REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 42 of 2011

AS CONSOLIDATED WITH CR.A PPEAL NO. 41 OF 2011,43 OF 2011 AND 44 OF 2011 (LESIIT AND MAKAU, JJ)

PETER MAINGI THURANIRA…….....1ST APPELLANT

STANELY MURURU LINYIRU…….....….2ND APPELLANT

PETER MURITHI ITABARI…….....…..3RD APPELLANT

GEORGE MWENDA NTURIBI ……...…….4TH APPELLANT

VERSUS

REPUBLIC ……..……..RESPONDENT

(Being an appeal from the judgment/Conviction and sentence of Mr. M. T. Kariuki, Senior Resident Magistrate in Tigania Criminal Case No.1465 of 2010)

J U D G M E N T

The appellants PETER MAINGI THURANIRA, STANLEY MURURU LINYURU, PETER MURITHI ITABARI, and GEORGE MWENDA NTURIBI were the first, second, third and fourth accused in the lower court respectively.

They were charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code and in the alternative to Count 1 and Count II with handling stolen property contrary to section 322(2) of the Penal Code. The particulars of the charge are as follows:-

COUNT ONE: **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**

1. PETER MAINGI THURANIRA, 2. STANLEY MURURU LINYIRU, 3. PETER MURITHI ITABARI AND 4. GEORGE MWENDA NTURIBI.

On the night of 3rd and 4th November, 2010 at Twale sub location in Tigania West District within Meru County jointly with others not before court, while armed with offensive weapons namely rungus and pangas robbed PATRICK KIREMA NDUBAI of his Nokia 1110 mobile phone serial number IMEI 556246/93/0830092/0, one lighter/spotlight, one Sonitec radio, a bottle of shoe cream polish and

one spotlight all to the total of Kshs.4,650/- the property of the said PATRICK KIREMA NDUBAI and during such robbery, hit PATRICK KIREMA NDUBAI with a rungu on his head which caused his death.

ALTERNATIVE CHARGE: <u>HANLDING STOLEN PROPERTY CONTRARY TO SECTION 322(2) OF THE PENAL CODE</u>

On the 4th day of November, 2010 at Ngundune trading centre in Tigania West District within Meru County, otherwise than in the course of stealing dishonestly retained one Nokia 1110 mobile phone serial number IMEI 556246/93/0830092/0, one spotlight, two gas lighters and a bottle of shoe cream polish knowing or having reason to believe them to be stolen property.

COUNT II <u>ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE:</u>

1. PETER MAINGI THURANIRA, 2. STANLEY MURURU LINYIRU, 3. PETER MURITHI ITABARI AND 4. GEORGE MWENDA NTURIBI.

On the night of 3rd and 4th November, 2010 at Twale sub location in Tigania West District within Meru County jointly with others not before court, while armed with offensive weapons namely rungus and pangas robbed JANET KAYUYU of her Nokia 1110 mobile phone serial number IMEI 3539725/01696932/4, and two gas lighters all to the total value of Kshs.2,560/- the property of the said JANET KAYUYU and during such robbery, beat JANET KAYUYU.

ALTERNATIVE CHARGE: HANDLING STOLEN PROPERTY CONTARY TO SECTION 322(2) OF THE PENAL CODE:

PARTICULARS: on the 4th day of November, 2010 at Ngundune trading centre in Tigania Wes District within Meru county, otherwise in the course of stealing dishonestly retained one Nokia 1110 mobile phone serial number IMEI 353972/01/696932/4 knowing or having reason to believe them to be stolen property.

After full trial the four appellants were convicted of the main count 1 and II and each sentenced to death for the two counts. Being aggrieved by the

conviction and sentence they filed these appeals which we have consolidated having arisen from the same trial.

The first appellant filed 2 grounds of appeal being as follows:-

1. That the learned trial Magistrate erred in both law and facts in failing to observe that the complainants herein failed to record a first report to the police with my names and or descriptions.

