State opposed the appeals on all counts. He submitted that it is not a mandatory requirement that violence be meted out on a victim in a charge of robbery with violence. Further, that PW1 testified that the 4 people who called him identified themselves as police officers, put him in a motor vehicle, and robbed him of Kshs 15,000/=. It was submitted that this evidence was confirmed by PW6.

Mr. Karuri argued that PW1 was able to identify the 1st and 4th Appellants who were sitted next to him in the motor vehicle, and PW5 testified that five people got out of the motor vehicle when it was stopped, including the complainant, and that the 4 Appellants were the other persons who were arrested by the police.

On the issue of the contradictory descriptions of the motor vehicle, Mr. Karuri testified that whether described rightly or wrongly, it was the motor vehicle found in the possession of the Appellants, and PW2 who was the owner of the motor vehicle testified that he had hired the vehicle to the 4th Appellant. Mr. Karuri further submitted that the other contradictions noted in the testimony of the witnesses were not fatal to the prosecution's case.

It was also Mr. Karuri's submission that it was incumbent upon the Appellants not being police officers, to explain how they came to be in possession of the items recovered from the motor vehicle, namely the jungle jacket and trouser, I barret and the handcuffs which were government stores.

Lastly, Mr. Karuri submitted that the record of the proceedings showed that the trial magistrate complied with sections 200 and 211 of the Criminal Procedure Code. On the compliance with section 200, Mr. Karuri submitted that Mrs Macharia did not hear any witnesses and was therefore not bound to comply with section 200, which had earlier been complied with by Mr. Mutembei. Lastly, it was submitted that the trial magistrate considered the issues in his judgment in compliance with section 169 of the Criminal Procedure Code.

The Determination by the Court

We will first address the common issues raised by all the Appellants, which are whether the ingredients of a charge of robbery with violence were proved; whether there was sufficient evidence to convict the Appellants of the charges; whether the evidence relied upon to convict the Appellants was contradictory, whether there was a positive identification of the Appellants; and whether there was compliance with sections 169, 200, 211 and 329 of the Civil Procedure Code. The additional issue raised by the 4th Appellant of the application of the doctrine of recent possession will be considered therafter.

Whether the ingredients of Robbery with Violence were met

The Appellants in this case were charged with and convicted of robbery with violence under section 296 (2) of the Penal Code which reads thus:

> **"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 the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death"**

We are in this respect guided by the decision in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** which sets out what constitutes robbery with violence under section 296(2) of the Penal Code as follows:.

> **"In order to appreciate properly as to what acts constitute an offence under Section (296) (2), one must consider the sub-section in conjunction with section 295 of the Penal Code.**
>
> **The essential ingredients of robbery under Section 295 are use of or thereof to use actual violence against any person or property and at or immediately before or immediately after to further in any manner the act of stealing. Therefore the existence of the aforedescribed ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in Section 296(2) which we give below and any one of which if proved will constitute the offence under the sub-section.**

1. **If the offender is armed with any dangerous or offensive weapon or instrument, or**
2. **If he is in the company with one or more other person or persons, or**
3. **If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person."**

We are also alive to the requirement that proof of any one of the above ingredients of robbery with violence is enough to base a conviction under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**. The particulars of the charge against the Appellants meet the criteria set out above, as they specify that the appellants jointly robbed Josphat Mweu Mutua of cash amount of 15,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Josphat Mweu Mutua. PW1, testified that there were four persons who robbed him, and PW3 and PW5 also testified that all the four appellants were arrested at the scene of crime. The Kshs 15,000/= that was stolen from PW1 was recovered from the 1st Appellant when he was in the company of the other Appellants. The Appellants were therefore in the company of more than one person at the time of the robbery, and the ingredients of the offence of robbery with violence were met. It is thus our finding that the charge of robbery with violence was proved beyond reasonable doubt, and the conviction of the Appellants of the said charge was safe. Further, it is our finding that the testimony of PWI that no violence or weapon was used during the robbery is not fatal to the conviction.

