REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 123 OF 2010

FREDRICK ODIWUOR OMONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 1138 of 2008 of the Senior Resident Magistrate's Court at Nyando)

Coram

R.N. Nambuye-J

Ali- Aroni -J

Mr. Kiprop for the state

Court clerks Laban/Ochola

Appellants present in person

J U D G M E N T

The appellant herein was charged in the lower court with the offence of robbery with violence contrary to section 296 (2) of the penal code, in that **"on the 23rd day of June 2008, at Owaga sub-location of Nyando district within Nyanza province, jointly with another not before court being armed with**

pangas robbed Naftali Juma Okeyo of cash Kshs. 8,000/= and a mobile phone make Motorola C113 valued at Kshs. 2,500/= and at or immediately before or immediately after the time of such robbery wounded the said Naftali Juma Okeyo".

The appellant was tried by the lower court, found guilty, convicted and sentenced to suffer death.

The appellant was aggrieved and he appealed to this court citing six (6) grounds of appeal to the effect that the leaned trial magistrate erred in law and fact:-

(1)By observing that the appellant was positively recognized, yet there was no name or descriptions pointing at him in the first report.

(2) By failing to appreciate the glaring contradictions in evidence by the prosecution witnesses.

(3) By failing to appreciate that the unexplained failure of the prosecution's to call the members of public who arrested and handed him over to the prosecution police was fatal to the prosecution case.

(4) In finding that my failure to offer any evidence during defence was a demonstration of guilt hence shifting the burden of proof.

(5) In failing to appreciate that the unexplained failure by the prosecution to call any of the witnesses the complainant alleges to have seen him being dragged into the sugar cane plantation was fatal to the prosecution case.

The appellant also put in supplementary grounds of appeal to the effect that the learned trial magistrate erred both in law and in facts:-

(1) By failing to comply with section 329 of the Criminal Procedure Code (CPC).

(2) By failing to appreciate and uphold the principle that the prosecution had to prove its case beyond reasonable doubt.

(3) By failing to find that he was not found with any offensive weapons and no recoveries were made.

(4) In not considering the place, time of his arrest which was not sufficient to draw his inference of guilt.

(5) By failing to observe that the prosecution's side admitted hearsay into the case for example PW4 (Amina Juma) only heard of what happened several hours later. After the alleged incident. This amounted to hearsay as she was not an eye-witness.

In its oral submission to court the state supported the conviction on the following grounds:-

- **The complainant went to sell scrap metal worth Kshs. 8,000/=.**

- **The appellant was present and witnessed the deal.**

- **The appellant lured the complainant through a sugar cane plantation alleging that he had scrap metal and on the way he removed a panga and attacked the complainant injured him and robbed him of the proceeds of sale of the scrap metal.**

- **PW1 screamed and villagers came to his rescue and appellant ran away.**

- **The incident took place on the 23rd June 2008. On 11-9-08 at 4.00 p.m. the complainant spotted the appellant at Muhoroni who ran away when he saw the complainant.**

- **The complainant raised an alarm and members of the public assisted him to give chase. Appellant was arrested and handed over to police for prosecution.**

- **PW4 confirmed having seen appellant talk to PW1 in June at 11.00 a.m. when they were discussing the selling and buying of the scrap metal.**

- **Concedes that though PW1 is a single witness he should be believed and his testimony acted upon in terms of section 143 of the evidence act.**

- **Concedes there is contradiction between PW1 and PW4 with regard to the amount of money paid for the proceeds of sale of scrap metal but to states this is not a material discrepancy which goes to the root of the charge and does not affect the conviction.**

- **Concedes that PW1 did not give the names and description of the appellant to police because he did not know him as he had just met him.**

The appellant on the other hand put in written submission and also made oral submission as follows:-

- **PW1 failed to explain what they were doing from 11.00 a.m. to 5.00 p.m.**

- **PW1 failed to explain where the weapon he used on him came from considering that PW1 and 2 never said that they saw any weapon on him at the place of the sale of the scrap metal. PW1 went to seek medical assistance on 14-9-2008 when he told the doctor that he had been assaulted by a person known to him which was contrary to the date of the commission of the offence which was June 2008.**

- **The court is invited to note that PW1 did not state how he transported scrap metal worth Kshs. 8,000/= something a bicycle could not transport.**

- **Arresting officer says he was informed of the arrest on 11th and yet by that time the appellant was already at Kodiaga and had pleaded not guilty to the charge.**

On the evidence tendered we would like to highlight the following salient features of the same.