2. That the learned Magistrate erred in law in failing to observe that the conviction and sentence was not supported by the weight of evidence tendered by the prosecution.

First appellant thereafter filed amended grounds of appeal raising 6 grounds of appeal as follows:-

1. That the learned trial Magistrate erred in law and fact in failing to find that visual identification at the scene of crime and the identification parade conducted by IP.Kingori cannot base a conviction to sentence me to death.

2. That the learned trial Magistrate for find that the prosecution has not established their case against me because:

a. The alleged handling of stolen property is not supported by OB booking of suspects at Tigania police station on arrest and items were found in a bush.

b. The arrest was not led by complainants in this case but rather by a man who had a case against me and he never even testified.

3. The learned trial Magistrate erred in law when he failed to consider that my rights as an arrested person were violated as I was held in police custody for long before I was brought to court(contrary to the provisions on article 49(f) (i) and (ii) of the Constitution of Kenya.

4. That he further erred in law when he failed to record the language used on 17/11/2010 to explain the charge and the interpretation made and by who, which contradicts the law, on language requirement.

5. that the death sentence imposed upon me is excessive, severe, harsh, inhuman and unconstitutional for it contradicts articles 26(1) and (3) and further denied me fair hearing contrary to law under Article 50(2) (p) of the Constitution of Kenya.

6. That the trial court failed to consider my alibi defence story which was on oath and therefore truthful and strong enough to displace the prosecution evidence.

The second appellant filed 4 grounds of appeal as follows:-

1. That the learned trial Magistrate erred in both law and facts in failing to observe that the complainants herein failed to record a first report to the police with my names and or descriptions.

2. That the learned trial Magistrate erred in both law and facts or misdirected himself in upholding the conviction while the same was not supported by an identification parade.

3. That the learned trial Magistrate erred in law in flouting section 211 subsection (1) of the C.P.C 75 Laws of Kenya.

4. That the learned trial Magistrate erred in law in failing to observe that the conviction and sentence tendered by the prosecution.

The 2nd appellant further filed amended grounds of appeal raising similar grounds to those raised by first appellant in his amended grounds of appeal.

The third appellant further filed 2 grounds of appeal as follows:-

1. That the learned trial Magistrate erred in both

Law and facts in failing to observe that the complainants herein failed to record a first report to the police with my names and or descriptions.

2. That the learned trial Magistrate erred in law and facts or misdirected himself in upholding the conviction while the same was not supported by an identification parade.

The third appellant further filed similar amended grounds of appeal with those of the 1st and the 2nd appellant and we need not repeat them.

The fourth appellant filed petition of appeal through the firms of M/s Mwanzia & Co. Advocates setting down 4 grounds of appeal as follows:-

1. ***That the learned Magistrate erred in law and fact by convicting and sentencing the appellant in a charge that was not proved beyond reasonable doubt by the prosecution.***

2. ***That the learned Magistrate erred in law and fact by finding that the appellant was properly identified on the night of 3rd and 4th November,2019 while the circumstances prevailing therein were not conducive for a proper identification and thus wrongly convicting the appellant.***

3. ***The learned magistrate erred in law and fact by disregarding the defence of the appellant and thus arrived at a wrong finding.***

4. ***That the evidence adduced at the trial could not support a conviction.***

Each of the appellant challenged the conviction on the basis of evidence of identification in that the circumstances were not favourable for positive identification, that the identification parade was not properly conducted and that their defences were rejected without cogent reasons.

This is the first appeal from conviction. We are therefore the first appellate court and are guided by the principles as enunciated in the case of **ODHIAMBO – V- REPUBLIC(2005) KLR page 565** in which case the Court of Appeal stated:

"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 demeanor.

The Court is not under any obligation to allow an appeal simply because the State is not opposed to the appeal. The Court has a duty to ensure that it subjects the entire evidence tendered before the trial court to a close and fresh scrutiny and reassess it and reach its own determination based on evidence."