Whether there was sufficient evidence to convict the Appellants

We have already found herein above that there was sufficient evidence to convict the Appellants with the offence of robbery with violence. As regards the offence of impersonating a public officer, section 105

(b) of the Penal Code states as follows:

> **"Any person who -**
>
> **(b) falsely represents himself to be a person employed in the public service, and assumes to do any act or to attend in any place for the purpose of doing any act by virtue of such employment,**
>
> **is guilty of a misdemeanour and is liable to imprisonment for three years."**

PW1 did testify during cross-examination by the Advocate for the 1st, 3rd and 4th Appellants that the persons who called him and robbed him identified themselves as police officers, and one was clothed in the uniform similar to that of an Administration policeman. The evidence by PW3 and PW5 was that the Appellants were found with these items in a suitcase that was in the motor vehicle used in the robbery. We find that this evidence was sufficient to convict the Appellants for the offence of impersonating a public officer and their conviction in this regard was therefore safe.

On the offence of unlawfully possessing Government stores contrary to section 324(3) of the Penal Code, the particulars and evidence were that the Appellants were jointly found in possession of one jungle jacket, one jungle trouser, one Barret and a pair of handcuffs being the property of Kenya Government.

The essential ingredient of this offence are that the accused person must convey and have in his possession stores which are the property of the disciplined forces, the said stores must be suspected of having been stolen or unlawfully obtained and an unsatisfactory account is given of how they came to be in possession of an accused person. We have reviewed the evidence given by the prosecution witness and found no evidence to show that the items that were found in the Appellants possession were shown to be government stores or the property of Kenya.

It is thus our finding that as no evidence was brought of any distinguishing marks that identified the items recovered from the Appellants as being government stores of the disciplined forces or property of the Government of Kenya, and the conviction of the Appellants for the offence of unlawfully possessing Government stores contrary to section 324(3) of the Penal Code was not safe, and is therefore quashed.

Whether the evidence was contradictory

There were two contradictory sets of evidence relied upon by the Appellants in their appeals. The first was on the description of the motor vehicle used in the robbery, and the second was on currency of the money recovered from the Appellants. On the description of the motor vehicle it was argued that different registration numbers were given of the said motor vehicle by PW3 and PW5. It is our view however when identifying things, it is possible to have various and different descriptions that are sufficient and material. In this case PW3 and PW5 gave a description of the car that was used in the robbery and which they later found the Appellants in as a "Green Rav 4". PW1 also testified that he was told to get into a Rav 4 motor vehicle. The Appellants were found in a similar vehicle by PW3 and PW5 at the time of arrest, and given the circumstances prevailing at the time contradictions in recollection of the registration numbers of the said motor vehicle were likely to occur.

Any such contradictory evidence in the registration number of the motor vehicle is in our view not fatal to the conviction of the Appellants, as there was also further evidence of identification of the motor vehicle by PW2 who identified it as the vehicle he had hired to the 4th Appellant being a Rav 4, Green in colour registration number KAU 147X, and PW4 who was shown the motor vehicle at the police station and took photographs of the same. He identified it as a green Toyota Rav 4 registration number KAU 147X.

Likewise, it is our finding that it is not a material contradiction that the money recovered during the robbery was described in different currency notes than the one that was presented to court as an exhibit, as it is likely that money being a common item is likely to change hands during the course of a trial. What

is material in our view is that the stated amount of money that PW1 complained was robbed of, namely Kshs 15,000/= was recovered from the 1st Appellant shortly after the said robbery upon arrest.