PW1 is the complainant herein. The salient features of his testimony are that:-

- **On 23-6-2008 he took his scrap metal to sell to one lady by the name Nyanya at Muhoroni.**

- **He found a person identified as the appellant and another talking to the lady.**

- **Upon receipt of his proceeds, he was convinced by the appellant and the other person that they had scrap metal iron, and that he could buy them if he was interested.**

- **PW1 said that he was interested in buying the scrap metal and agreed to accompany them to where the scrap metal was.**

- **On the way they passed through a sugar cane plantation and on the way when PW1 was feeling very tired, the appellant and his companion attacked him, robbed him of the items mentioned. He screamed and a person herding cattle nearby came to his rescue. Then appellant and his companion made off with all the items robbed from the appellant enumerated in the charge sheet.**

- **It is PW1's testimony that by then he was bleeding profusely. The good Samaritan who responded to his call went to a nearby home and they called police and because the man had screamed many people came.**

- **After about one hour, police came, they interrogated the people around and then took PW1 to Muhoroni police station then Muhoroni sub district hospital from where he was transferred to Russia (NNGH) in Kisumu X-rayed, taken to the theatre and the next day he found that he had been stitched and his hand was plastered. The left knee had stitches. He stayed in hospital for about one month.**

- **Upon discharge from hospital, he went back to Miwani where he stayed for two weeks.**

- **Then he went back to Muhoroni, to show himself up as it had been rumoured that he had died.**

- **He had also reported to Muhoroni police station and recorded his statement.**

- **After staying in Muhoroni for about two weeks, he was at a place called Shirikisho in Muhoroni when he saw the accused person him PW1 was taking soda, so he placed it down and followed the accused person. He screamed and chased after him. He was trying to escape but people assisted and they arrested him. Another youngman called the chief who came and re-arrested him.**

They escorted him to Muhoroni police post, recorded their statements and left him there.

When cross-examined, PW1 gave the following responses:-

- **He sold his scrap metal for Kshs. 8,000/= and not Kshs. 150/=.**

- **When they met he had no phone but he bought one later.**

- **The lady who is their boss saw him leave with the appellant.**

- **PW1 promised to give PW1 a commission.**

- **He left the hospital about one month later.**

- **He has documents to show that he had been in hospital for one month.**

- **PW1 had the appellant arrested two weeks after him PW1 returned to Muhoroni.**

- **He did not take action immediately because he needed to heal first and then have the P3 forms filled.**

- **He had never met the appellant before.**

- **He spotted the appellant Shirikisho.**

- **He concedes at Shirikisho they sell spares but they sell sodas nearby.**

When re-examined PW1 gave the following responses:-

That he knew the accused before and even his home. He had hospital documents and had the P3 filled. He had a phone at the time he was robbed. Infact it had been given to him by his boss "Nyanya".

PW2, the assistant chief of Muhoroni recalled "receiving a call from one Robert at 4.30 p.m. on 11-9-2008 to the effect that a suspect had been arrested for having cut and robbed a resident of Muhoroni of his property. He re-arrested him and took him to Muhoroni police station. The said suspect is the appellant. The information given to him was that there was a youngman who deals in scrap metal who was alleged to have been misled by the appellant and others that they were going to sell him scrap metal and then led him into a sugarcane plantation and robbed him. He had been seeing the appellant but he did not know him.

When cross-examined he stated that he only re-arrested the appellant. He had been seeing the appellant in the locality but did not know his name. He was only called on phone and he responded to that call.

PW3 on the other hand had this to say:-

- **It was on 11-9-2008 at around 4.00 p.m. He was in his workshop when PW1 whom he identified as a youngman who had been hit by a panga. He ran into PW3's shop at the time.**

- **PW1 informed him that he had seen one of the men who had hit him go into mama Rehema's house which is about 50 meters from his workshop.**

- **Then PW3 went into mama Rehema's house and found the youngman sitting down and when he saw PW3 he was shocked.**

- **PW3 was accompanied by other people and the complainant.**

- **PW3 asked the complainant to show him the youngman and he pointed to appellant.**

- **PW3 asked appellant if he had any issues with the complainant and the appellant said he had none.**

- **They pushed him and led him out of the house.**

- **PW3 then called their assistant chief.**

- **The appellant tried to resist but he would not escape.**

- **The assistant chief came and they lead the suspect** .