The 1st appellant filed written submissions. The main bone of contention was that the evidence on identification at scene of crime fell far short from the required standard of proof and the trial court failed to consider the first appellant's defence of alibi.

The 2nd and the3rd appellant filed written submissions and raised similar grounds of appeal to the ones raised by the 1st appellant herein above and we need not repeat them.

The 4th appellant was represented by Mr. Mwanzia who argued all the four grounds together. Mr. Mwanzia, learned Advocate for fourth appellant urged the circumstances prevailing on the night of robbery were not conducive to proper identification of the 4th appellant. He urged that PW1 stated that there were 4 robbers at the material night and that the fourth appellant had a red cap. That at the identification parade PW1 said she was able to identify the 4th appellant who had no cap. He urged that at the scene of the robbery there were two children aged 14 years and 12 years respectively and that the child aged 14 years was asleep during the time of robbery and never managed to wake up during the robbery. He urged though the Investigation Officer(PWII) stated that PW1 stated the 4th appellant was wearing a cap, PW1 in her evidence never mentioned the 4th appellant being at the scene. He urged PW2 a child of 14 years said he saw 6 people whereas PW3 stated that she saw the 4th appellant who had concealed his face with a cap. PW4 on the other hand said he did not see any robber wearing a cap. He urged that the Investigation officer(PWII) recorded PW2 as having said he could not see the robbers as they wore caps. Mr. Mwanzia, learned Advocate submitted that the contradictions of the prosecution witnesses clearly support his submission that it was dark for prosecution witnesses to see what was happening hence each prosecution witness gave a different story contradicting one another. Mr. Mwanzia urged that the evidence of PW2 and PW3 was evidence of children of tender years and urged that the trial court did not conduct a voire dire examination in their respect to satisfy itself indeed the witnesses were possessed of sufficient intelligence to give their evidence on oath. He referred us to the case of **JOHNSON MUIRURI –V-REUBLIC(1983) KLR 445** where the court of Appeal stated:-

"1.Where, in any proceedings before any court, a child of tender years is called as a witness, the court

is required to form an opinion , on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the later event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him."

Mr. Mwanzia further referred us to the case of **KEMONI –V-REPUBLIC (1991) KLR 489** in which Hon. Patel J, as he then was held:-

1) It is well established that before the evidence of a person of tender years is admitted, a voire dire examination should be carried out by court to satisfy itself that (a) the witness is possessed of sufficient intelligence and understands the duty of speaking the truth (b) understands the nature and significance of an oath.

2) If satisfied as to (a) but not as to (b) the evidence may be received but not on oath.

3) The non-compliance with procedure on this issue was fatal as the evidence of the girl amounted to nothing.

4) Corroboration means some independent testimony which implicates the accused, and tending to show that not only the offence has been committed but that the accused has committed it.

Mr. Mwanzia submitted that the failure of trial Magistrate to conduct voire dire examination rendered the testimony of the children PW2 and PW3 worthless.

He further urged the trial court got emotionally involved in the case and ended up forgetting its duty. That is of looking at the evidence when the complainant broke down and sobbed in court and court stated that it could as such not doubt her sincerity. Mr. Mwanzia urged that the emotion blinded the court in its duty. He concluded by submitting that the charge was not proved against the appellant beyond reasonable doubt and urged us to allow the appeal.

The appeal against the 1st, 2nd and 3rd appellants was strongly opposed by Mr. Mungai, the learned State Counsel, but he conceded to appeal by the 4th appellant. He urged the identifying witness was PW1, the complainant who was able to see the 1st, 2nd and 3rd appellants at the scene of robbery. That PW1 was also able to pick up the 1st, 2nd and 3rd appellants at Tigania Police Station in an identification parade. PW1 identified the 1st appellant by the jacket he was wearing. That the appellants at the time of robbery had torches and by use of those torches PW1 was able to see and identify the first three appellants. He urged that PW1 saw the first three appellants long enough to be able to identify them.

Mr. Mungai, the learned State Counsel urged that PW1 was particular on colour of the jacket she saw. She stated it was a red jacket with white and black stripes and stated that was the one the first appellant wore at the time of robbery and which jacket was produced as exhibit No.2. PW1 testified that the 2nd appellant wore a khaki/grey jacket which was produced as exhibit No.1. Mr. Mungai, learned State Counsel urged that the four appellants were arrested in connection with another offence and when they were taken to the police station, they were wearing the same clothes as described by the complainant. The trial court took into account the doctrine of recent possession. He urged that the 1st appellant had a mobile phone which belonged to the complainant(PW1) which PW1 identified as hers by markings"JK" on it. That the 2nd appellant was found in possession of a Nokia mobile phone with same markings "JK". Mr. Mungai, learned State Counsel submitted that PW1 identified both phones as those stolen from her house the previous day. He urged in regard to the 3rd appellant that he was identified by the jacket that he was wearing. He urged PW5 corroborated the evidence of what the 3rd appellant was wearing at the time of his arrest. He urged that the trial Magistrate took all evidence into consideration on basis of evidence of PW1 and identification and correctly convicted and sentenced the 1st, 2nd, and 3rd

appellants. On the appeal by the 4th appellant, Mr. Mungai, learned State Counsel conceded the appeal and stated that as per court's record the 4th appellant was identified on the basis of the red cap he was wearing. He urged as per evidence of PW2 the 4th appellant face was partly hidden and that the 4th appellant was arrested together with the 1st, 2nd and 3rd appellants. The 4th appellant was first released and later arrested. He urged that the robbery took place during the night of 2nd and 3rd November, 2010 and identification parade took place on 5th and 6th November, 2010 two days after the incident.

The first appellant in his response, stated that the jacket he was wearing was his own jacket and that he was not involved in the robbery. He stated that the jacket was taken from him and during identification parade he was told to wear it and he was identified on the basis of the jacket. He submitted that he did not have any exhibit on him.

The 2nd appellant stated that he was prejudiced at the trial and that PW1 did not identify him sufficiently. He urged that PW2 said he did not know him and he never saw him. PW3 also said he never saw the 2nd appellant and she did not know him. PW4 stated he never saw the 2nd appellant. On the issue of being found in possession of the mobile phone the 2nd appellant said that he had his own phones which got lost and that one was planted on him.

The 3rd appellant responded by stating that he was not found with anybody's property. On identification by the jacket he urged the complainant did not show any special marks that enabled her identify the 3rd appellant on basis of the jacket. He urged that the jacket the basis of his identification was not the only jacket of similar colour and design. On identification parade he urged that he had been exposed to PW1 before identification and that is how she was able to identify him and that in the identification parade he was the only one with khaki/grey jacket in the parade. He urged PW2 identified him in identification parade but in court he said he had never seen him.

The facts of the prosecution case are that Janet Kayuyu(PW1), her late husband Patrick Kirema Ndubai, their two children PW2 and PW3 went to sleep at around 10p.m. That later people came and hit the door demanding they open the door. PW1's husband asked the robbers whether there was any problem and they told him there wasn't. He then got up and opened the door. The robbers demanded money from him and he told them he did not have any money. He was told to sit down and he complied. He begged the robbers not to kill him as he did not have money. He was told to lie prostrate. He was beaten senselessly. Two robbers then entered into the bedroom of PW1 and beat her demanding money. The robbers took two mobile phones, make Nokia, two torches, a big one and a small one which had lights and two gas lighters and a panga. That the robbers on noticing that the PW1's husband was dead, left and proceeded to another house where there was a visitor. They broke the window and entered into the house.

They later returned to the PW1's house and asked PW1 whether her husband was dead or pretending. They lifted the body and threw it on the ground. PW1 said she saw four robbers when her husband opened the door and one had a red jacket with black and white stripes on the lower part and the other one had a black jacket and that she did not know what the other robbers wore.

PW1 made a report to Tigania Police Station. On 4th November, 2010 No.59356 P.C. Mark Kipkoech attached to Tigania Police Station was at the office when he received a report from a complainant in another case. The report was that he had seen three people who he had identified when they were robbing him on the night of 2nd and 3rd November, 2011. He said that they were wearing the same clothes they had at the time of the robbery and he alleged they were in company of the 4th appellant in a butchery eating meat within Ngundune market.

PW5, CPl Nyongesa and PC Kobia proceeded to where the suspects were said to be. That they saw the four suspects walking from the butchery towards Maua direction along the Meru-Maua road. The complainant in the other case pointed the 1st, 2nd and 3rd appellants. The 1st appellant wore a red jacket with white stripes at the back. The 2nd appellant wore a blue jersey while the 3rd appellant wore a grey

khaki jacket. PW5 apprehended the three appellants and asked the 4th appellant to accompany them to police station. The 1st, 2nd and 3rd appellants were booked in the occurrence book. Body search was conducted and PW5 recovered a mobile phone, a Nokia 1110, Kangaroo shoe polish, four gas lighters, two of which PW1 identified, and a torch from the pockets of the red jacket that 1st appellant wore. From the 2nd appellant PW5 recovered a mobile phone a Nokia 1110 and cash. From 3rd appellant, PW5 recovered cash only. PW5 later called the complainant in this case and the complaint in the other case. PW5 visited the home of the 1st and 2nd appellants but did not make any recovery.

PW12 NO.232894 I.P. John Kingore, Deputy OCS Tigania police station conducted identification in this case on 6/11/2010. The first identification parade involved the 1st appellant in which there were three witnesses. The 2nd identification parade involved the 2nd appellant in which there were three witnesses. The third identification parade involved the 3rd appellant in which there were three witnesses.

On 14th November, 2010 PW13 No.231510 C.P. Isaiya Langat conducted identification parade for the 4th appellant in which there was one witness.

The appellants gave defence of alibi. The 1st appellant's defence was that on 2nd November, 2010 he went to his farm in Ruanda where he worked up to 7.00 p.m. when he went home and slept. That on 3/10/2010 he went back to the farm and returned home in the evening and slept as he was not feeling well. That on 4/11/2010 at 1.00 p.m. he left for Ngundune trading centre to buy medicine where he met a police officer P.C. Koech and another, accompanied by the complainant in SRMCC 1432 of 2010 Tigania, and he was arrested. On 5/11/2010 he was called with the 2nd appellant who he had found at Tigania police cells and they were taken to their respective homes for search. That no recovery was made from the 1st appellant.

The 2nd appellant's defence was that on 3/11/2010 he woke up and reported at his place of work at 8.00 a.m. as was his routine and worked up to 6.00p.m in the evening . That the following day he reported on duty and worked up to 12pm when he left for Meru town at 2.00 p.m. and reached Ngundune at 2.30 p.m. That on 15th October, 2010 he was arrested by two police officers and escorted to Tigania Police Station where he was told to remove everything. The 2nd appellant removed his mobile phone a Nokia 1110, a red wallet, three keys and money. On 5/11/2010 the 2nd appellant and the 1st appellant were removed from cells and taken to their respective homes for search. Search was carried out and nothing was recovered from him.

The 3rd appellant in his defence stated that he is a miraa dealer and that on 2nd and 3rd November, 2010 he was in his kiosk selling miraa. That on 4/11/2010 at 1.20 p.m. he left for his home at Ngundune arriving there at 2.00 p.m whereby he met a police officer called Gitonga and another person he did not recognize. He was arrested and taken to the police station, where he was told that he was one of the people who had robbed the person who was with the police officer. That on 5/11/2000 he found the 1st and 2nd appellants at the report desk. The 3rd appellant stated that he saw the 1st and 2nd appellants at the report desk for the 1st time.

The 4th appellant defence is that he is a conductor in a matatu that ply Meru-Maua road. The matatu is Reg. No.KBL 930M. That on 3/11/2010 he closed business at 9.00 p.m. and spent a night at a bar with his driver one Joel Guantai. He stated that he woke up at 6.00 a.m. and continued with his work. That on reaching Meru he received a telephone call from his father, the owner of the matatu registration No.KBL 930M, instructing him to go to Ruanda and collect cattle for slaughter. That the 4th appellant went to Ngundune market at 9.30 a.m. and waited for a lorry. That at lunch hour he went to View Point Hotel for lunch. He was alone. That after his lunch he found the 1st, 2nd and the 3rd appellants being escorted by police officers to the police station. The police officer told 4th appellant to follow them to the police station. He followed them and the three were put into cells. That by 3.00 p.m. the 4th appellant left as no one was asking him anything. That on 9th November, 2010, the 4th appellant was arrested at Ngundune by CID officers and escorted to Tigania Police Station. He was later jointly charged with the 1st, 2nd and

3rd appellants. He denied having been involved in the robbery. The 4th appellant called one witness DW1 Joel Guantai Kanda who corroborated the 4th appellant's evidence. DW1 stated that on 3/11/2010 they spent the night at a lodging in Maua in the same room but in different beds. That they slept till morning. He produced receipts for the lodging.

The evidence against the appellants was that of the complainant PW1, PW2 and PW3. PW1's evidence was that people came and hit the door demanding money. That her husband opened the door. That two of the robbers entered her bedroom and beat her demanding money. That PW1 saw four robbers when her husband opened the door. One of them had a red jacket with black and white stripes on its lower part. That the other robbers had a black jacket and she did not know what others wore. She further in her evidence stated that the people who robbed her were the four accused in the dock. PW1 stated that she did not know their names. PW2 said the robbers were 6 in number. That the four entered inside the house and 2 remained outside. That the 1st appellant wore red jacket and another robber had a jacket but he could not recall the colour. That PW2 saw the faces of the other two but could not recall the colour of the clothes they wore. PW2 on being cross-examined by the 1st appellant, and the 2nd appellant stated that he did not know any of them and he had not seen any of them before. PW2 on being cross-examined by the appellant said that he saw the face of the 4th appellant but contradicted himself by saying he was asleep when the robbers came and he never woke up during the incident. He said it was dark.

PW3 said she was sleeping in a different room when robbers came. That she knew the 4th appellant who she claimed was beating her father. PW3 could not identify the other robbers. PW3 stated that the 4th appellant had partly concealed his face with a cap.

The evidence of identification in this case was difficult since the incident took place at 10.00 p.m. or thereafter and therefore it was dark. The complainant, PW1, PW2 and PW3 did not describe the lighting at the scene. PW1 said she saw four robbers when her husband opened the door, through the torch lights that the appellants had. That her husband did not put his torch on. We find the complainant, PW2 and PW3 did not disclose the light with which they could see and identify the assailants. The intensity of the appellants' torch light was not described and we have found no evidence to the effect that any torch light was focused on the faces of the appellants at any given time to enable the complainant, PW2 and PW3 see and identify the attackers. Indeed the evidence from PW2 is clear that he was asleep throughout the time of robbery. This was corroborated by PW3. We believe that was why during cross-examination he admitted that he did not know nor had he seen the 1st, 2nd and 3rd appellant. PW3 stated that she did not know the 1st, and 2nd appellant and that she had not seen them before. PW3 stated that the only appellant, she could identify was the 4th appellant yet in cross-examination by 3rd appellant she said he was wearing a grey jacket. On the 4th appellant PW3 said his face was partly hidden by a cap.

In the case of **PAUL ETOLE AND ANOTHER NO.24 OF 2000(UR)** Court of Appeal stated as follows:-

"The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification 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 weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

We have carefully examined the evidence of identification by the complainant, PW2 and PW3 as against the four appellants. The complainant did not know the appellants before. The complainant, PW2 and PW3

did not give any details of the basis of identifying the appellants. Complainant did not for instance give any description of 1st, 2nd, 3rd and 4th appellants to police and neither did she give any in her evidence save describing the assailant clothes but not by visual identification.

It is trite law that for a proper identification parade to be conducted the identifying witness must first give a description of the person he/she was able to identify before a parade is held. In that way there will be a basis of testing the evidence of identification to confirm whether there was any material basis upon which the parade was held in the first place and the person was identified.

In this case there was no evidence of description having been given by the complainant. The identification in this case as against the appellants was done after the plea was taken. The appellants were taken back to the police station. It is probable the witnesses who participated at the identification parade saw the appellants in court at the time of taking plea. The 3rd appellant stated that before the identification parade investigating officer in this case exposed to the complainant and her witnesses the 3rd appellant as he was clearing a room assigned to him few house before identification parade. That 3rd appellant was forced to remove his t-shirt and jacket and forced to wear some jacket during the parade. That in the parade of 8 members only 3rd appellant and another officer had shoes.

We find that the identification parade in the instant case was flawed and for the reasons herein above we find the same was of little probative value. We would like to state that 1st and 2nd appellants were identified in the identification parade on the basis of the jacket they were wearing and not by visual appearance. They had given any specific identification marks of the said jackets. The said jackets were not specifically shown to be unique or unavailable to any other member of public. We find that the trial court was wrong in accepting the identification of a suspect based on the kind of clothing he was wearing when the same was not specifically shown to be special and unique, and that the suspects were the only prsons with such types of jackets. We believe that similar jackets are easily available in Kenyan markets and that it is not impossible to have similar jackets.

The trial Magistrate when applying doctrine of recent possession stated as follows in his judgment:-

"Besides the jacket the 1st accused did not dispute that he was found with a mobile phone and four gas lighters. These items were also identified by the 2nd complainant as some of the properties that had been stolen from her house. The mobile phone had a mark "JK" on it which assisted the 2nd complainant to identify it as hers. The 1st accused never claimed that the mobile phone was his. In those circumstances and under the doctrine of recent possession which shifts the burden of proof to someone found in possession of something that is stolen the 1st accused was required to explain how he came by that mobile phone and four gas lighters. He failed to discharge that burden and must be presumed to be the one who stole them from the 2nd complainant's house.

The same doctrine applies with equal force with regard to the 2nd accused. He too was found in possession of a mobile phone a Nokia 110 which bore the initials "JK". PW1 identified it also as one of the two mobile phones that had been stolen from her house. The 2nd accused claimed that the mobile phone was his and that he had left it's receipt in a leather wallet that is being held at the police station. That claim is found to be untrue……"

The 2nd accused claimed that the mobile phone was his and that he had left it's receipt in a leather jacket. The learned trial Magistrate observed:-

Just like the 1s accused it was incumbent upon the 2nd accused to explain how he came by the mobile phone under the doctrine of recent possession. He offered no explanation other than claiming the mobile phone was his. If the mobile phone was his. If the mobile phone was his then the 2nd accused ought to have proved it and also explain how the initials "JK" came to be on the phone"

In the case of **MALINGI –V-REPUBLIC(1989) KLR 225** the Court of Appeal applied the doctrine of recent possession stated as follows:-

"The doctrine of recent possession is one of fact and it arises under section119 of the Evidence Act (cap 80).

With respect 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.

Further in the case of **WANDUE –V-REPUBLIC(2003)IKLR 26** Court of Appeal stated as follows:-

"The doctrine of possession of recently stolen property could not apply until possession by the appellant was satisfactorily proved."

In addition to the above in the case of **MWACHANJE & 2 OTHERS –V- REPUBLIC** the High Court at Mombasa(2002)eklr page 342 stated:-

"Where an accused is found in recent possession of goods alleged to have been stolen, he is under an obligation to explain how he came into such possession and that such possession is innocent. Failure to do so lead to the inescapable conclusion that he is a thief or robber

In the instant case the prosecution was under obligation to prove that the appellants were in possession of the complainant's stolen properties. The trial Magistrate stated in his judgment. The 2nd complainant was able to identify the mobile phone through a mark "JK" on it as hers. We have carefully gone through the evidence of PW1, the complainant in this case and nowhere did we find her stating that her stolen mobile had a mark "JK".

All PW1 stated was:-

"The robbers took two mobile phones make Nokia……"

We have asked ourselves where did this evidence which the trial court relied upon come from unless the trial court Magistrate. The same for reasons better known to him. We also do not find any evidence to the effect that the complainant has the sole reason the mark "JK". "JK" as a mark is not unique and referred to any particular individual. It could be used by anybody. The 1st appellant was not found with any mobile phone. The 2nd appellant claimed ownership of the mobile to be his own and he had left the receipt at home. The appellants gave an explanation how they came to be in possession of the mobile phone. Besides that we find that the complainant failed to lay down sufficient evidence of ownership of the two mobile phones and that the trial court was in error in holding that the doctrine of recent possession applied in this case.

The appellants in this case denied this offence and raised an alibi defence. The trial Magistrate dismissed 1st appellant's defence as untrue, sham and lacked proof. In the case of **MSEMBE & ANOTHER –V-REPUBLIC(2003) KLR 521** the learned Judges of the High Court held:-

"It is trite law that an accused who raises an alibi defence does not assume the burden of proof where the defence of alibi is raised by an accused in his defence. The burden is on the prosecution to rebut the same."

It is sufficient if an accused person, in answer to the charge puts forward a defence which introduces into the mind of a court a doubt either in the prosecution case or a doubt that he was involved in the offence against him. Looking at the totality of the evidence before the lower court I find that the appellants in their defence introduced doubt in the mind of the court whether indeed any robber was committed against the complainant by the appellants. The court in considering the appellants defences shifted the burden of proof to the appellants and therefore erred in failing to note it is trite law that an accused person bears no

burden of proving his defence as time of proving his innocence. The trial Magistrate failed to interrogate a very important issue whether indeed it was the appellants who committed the robbery against the complainant.

Mr. Mwanzia learned advocate for 4th appellant raised on issue that no voire dire examination was conducted in respect of PW2 and PW3 by the court to satisfy itself that the witnesses were passed of sufficient intelligence and understood the duty of speaking the truth and that they understood the nature and significance of an oath. Mr. Mwanzia learned Advocate was of the voire dire examination that evidence was nevertheless for non-compliance with the laid down procedure before they gave their evidence.

Mr. Mwanzia learned Advocate for the 4th appellant was of the view that PW3 and PW2 were children of tender years. The "child of tender years" as per the definition under the Children Act (Cap.141) means a child under the age of ten years. In view of the foregoing we find no error in the trial Magistrates failure to invoke a voire dire examination against PW2 and PW3, whose evidence was considered and make our comments on the same.

Having considered the evidence adduced before trial court we hereby find that the conviction is not safe. We find the appeals have merits. We allow the appeal and quash the conviction. The sentence is also set aside. The appellant to be released forthwith unless lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 6th DAY OF NOVEMBER, 2012.

J. LESIIT **J. MAKAU**
JUDGE **JUDGE**

Delivered in open court in presence of:

Mr. Mungai State Counsel for State

Mr. Rimita Advocate – for the Appellant -present

J. LESIIT **J. MAKAU**
JUDGE **JUDGE**