Whether there was a positive identification of the Appellants

The law on identification of accused persons is replete with warnings on the need for caution before sustaining the conviction on the basis of identification of a single witness or in difficult witnesses. These warnings however do not apply in this appeal as the Appellants were arrested during the day, and there are three witnesses who have given evidence of their identification, namely PW1, PW3 and PW5. It is our view that the only issue before us is with regard to the correctness of the identification. We reminded ourselves of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in this respect, in which the Court of Appeal held, inter alia,that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

The 1st and 4th Appellants were identified by PW1 as the persons who sat next to him in the motor vehicle used during the robbery. It is argued by the 4th Appellant that as PW1's face was covered during the robbery he did not have enough time to identify the Appellants. PW1 however in his testimony stated that his face was uncovered when they reached State House, and he was able to describe the persons who sat next to him as a brown man in jungle uniform and an elderly man. He identified them in court. More importantly however, all the four appellants were positively identified by PW3 and PW5 as the persons who were in the car with PW1 after the robbery, and whom they arrested. It is thus our finding that there was a safe and correct identification of the Appellants in the circumstances.

Whether there was compliance with section 200 of the Civil Procedure Code

Section 200 of the Procedure Code provides as follows:

> **"(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may -**
>
> **(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or**
>
> **(b) where judgment has not been written and signed by his predecessor or, act on the evidence recorded by that predecessor or, resummon the witnesses and recommence the trial.**
>
> **(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.**
>
> **(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witnesses be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.**
>
> **(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."**

The Court of Appeal in **Bob Ayub alias Edward Gabriel Mbwana alias Robert Mandiga v Republic, Criminal Appeal No. 106 of 2009**, stated that the right under section 200 of the Criminal Procedure Code was owed to the accused and not his/her advocate and that the duty to explain to the accused the right to opt to have witnesses recalled or trial start afresh was mandatory.

We have perused the court record and note that Mrs. T.W.C. Wamae heard and recorded the evidence of PW1, PW2 and PW3 on 9/10/2009 and 21/10/2009 . She thereupon informed the court that she woul be on transfer from January 2010. Thereafter the hearing proceeded before Mr. Mutembei on 22/12/09 and it is recorded as follows:

> "**Trial Magistrate on transfer. Hearing to proceed on another court. Section 200 explained"**

All the Appellants then responded as follows:

"I want hearing to proceed with evidence on record"

An order was then given by the court to this effect.

Even though the case was thereafter mentioned before various magistrates, no hearing took place nor was any evidence taken until 24/3/2010 when Mr. Mutembei proceeded to hear the remaining prosecution witnesses and the Defence case and delivered judgment. In our view the operative time when section 200 ought to be complied with is the commencement of hearing of proceedings after evidence has been taken before a different trial magistrate, which in this appeal was after the transfer of Mrs. TWC Wamae. The hearing thereafter commenced and continued before Mr. Mutembei, who complied with section 200 of the Criminal Procedure Code as shown from the proceedings.

Whether there was compliance with section 211 of the Civil Procedure Code

It was also argued by all the Appellants that section 211 of the Criminal Procedure Code was not complied with. Section 211 provides as follows:

> **"(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).**
>
> **(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses."**

After perusal of the proceedings, we note that the trial magistrate on 20/4/2010 gave his ruling that each accused person had a case to answer and put each accused person on their defence. There is no record of section 211 having been complied with by the trial magistrate. However, after the said ruling was given the counsel for the 1st, 3rd and 4th Appellant then submitted as follows:

> **"Accused 1,3 and 4 will give sworn evidence. No witnesses. I apply for Defence hearing on 23/4/10."**

The Counsel for the 2nd Appellant on his part submitted as follows:

"2nd Accused will give unsworn defence. No witnesses"

It is thus our finding that the Appellants were not prejudiced by the non-compliance with section 211 of the Criminal Procedure Code, as they had legal representation and their counsel were clearly aware and addressed the trial court on the application of the provisions of the said section to their clients.