When cross-examined PW3 stated that:

- **They arrested him at 4.30 p.m.**

- **They found him seated in mama Rehema's house.**

- **They did not beat him up. They tied him with a rope.**

- **When they arrested him the complainant's hand had not healed. It was still oozing blood and pus.**

PW4 on the other hand stressed the following:-

- **Her names are Amina Juma, a scrap metal dealer at Muhoroni.**

- **She recalled on 23-6-2008, she was in her business premises at Muhoroni when appellant and another informed her they had scrap metal for sale. She said she was busy.**

- **The two just stood there.**

- **That shortly after Naftally who turned out to be PW1 came with scrap metal on a bicycle. PW4 weighed it and it was 15 Kg and she paid him Kshs. 150/= while appellant and the other were looking and then she saw appellant and another call PW1 out. They talked where upon PW1 reported back saying that the appellant had said that he had scrap metal for sale. PW4 told appellant that she had received the same report but then she was busy and it was upto the appellant to decide on what to do. The party discussed at the verandah of her shop for a while and then they left.**

- **The same day at 6.00 p.m. acting on information from a person, she went to Muhoroni hospital and found Naftally lying down. He had been hit on the hand. Leg and ears. He tried to talk to him but he could not talk.**

- **The doctor advised that he should be transferred to Kisumu since his condition was bad.**

- **PW4 fuelled the ambulance with Kshs. 2,000/= fuel and gave a shoe maker Kshs. 1,000/= to take care of Naftally till they traced his people. The shoe maker stayed with him for 30 days came to his shop and told her what had happened.**

- **Upon getting better the appellant**

When cross-examined PW4 responded thus:-

- **She saw appellant at her shop.**

- **Appellant left with Taabu.**

- **She called appellant's wife after the incident.**

- **She could not have taken action because she was not the complainant.**

- **It was after long when appellant came to sell scrap metal to her and he was arrested.**

PW5 a clinical officer gave evidence to the effect that he filled a P3 on 14-9-2008. The complainant had come with a history of assault by a person known to him on 23-6-2008. He had received first aid at Muhoroni sub district hospital then referred to New Nyanza General Hospital. The wounds were healing. There were fractures. The weapon used was sharp.

PW6 a police officer at Koru received information on 23-6-2008 from the members of public, that there was a person lying at Got Ruke sugar plantation. On arrival at the scene, they found a man lying down with no clothes on and had cuts on the head and body. They took him to Muhoroni sub-district hospital. On 11-11-2008, PW6 received information that there was a suspect who had been arrested by members of the public and taken to Koru police station. He went there and took the suspect and had him charged in court.

The appellant opted to remain silent on his defence and he had no witness to call.

Against the afore set out background information, the learned trial magistrate made the following findings on the facts of the case:-

- **Found that the issues for determination were two namely**

(a) Whether the offence of robbery with violence was committed against the complainant if so

(b) Whether the accused person was the one who was involved.

- **With regard to the first question the learned trial magistrate was satisfied with the evidence adduced that indeed the complainant had suffered injuries confirmed by PW5 and PW4 who saw the appellant shortly after the incident. The magistrate believed the testimony of PW1 with regard to the robbery and items robbed and was satisfied that the ingredients of the offence had been satisfied.**

- **Regarding the issue of whether the appellant was the culprit, the learned trial magistrate believed the testimony of PW1 that it was the appellant whom he knew very well who told him appellant had scrap metal which he appellant wanted PW1 to sell for him to PW4. That this evidence was confirmed by the testimony of PW4 who stated that the appellant and another had gone to her place wanting her PW4 to go and get the scrap metal but PW4 told them that she was busy and that she PW4 saw the appellant and another talking with PW1, and later realized that they had left and on that note, the learned trial magistrate found as a fact and came to the conclusion that PW1 and 4 gave a firm and consistent account of their encounter with the appellant beyond reasonable doubt. That he was among the last person to be seen with the complainant before he was injured.**

- **The trial magistrate was satisfied and believed the evidence of PW1 and 4, that they saw and talked with the appellant during the day at 11.00 a.m.**

- **Believed and opined that the encounter was not brief because PW4 talked to the appellant and another man. Shortly thereafter the complainant came and sold his scrap metal and after a while she PW4 saw the complainant and appellant and the other man talk with PW1 for a long time**

before they disappeared.

- **Believed PW1's evidence that him PW1 walked with the appellant and the other person through the sugar cane plantation and as such PW1 talked in close proximity with the appellant and that some moments passed before the attack.**

- **Believed PW1's evidence that him PW1 walked and talked with the appellant for long believing the appellant that they were going to collect the scrap metal.**

- **Believed PW1that on reaching Ruke primary school, the two men put the bicycle aside told the appellant to remove his clothes and all that he had and after doing so is when they cut him, robbed him and then left him.**

- **The learned trial magistrate opined that the appellant had not rebutted the evidence by the prosecution witnesses as he opted to remain silent and called no witnesses and for this reason the learned trial magistrate made a finding that in remaining silent he did not advance any evidence to cast doubt on the evidence of PW1 and PW4 or even raise a doubt on their encounter.**

- **Found that the (appellant) accused person did not water down the testimonies of the prosecution witnesses in cross-examination.**

- **On the above note the learned trial magistrate found the prosecution case proved beyond reasonable doubt, found the appellant guilty, convicted him and then sentenced him to suffer death in the manner provided by law.**

We have given due consideration to the said findings of the learned trial magistrate and considered the same in the light of the entire evidence tendered on record as well as the rival arguments put forward and in our opinion we are minded to pause simple routine questions to guide us in the disposal of this matter namely:-

(1) What is this court being asked to do in this matter?

(2) What is this court's mandate with regard to that request?

(3) What issues have the rival arguments herein raised?

(4) What is our final conclusion in the disposal of this matter?

We shall deal with the questions globally.

The invitation we have received from both sides with regard to the disposal of this matter, is that the appellant has invited this court in its appellate capacity to upset both the findings and the conviction and sentence handed out by the lower court. Whereas the state has called upon us to confirm the same. The reasons advanced by each side in support and against of each sides view are already reflected on the record. By reason of the appellate approaching the seat of justice in an appellate capacity, it is evidently clear that what this court is being called upon to do is to exercise its appellate mandate. We are alive to

the guiding principle on the exercise of this mandate that we have judicial notice of namely to revisit the evidence that was tendered by the lower court, re-evaluate the same and then arrive at its own conclusion on the matter. We have done so and have identified the following as the issues raised by the appellant namely issues of discrepancies in the prosecution evidence, issues of credibility of prosecution witnesses, the weight to be attached to evidence of a single witness, and issues of shifting of the burden of proof on to the appellant. Discrepancy of evidence between the prosecution witnesses arose from PW1's evidence that he had sold scrap metal to PW4 worth Kshs. 8,000/=, PW4 paid him the said amount, that he had purchased a mobile phone out of the proceeds of sale of scrap metal and that, that is the amount of money robbed from him along side. The mobile and other items. Whereas PW4 had said that the scrap metal sold to her by PW1 was worth Kshs. 150/=. Further invited the court to note that PW1 did not explain to court the means of transporting scrap metal worth Kshs. 8,000/= which in the appellants estimation must have been more that 1 ton which a bicycle could not transport because that is the only means of transport that the complainant had. Indeed from the evidence on the record, PW1was firm that he sold scrap metal worth Kshs. 8,000/=. We agree the means of transporting the metal was only a bicycle. We agree with the appellant's assertion that a bicycle cannot carry scrap metal worth Kshs. 8,000/= and since PW4 did not mention early deliveries by PW1, we take it that the means of transporting the scrap metal to PW4 was the bicycle which bicycle could not carry scrap metal worth Kshs. 8,000/=. A doubt is therefore created as to whether metal worth Kshs. 8,000/= was delivered and sold which also gives doubt as to whether PW1 was robbed of Kshs.8, 000/=. The existence of this doubt has further been fortified by the fact that PW4 said the scrap metal delivered to her were 15kg worth Kshs. 150/=. We are satisfied that the appellant has raised a genuine complaint that this issue was not addressed by the learned trial magistrate.

While still on doubts there is the issue of the presence of a mobile phone alleged to have been among the items which were robbed from PW1. PW1's testimony is that he purchased the mobile from the proceeds of the sale of the scrap metal. The mobile phone was worth Kshs. 2,500/=. If this is correct then it means that when deducted from a figure of Kshs.8, 000/= that leaves a balance of Kshs. 5,500/= which is the amount of money PW1 could have been robbed of.

When confronted with this mathematical discrepancy as to how PW1 could claim to have been robbed of Kshs. 8,000/= which was the entire proceeds of the sale of scrap metal and then claim at the same time to have purchased a mobile phone out of it worth Kshs. 2,500/= PW1 did not give a satisfactory answer to that question, and when the prosecution sought to clarify that issue in re-examination PW1 state that he had been given the mobile phone by his boss "Nyanya" who happened to be PW4. It is to be noted that in the entire evidence of PW4 nowhere did she mention having given a mobile to PW1. This discrepancy creates a doubt as to whether PW1 indeed had a mobile phone in the first instance, and in the second instance created a doubt as to whether a mobile was one of the items that were robbed from PW1.

Another discrepancy created in the prosecution's case which was not resolved by the learned trial magistrate was whether PW1 knew the appellant before the incident or not. According to PW1's evidence, as well aw evidence of PW4 also in chief, the impression created was that PW1 and appellant met for the first time on the date of the incident familiarized themselves with each other and then left. This is what created the impression as to why it took PW1 from 23-6-2008 to 11-9-2008 to have the appellant arrested.

However, when issues as to why PW1 did not take action to have appellant arrested arose in cross-examination. PW1 responded that he had been looking for the appellant all along and when he spotted him in Muhoroni on that date is when he sought help to have him arrested and handed to police.

Turning to PW4 she stated that she had been seeing appellant and that they were with one Taabu on the day of the incident. Then in cross-examination she stated that she had phoned the appellant's wife. In re-examination PW1 stated that he knew appellant and even his house, one wonders why PW1 never led police to appellant's house to have him arrested or why PW4 who was so concerned about the welfare of PW1 never gave appellant's wife's phone to police to track him down. When pinned down on this issue,

PW4 stated that she could not volunteer that information because she was not the complainant. This evidence creates doubt as to whether the appellant was indeed a stranger to PW1 and 4.

A further discrepancy is found in the evidence of the appellant's arrest as narrated by PW1 on the one hand, and PW3 on the other hand according to PW1 he is the one who spotted the appellant, shouted, gave chase and had him arrested with the assistance members of the public. While according to PW3, PW1 reported to him they went to the house of mama Rehema found appellant seated, he was interrogated and then arrested. PW3 only mentioned resistance to accompany them. As submitted by the appellant this discrepancy negatives guilty conscious or conduct on his part. We are in agreement that definitely the fact of appellant running away on seeing PW1 would have led to an inference of guilty conscious. The discrepancy between PW1 and PW3 evidence on the conduct of appellant on seeing PW1 on the day of the arrest casts doubt as to whether the appellant displayed guilty conduct on the day of the arrest.

Issues of credibility of the prosecution witnesses attaches to PW1's evidence in that the discrepancies we have identified above with regard to doubt as to whether PW1 was robbed of 8,000/= and a mobile phone and whether the proceeds of sale of the scrap metal was 8,000/= or 150/=, are discrepancies which were not resolved by the learned trial magistrate, and which discrepancies cast doubt to the credibility of PW1 as a truthful witness which doubt goes to the root of the prosecution case.

On identification of the appellant at the time of incident, it is clear that PW1 was the sole witness. To convict, the learned trial magistrate relied on the evidence of PW4 to the effect that appellant and another were seen talking with PW1 at 11:00 a.m. and left together. Indeed we are satisfied with the finding of the learned trial magistrate that the encounter was in daylight, parties were within close proximity, they conversed at length and left together. We find this was a correct appreciation of the evidence by the learned trial magistrate in so far as events of 23/6/08 were concerned upto 11:00 a. m. Thereafter what we have is the account of PW1 as to what happened, challenge to that account by appellant through cross examination and the silence of the appellant as to his defence. As contended by the appellant that account leaves PW1 as a single witness to the commission of the offence. For this reason the learned trial magistrate should not have used the events of earlier in the day, to operate for events of the evening of that day in order to find corroboration from the evidence of PW4. What PW4 relayed to court as regards the events that took place in the evening was drawn from what she had been told by the appellant and was therefore hear say. Once discounted PW1 remains a single witness. This fact required the learned trial magistrate to apply principles of law applicable to reception, treatment and weight to be attached to evidence of a single witness. We have judicial notice of theses principles namely that the court has to warn itself against the dangers of acting on the evidence of a single witness in the absence of corroboration and then give a determination as to whether it was safe or not safer to act on such evidence and then go ahead to give reasons for either acting or not acting on such evidence to find a conviction.

In **Abdalla bin Wendo & Another** versus **R** (1953), 20 E.A.C.A 166 at 168 stated in part:-

" 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 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 "

Herein no such steps were taken. Going hand in hand without complainant there is the issue of where the weapons used in the attack came from. PW4 did not say she saw appellant and his companion carrying any object in which they could have hidden the pangas and rungu. PW1 also did not mention that the

appellant and his companion were carrying anything. Neither did he say where the pangas and rungu used to attack came from.

As regards burden of proof, we are alive to the cardinal principles on the subject that we have judicial notice of which is to the effect that it always lies on the prosecution irrespective of whether accused person tenders evidence in his defence or remains silent. Herein we are minded to state that the learned trial magistrate shifted that burden on to the appellant by taking issue with the appellants failure to call evidence by himself and call witnesses to rebutt the prosecutions case.

This Principle is well captured in the English case of **Woolmington** versus **DPP** (1935) A. C 462:-

" Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject *[to the qualification involving the defence of insanity and to any statutory exception*]. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [*the offence was committed by him*], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained ."

The above English authority if is to be noted captures the standards set by our courts in all fours.

To us the approach by the learned trial magistrate was a wrong approach and lack of application of clearly acceptable principles of law on the subject. What the learned trial magistrate should have done in the circumstances of this case was to weigh the appellants cross examination of the witnesses, and his silence against the totality of prosecution case and then determine whether the prosecutions case is water tight or not. We are satisfied on the basis of our above assessment that had the learned trial magistrate done so, he would have arrived at the conclusion that the prosecution case was wanting for the following reasons:-

(i) Discrepancy between the evidence of PW1 and PW4 over the amount of the proceeds of sale of scrap metal and the purchase of a mobile phone and or giving of a mobile phone by PW4 or not cast doubt to the robbery of the said 8,000/= and the mobile phone from the complainant

(ii) The discrepancy between the evidence of PW1 & PW3 on how the appellant was arrested did not display guilty conduct on the part of the appellant

(iii) Matters forming the basis in number 1 and 2 above are matters which go to erode the credibility of PW1 as a truthful witness and since PW1 is the foundation stone of the prosecution's case once that foundation is removed there is no base on which the prosecution's case can stand.

(iv) A further doubt raised in the prosecution's case is why PW1 and PW4 who claim to have known the appellant and even his house and PW4 who knew the wife of the appellant even spoke to her on phone after the incident never reported to police earlier to have him arrested.

(v) By reason of matter stated in number 1 – 5 above there is glaring doubt in the prosecution case which doubt was not resolved by the learned trial magistrate. We are alive to the cardinal principles of law applicable that where there exist the same should be resolved in favour of accused

person and in this case the appellant.

(vi) The issue of where the weapons of attack came from was not resolved by the learned trial magistrate as neither PW4 or PW1 said that the appellant and his companion were carrying any object in which the weapons could have been carried. Neither did PW1 say where these were removed from at the time of attack.

(vii) It was wrong to shift the burden of proof on to the appellant . All that the learned trial magistrate was required to do was to weigh the appellant's silence as well as his cross-examination against the prosecution case and then determine whether it stood or not. As mentioned, we have done so and found it ousted.

(viii) The trial magistrate's failure to warn himself against the dangers of acting on the evidence of a single witness to convict was prejudicial to the appellant.

For the reasons given in the assessment we are minded to allow the appeal in its entirety, quash the conviction, set aside the sentence. The appellant is ordered to be set at liberty in connection with the conviction which led to this appeal unless otherwise lawfully held.

Dated, signed and delivered at Kisumu this 5th day of March 2011.

R. N. NAMBUYE

JUDGE

ALI-ARONI

JUDGE

RNN/va