Whether there was compliance with section 169 of the Civil Procedure Code

It was also argued by the Appellants that section 169 of the Criminal Procedure Code which provides as follows was not complied with:

> **"(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.**
>
> **(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.**
>
> **(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."**

We have examined the trial magistrate's judgment and the material part of the said judgment states as follows:

> **"The issue which falls for determination is whether or not the accused person are the people who hijacked and robbed the complainant and whether or not they were the same people who were arrested after alighting from the motor vehicle which the complainant was. Whereas the key prosecution witness said that the accused persons are the people who alighted from the vehicle in which the complainant was, the accused persons on the other hand said they were innocent travellers along Processional Way who were caught up in a police operation. This would imply that the police let loose the real culprit people. This poses a question as to why the complainant and the police officers would want to frame the accused persons.**
>
> **After weighing and evaluating the evidence for both sides, I find no reasons as to why the key prosecution witnesses would want to frame the accused persons. I find no weight in the claim by the accused persons that they were arrested and charged for no reason.**
>
> **I am satisfied beyond a reasonable doubt that the accused person while posing as police officers, robbed the complainant as alleged in the charge sheet. I find each accused person guilty as charged don the 1st, 2nd and 3rd counts and I convict them accordingly."**

While the trial magistrate did identify the issues for determination, we agree with the Appellants submissions that there was no identification of the law that applies to the issues, and no analysis of whether the evidence adduced had shown that the requirements of that law had been met. To this extent we find that the judgment did not provide any legal reasons for the conviction of the Appellants of the three counts they were charged with. We also note that the said judgment did not specify the offence and the section of the Penal Code or other law under which the accused was convicted as is required by section 169(2) and as stated in **Nyanamba v Republic (1983) KLR 599.**

However it is our view that this being a first appeal**,** the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination as to whether or not to uphold the conviction of the Appellants. We are in this respect guided by the decision in **Odhiambo vs Republic**

[2005] 1 KLR 564 wherein it was held as follows:

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

We have already found in this respect that the prosecution adduced sufficient evidence of identification to sustain the conviction of the Appellants on the charges of robbery with violence contrary to Section 296(2) of the Penal Code and impersonating a public officer contrary to section 105 (b) of the Penal Code to the required standard of proof of beyond any reasonable doubt. The Appellants' conviction of these charges is therefore upheld irrespective of the non-compliance with section 169 by the trial magistrate.

Whether there was compliance with section 329 of the Civil Procedure Code

The 4th Appellant argued that section 329 was not complied with by the trial magistrate. Section 329 provides that the court may, before passing sentence receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. We note that requirement of additional evidence under this section is discretionary, and if a trial magistrate is satisfied that no additional evidence is needed, the section need not be complied with. No prejudice was therefore caused to the 4th Appellant by the decision by the trial magistrate not to apply section 329 of the Civil Procedure Code.

Whether the doctrine of Recent Possession applied to the 4th Appellant

The doctrine of recent possession is stated in the case of **Malingi vs Republic (1989) KLR 227** as follows:

> **"The doctrine in one of fact. It is a presumption of fact arising under section 119 of the Evidence Act, Cap 80 Laws of Kenya which provides:**
>
> **"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."**
>
> **So as applies to the offence of theft or handling, recent possession raises a presumption of fact that the one in possession is either the thief or guilty receiver (R – v – Hassan s/o Mohamed (1948) 25 EACA 121). The trial court has the duty to decide whether from the facts and circumstances of the particular case under consideration the accused person either stole the item or was a guilty or innocent receiver. By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."**

In this case the briefcase with the items suspected to be government stores and which were used by the Appellants to commit the robbery were found in the motor vehicle that was hired by the 4th Appellant. He did not give any explanation as to how the suitcase came to be in the said motor vehicle, and there was also no break in his possession of the said suitcase between the time of robbery and the time of recovery of the suitcase. It is thus our finding that the doctrine of recent possession correctly applied in this case,

and pointed to the participation of the 4th Appellant in the robbery of PW1.

In the premises therefore, the conviction of the Appellants for the two offences of robbery with violence contrary to Section 296(2) of the Penal Code and the offence of impersonating a public officer contrary to section 105 (b) of the Penal Code is upheld, and the sentences for this conviction are hereby found to be legal, with the sentence of death for the second offence of robbery with violence being held in abeyance. The Appellants are however acquitted of the charge of unlawfully possessing Government stores contrary to section 324(3) of the Penal Code and the sentence imposed for the said conviction is hereby set aside.

Orders accordingly.

DATED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE