IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, SICHALE & KANTAI, JJ.A.)

CRIMINAL APPEAL NOs. 103, 106 & 108 OF 2014

PETER WAIHIGA KABIRU.....1ST APPELLANT

SIMON BAABU MWANGI.....2ND APPELLANT

ZACHARY SINDA KEROSI.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from a conviction and sentence of the High Court of Kenya

at Nyeri (Wakiaga, Ngaah, JJ.) dated 19th September, 2014

in

H. C. Cr. A. Nos. 177, 181, 182 & 183 of 2011)

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JUDGMENT OF THE COURT

The three appellants **Peter Waihiga Kabiru, Simon Baabu Mwangi** and **Zachary Sinda Kerosi** were charged with another before the Chief Magistrate's court at Nyeri on various offences. They were tried and convicted by the Senior Principal Magistrate and were sentenced as we shall show in this judgment.

They filed appeals to the High Court of Kenya at Nyeri which were consolidated. In a judgment delivered by the High Court **(Wakiaga & Ngaah, JJ**) on 19th September, 2014, the appellants' convictions and sentences in respect of the 3rd, 4th and 5th counts succeeded and those convictions and sentences were quashed and set aside. The other persons' appeal (who had appealed with the appellants) succeeded as his appeal on all counts was allowed and convictions and sentences were quashed and set aside. The appellants' appeals against conviction on a count of robbery with violence and a charge of personating a public officer were dismissed. It is those orders that provoked this appeal.

This is a second appeal from the said convictions and sentences by the Magistrates court, the first appeal to the High Court having failed. Our mandate on a 2nd appeal like this one is captured by the provisions of ***Section 361(1) (a)*** Criminal Procedure Code which limits our jurisdiction to consider issues of law only but not matters of fact which have been heard and determined by the trial court as reviewed or re-evaluated on first appeal. The trial court has the advantage of hearing witnesses and seeing their demeanour and upon evaluation by the High Court, facts which are established by the 2 courts should be left to stand but we are entitled to shift from those holdings of fact if we find that they are based on no evidence or are arrived at in a way that a reasonable tribunal properly exercising its mind would not reach. This point has been made in many judicial pronouncements of this court in cases such as ***Stephen M'Irungi & Another v Republic [1982-88] 1 KAR 360,*** where the following passage appears:

> ***"Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."***

We shall examine the facts of the case as were found by the trial court and as re-evaluated by the High Court for purposes of satisfying

ourselves that the two courts carried out their mandates as required by law.

The charges that were read out to the appellants on 19th January 2010 when they appeared at the Magistrate's court were: Count 1 – Robbery with Violence contrary to ***Section 292 (2)*** of the Penal Code, particulars being that on the 30th day of December 2009, at Murang'a township in the then Murang'a East District, they jointly while armed with dangerous or offensive weapons namely pistols and handcuffs, robbed Mungai Kibora of cash and a mobile phone all valued at Kshs. 68,000/= and that immediately before or immediately after such robbery, they used actual violence on the said Mungai Kibora. On Count 2 the charge was personating a Public Officer contrary to ***Section 105 (b)*** of the Penal Code, particulars being that on the said date at the said place, the appellants presented themselves to be persons employed by the public service as police officers and assumed to arrest Mungai Kibora. The charge in Count 3 was: Making a Document without Authority contrary to Section ***357(A)*** of the Penal Code, particulars being that on an unknown date and place with intent to deceive or defraud without lawful authority or excuse they made certain documents namely 3 police certificates of appointment in the names of No. 86874 Sgt James Mwalimu Mike purporting to be genuine police certificates of appointment signed and issued by Mr. Elia, Assistant Commissioner of Police. Count 4 related to Being in Possession of Public Stores contrary to ***Section 324(3)*** of the Penal Code, particulars being that on the 12th day of January 2010 at Murang'a Police Station yard, they were jointly found in possession of public store namely one pair of handcuffs serial EM.CD, the property of Kenya Government, such property being suspected of having been stolen or unlawfully obtained. In the last count, the appellants were charged with having suspected stolen property contrary to ***Section 323*** of the Penal Code, particulars being that on the 12th day of January at Muranga Police Station yard, jointly having been detained by No. 34671 Sgt Alphone Mbulu as a result of the exercise of the powers conferred by section 23 of the Criminal Procedure Code, they were found in possession of communication set Serial No. 70221165 make Kenwood reasonably suspected to have been stolen or unlawfully obtained.

As we have stated, the appeals by the appellants to the High Court succeeded in respect of counts 3, 4, & 5 and we shall only speak to the evidence in respect of those counts where it is relevant for purposes of this appeal as some of the evidence is interlinked and is not separable in the appeal before us.

Let us review the prosecution case and that of the defence to be able to carry out our mandate which we have already set out.

Mungai Kiboora (Mungai) (PW1), a contractor at Murang'a T/A Home Rectifying Limited situated at Murang'a town testified that on 30.12.09, after leaving home, he reached Muranga town and immediately proceeded to the Muranga branch of Equity Bank. He withdrew Kshs 60,000/= in cash from the bank to buy some materials related to his business. He had just left the bank and was walking when a motor vehicle stopped next to him. One person in the said vehicle played him a trick by beckoning and pretending to ask for directions. Mungai went near the vehicle to offer assistance but as he did so, a person emerged from the rear door who had handcuffs in his hands and came to him saying; *"you are the one we were looking for. These are the clothes. We are police."* He was immediately handcuffed and he started screaming as he suspected that these people were not genuine police officers. His struggles were thwarted by the force of the occupants of the vehicle and he was thrown into the vehicle and made to lie facing the floor. The vehicle was started and moved around to places he did not know as he could not see the outside or the surroundings. While in that position the money he had withdrawn from the bank and an extra Kshs 5,000/= which he had in his pocket was taken as was his mobile phone. His goggles were broken making it difficult for him to see and in the process he was beaten with fists and stepped on. He was injured on the limbs, shoulders, chest and abdomen. Probably as an act of humiliation, they removed his one shoe after which the vehicle stopped and he was ordered to go into a bush. He could not see the registration number of the motor vehicle as, according to him his glasses had been broken. When the abductors left in their motor vehicle he was able to get help after being told by people who rescued him that he was at Mwea. He was assisted to get to Murang'a but that was not before his humiliation in a public service vehicle where occupants laughed at him for having only one shoe. He explained to them what had befallen him and was thereafter helped to the scene where he had been abducted. Thereafter he recorded a statement at Murang'a Police Station and went to hospital for treatment. According to him he could recognize the person who had beckoned him asking for directions and the one who had handcuffed him.

Mungai was called to Murang'a Police Station on 13th January 2010 for purposes of an identification parade but the same did not take place as the appellants refused to participate in the same. He identified various photographs of a motor vehicle registration mark KBB 653 F which were shown to him. He further testified to the trial court that his abductors had handcuffs with a key and a pocket phone. He produced evidence to show that he had withdrawn money from the bank that morning and evidence of purchase of the phone that was stolen from him. In cross-examination, he stated that he was not asked to give a description of the abductors and did not give any description when he made a report to police.

Nelson Mwangi Muchai (Muchai) (PW2) was an employee of the then Municipal Council of Murang'a where he worked as a revenue collector and his office was next to the scene where Mungai was abducted. That morning at about 8.30 am he heard a person screaming asking for help and he saw a person who he knew (Mungai) being dragged into a motor vehicle. That motor vehicle was registration mark KBB 653F which he memorized, he was trying to approach the scene when the vehicle was driven off very fast towards Sagana. He testified that:

> ***"I did not recognize the people who were dragging him other people had also come to resave (sic) him"***

According to him there was another person, Kamau Ndungire at the scene, (this person did not testify before the trial court) who Muchai asked to telephone police. Police were called and came to the scene. He later met Mungai who related to him how he had been abducted and robbed. He did not know any of the persons who were charged before the trial court.

No. 71295, Cpl Codec Omari was based at CID Eldoret office where he was on 8th January 2010 when he was instructed by his superiors to mobilize officers to intercept suspects who were on their way from Eldoret to Kitale who were likely to be armed and were in a vehicle make Toyota Harrier registration mark No. KBK 280A. He moved to the said road with other officers where they patrolled and according to him, he was then informed by the DCIO Murang'a, Mr. Kisaka, on telephone, that he (Kisaka) had through the Safaricom system been able to establish that the suspect motor vehicle was at Milimani estate. He was directed by Mr. Kisaka to move to the Kitale – Kapenguria road and

when they reached the show ground, Mr. Kisaka again instructed them to go to the KCC road. On reaching there, they saw a motor vehicle which made a u-turn and when they approached it they realized that it was the suspect motor vehicle. They intercepted it and the occupants surrendered. On searching the motor vehicle they found 8 mobile phones, some clothes which occupants of the motor vehicle claimed to be theirs and school uniforms for Molo Academy. They took the motor vehicle and the occupants to Kitale Police Station where they interrogated them the next day 9th January 2010, he was instructed by the DCIO to escort the suspects to Nakuru which he did. They escorted the suspects and handed them over to CIP Maina of Special Crime Prevention Unit - Nairobi. He also handed to him the motor vehicle and the items that had been found in the vehicle. In cross-examination he testified that the motor vehicle that they had intercepted had been searched by himself, the DCIO and the OCPD, searches which were carried out in Kitale, Nakuru and Nairobi.

Evidence of **No. 58160, PC Erick Kithinji** of Muranga Scenes of Crime Section related to taking various photographs of a motor vehicle KBB 653F and another KBK 280A which he produced in court as part of the evidence.

Then there was the evidence of **Kennedy Wambugo Ruteere** (Ruteere) (PW5) who amongst other occupations owned a car hire business known as Joy Car Agencies whose offices were situate in Nairobi. He testified that on 15th December 2009 he had an appointment with the 1st appellant who had previously hired a vehicle from him. The 1st appellant wanted to hire a motor vehicle and they signed a car hire agreement in respect of KBB 653F to run from 16th December 2009 to 15th January 2010. According to him on 4th of January 2010, the 1st appellant requested to return the said motor vehicle and exchange it with a bigger one. KBB 653F was returned to Ruteere and exchanged with KBK 280A which the 1st appellant took in exchange. An agreement was made to that effect which was reduced to writing on an envelope as there was no writing paper. On 7th January 2010, Ruteere was approached by CID officers who wanted to know the whereabouts of KBB 653F on 30th December 2009. He informed the police that the vehicle had been hired by the 1st appellant who had returned it on 4th January 2010. He was informed that the motor vehicle had been involved in a robbery. He was later told that KBK 280A had been found in Kitale and people in it arrested. On being informed that the motor vehicle had been involved in a robbery, he contracted a vehicle tracking company and was informed of the movements of that motor vehicle for thirty days. He produced into evidence a print out on data for usage of that motor vehicle which included dates, time and path taken by the vehicle. That data showed movement of the motor vehicle which showed the vehicle as having been stationary at Muranga between 9.02 and 9.25 am on 30th December 2009. It also showed that the motor vehicle then proceeded to Sagana. In answer to a question in cross-examination, Ruteere confirmed that it was not indicated which tracking company he used and he did not know who had printed the data which he had shown in evidence.

The evidence of **No. 217401 ACP Emmanuel Kenga (PW6)** related to examination of documents. He had compared disputed documents with signatures of the 1st appellant and formed the opinion that the 1st appellant's signature in various documents were similar and were authored by the same person.

No. 212421, SSP Benjamin Mwaliko (PW7) was based at the photographic section of CID headquarters Nairobi. He had received exhibits from Murang'a Police Station relating to 3 identification cards similar to ones issued to police and upon examination he formed the opinion that they were not genuine and were as a result of forgery.

No. 231479, IP Joseph Musembi Mutua (PW 8) arranged identification parades but each of the appellants objected to participating in the same for various reasons including that members of the parade were of different sizes, height and features from those of the appellants.

No. 56844 Cpl John Okotho (PW 9) was attached to CID Murang'a and was on 20th January 2010 instructed by his superiors to go with other officers to the Special Crimes Prevention Unit Nairobi to collect some suspects. When he got there, he took charge of 4 suspects, 3 of who are the appellants here. The appellants were driven in a police vehicle from Nairobi to Murang'a and the motor vehicle KBK 280A was driven by a police officer from Nairobi to Muranga. On reaching there and in the presence of the appellants, the said motor vehicle was subjected to a thorough search and the process yielded handcuffs, certificates of appointment, a spent cartridge and a field pocket phone. They also found some clothes and a handbag. This officer made an inventory of items recovered which he produced as evidence. The appellants were detained and later charged.

No. 71671, PC Kamar (PW 10) attached to CID Murang'a as a driver was one of the officers who travelled from Murang'a Police Station to the offices of Special Crimes Prevention Unit Nairobi and drove the motor vehicle KBK 280A. According to him, he drove in close proximity with the police land rover where the appellants were all the way from Nairobi to Murang'a and the journey was non-stop. He participated when the vehicle was searched at the police station yard by Cpl Okotho and Sgt Mbulu and according to him, the items we have referred to were recovered from the motor vehicle.

The investigations officer in the case was **No. 34671, Sgt Alphonse Mburu (PW11).** He received a report on the 30th of December 2009 at 9.00 am of the incident involving Mungai. He visited the scene together with other officers but they did not find either Mungai or the abductors at the scene. Mungai visited the station on the same day at 12 noon and reported how he had been abducted by four people and robbed. He noted that Mungai had visible injuries on the face and neck and issued him with a P3 form. He carried out further investigations and was able to establish the owner of motor vehicle KBB 653F which belonged to one Rachel Ngesa Maina, wife to Ruteere. When he went to Ruteere's office, Ruteere told him that the motor vehicle had been hired by the 1st appellant on 15th December 2009. He was shown a document signed by Ruteere and the 1st appellant which he introduced into evidence. He further established that the 1st appellant had returned that motor vehicle on 4th January 2010 and hired another motor vehicle KBK 280A. Ruteere also told him that he had a device for tracking his cars. Using those tracking devices, they traced the latter vehicle KBK 280A to Kitale. He relayed that information to the Kitale police and the vehicle was intercepted. Arrangements were made for the vehicle and the appellants to be ferried to Nairobi. He collected the vehicle and the appellants from the Special Crimes Prevention Unit – Nairobi on 12th January 2010. He and others drove the vehicle to Murang'a Police Station where the appellants were detained. A search was conducted and the various items we have stated were found in the vehicle. According to this witness, he is the one who led in the searching of the motor vehicle and recovery of items. He produced various items as exhibits in the case. According to him, reference to motor vehicle KBK 820A was wrong as the correct registration No. was KBK 280A. In cross-examination, this witness admitted that the motor vehicle KBK 280A was searched in Kitale, in Nakuru and at SPCU – Nairobi offices before being searched at Murang'a Police Station. Further that Mungai did not give him any description of the people who

attacked him.

Emmanuel Langat, (PW 12) a ballistic expert at CID headquarters Nairobi was requested by CID Murang'a to examine a spent cartridge to ascertain the caliber and firearm used. He found the exhibit to be a caliber 7.62mm x 39mm. According to him, the exhibit was fired from an AK 47 rifle or a simanur rifle or any other firearm charged for that caliber.

That was the evidence that was tendered before the trial Magistrate by the prosecution after which fairly lengthy submissions were made by both sides on whether there was a case to answer. The trial Magistrate found that each of the four accused before him, three of who are appellants here, had a case to answer. In a sworn statement, the 1st appellant, **Peter Waihiga Kabiru** stated that he had been for about 30 years in transport business with a lorry business and also car hire. He referred to a delivery book and an invoice book in respect of the said business which had been produced as an exhibit in another case. He also produced a Certificate of Registration for the car hire business. In further evidence, he stated that on the 24th December 2009, he had traveled home for Christmas holidays and that on 26th December 2009, he was telephoned by one of his customers who he named as Josphat Mithanga who was looking for a motor vehicle to hire. They agreed and he took the vehicle to the said person. He produced a car hire agreement between him and Mithanga and a receipt and a copy of the identification card, driving licence of Mithanga and a receipt. He further stated that he gave Mithanga the motor vehicle KBB 653F because he would himself or as a business, hire motor vehicles which he would rehire to other people. According to him, he went back home where he remained until 2nd January 2010 as he had no vehicle to use. On 2nd January 2010 he went back to Nairobi as hired motor vehicles were being returned. He denied being in Murang'a on 30th December 2009. Further that on 2nd January 2010 while in Nairobi, he telephoned Ruteere from whom he had hired the motor vehicle and told him that he was to go to Kisumu to see customers there. Upon request, Ruteere gave him the motor vehicle KBK 280A on 4th January 2010, upon return of the 1st vehicle KBB 653F. The man Josphat Mithanga returned the vehicle he had hired to him which he now returned to Ruteere. He drove the motor vehicle to Kisumu on 12th January 2010 and the next day to Kitale. It was while in Kitale that he was intercepted by police, arrested with other occupants and the motor vehicle impounded. According to him the motor vehicle was searched at the scene and nothing was recovered. They were taken to Kitale Police Station where another search was conducted. They were then transported to Nakuru Police Station where the motor vehicle was again searched after they were detained there and later transported to Nairobi where the motor vehicle was searched again at Parklands Police Station. After several days, they were taken to Murang'a Police Station. According to him, the subject motor vehicle was left as SPCU – Nairobi. They were questioned about possession of guns but he denied ever having seen a gun apart from those with police. According to him, the investigating officer arrived holding handcuffs and a radio but the 1st appellant denied knowing anything about them. He was thoroughly beaten and forced to sign an inventory. He was taken round other police stations and when he was asked to participate in an identification parade he refused to participate because the people in the parade did not resemble him. He stated that he had been framed and that he should be freed.

The 2nd appellant, **Simon Baabu Mwangi** stated in a sworn statement that he was a broker of maize. He testified that he had been at home in Kitale and that on the 8th of January 2010, he was with the accused whose appeal was allowed and also with the 1st appellant when they were arrested. He related how on the 3rd January 2010, he had been telephoned and instructed to look for maize in Kitale which a customer wanted to buy. He found maize and it was the 1st appellant who was to transport it. While on the way to pick maize they were arrested by police. A search of the motor vehicle did not find any guns. He gave a long narration of being taken to various police stations as has already been stated. He refused to participate in an identification parade because parade members did not resemble him.

The third appellant **Zachary Zinga Kerosia** stated in a sworn statement that he was a second hand clothes dealer at Gikomba market, Nairobi but he also doubled up as a transport supervisor for the 1st appellant. According to him on 30th December 2009, he was at home in Isebania in Kuria District celebrating Christmas and did not return to Nairobi until 6th January 2010. On that day, his client enquired about transport of goods from Gikomba to Kisumu, he informed the 1st appellant about it and an agreement was made on how goods were to be transported. He prepared an invoice book for the job which he produced thus a delivery note as part of the evidence. According to him he and 1st appellant travelled to Kisumu but encountered mechanical problems of their vehicle on the way. The 1st appellant informed him that he required to be in Kitale. The 1st appellant then left for Kitale after they had agreed that he, the 3rd appellant, would join him in Kitale the next day. When the 3rd appellant arrived in Kitale he found the 1st appellant with the 2nd appellant and the accused whose appeal was allowed. They were driving to collect maize when they were arrested. The motor vehicle was searched and they were thereafter taken to various police stations in various towns and ended up at Murang'a Police Station. He said that they were tortured being asked to admit offences they had not committed.

That was the totality of the evidence presented before the trial court which was considered and the appellants convicted. The appeal came up for hearing before us on 23rd October 2018 when learned counsel **Mr. Paul Ngarua** appeared for the 1st appellant, learned Counsel Mr. **Wahome Gikonyo** appeared for the 2nd respondent while **Dr. Khaminwa** appeared for the 3rd appellant. **Mr. F. M. Njue, Senior Prosecution Counsel** appeared for the respondent.

The 1st appellant, Peter Waihiga Kabiru had filed homemade grounds of appeal where it is stated that identification was not proved to the required standard; that evidence of witnesses was not proved and that the High Court erred in not holding that the defence offered had been ignored.

In a Supplementary Memorandum of Appeal drawn for the 2nd appellant Simon Baabu Mwangi by his lawyers M/S Wahome Gikonyo & Company Advocates, the High Court is faulted for not holding that circumstances for identification were difficult; that the High Court should have held that evidence tendered before the trial court was not credible; that the High Court should have reversed the trial magistrate after finding that the trial magistrate had not warned himself of the danger of relying on a single identifying witness; that the High Court should have found that the alibi defence had not been considered and finally, that the High Court should have found a doubt in the prosecution case.

M/S Khaminwa & Khaminwa advocates filed Supplementary Grounds of Appeal on behalf of the 3rd appellant, **Zackary Sinda Kerosia**. It is urged in those grounds that the High Court should have found that witnesses were mistaken on the issue of identity of the attacker. It is further stated that the High Court erred in relying on the evidence of a single identifying witness and for ignoring a defence of alibi. The

sentence awarded is said to be unlawful and unconstitutional.

In submissions, **Mr. Ngarua** gave a history of the prosecution evidence. According to him the 1st appellant gave a good explanation to the investigations officer that he had left the subject motor vehicle to a **Mr. Mithanga**. The 1st appellant had produced receipts and a contract for car hire of the subject motor vehicle to Mr. Muthinga. Learned counsel submitted that the 1st appellant had given an alibi defence which according to him had not been considered by the trial court or the High Court on first appeal. Learned counsel submitted that the trial magistrate and the 1st appellate court were wrong not to consider that the 1st appellant had proved that he owned a business which dealt in car hire. According to counsel it was the duty of the prosecution once it was alleged that the 1st appellant owned a business and produced documents in support, the prosecution had a duty to investigate the truthfulness of the allegation. According to him it was also the prosecution's duty to investigate whether the person called Mithanga whom it was alleged had hired the subject motor vehicle existed or not. Counsel completed his submissions by urging that should the appeal on conviction fail, we should reconsider the death sentence imposed in the circumstances obtaining now where the Supreme Court has ruled that sentence of death is not mandatory.

In associating himself with the submissions of the counsel for the 1st appellant, Mr. Wahome for the 2nd appellant relied heavily on the case of **Muiruri & Others vs. R [2002] 1KLR 274** for the proposition that a witness should be asked for a description of attackers while making a 1st report. He pointed out that Mungai, the complainant, testified that he had not given any description to the police. Counsel attacked dock identification stating that it is unreliable. According

to Mr. Wahome, Ruteere's evidence on how he had collected and printed out data of a tracking device should not have been admitted as it did not comply with the provisions of the Evidence Act in relation to production of electronic evidence. He submitted that without a certificate as required by the said Act, such evidence is worthless and should not be relied on. According to Mr. Wahome the trial magistrate found that the 2nd appellant had false identification documents and other items but conviction on those counts was quashed by the High Court. He wondered why the High Court should believe part of the prosecution case and not believe the other part. According to him once the prosecution case failed in some respect, it should have failed in all respects. Counsel faulted the trial magistrate for rejecting the alibi defence or not considering it and further faulted the High Court for falling into the same trap. He cited the case **Kiarie VS. R [1984] eKLR** for the proposition that once alibi is raised as a defence it should be considered. On identification, counsel cited the case of **Matianyi VS. R [1986] KLR 198** and submitted that in the case before the trial court there was only one identifying witness and the trial court and the High Court should have warned themselves on the danger of relying on the evidence of a single identifying witness.

Dr. Khaminwa went through part of the evidence of the PW1 (Mungai) and wondered why no description was given to the police. In the absence of a description being given, it was counsel's view that there should have been some corroboration. According to counsel, Mungai was frightened when he was threatened by attackers. Counsel cited the case of **Muiruri & Others VS. R [2002]**

1KLR 274 and submitted that evidence of the prosecution should have been tested with the greatest care to exclude the possibility of mistaken identity where there was a single identifying witness. Counsel faulted the High Court on 1st appeal for holding that an identification parade was not necessary submitting that since Muchai who was near the scene did not give any evidence to corroborate Mungai's evidence on identification, such a parade was necessary. Counsel asked us to allow the appeal.

Mr. Njue opposed the appeal both on conviction and sentence submitting that the holdings by the courts below were proper and founded on the evidence. According to counsel, the High Court on first appeal was alive to its duty to re-evaluate the evidence and come to its own conclusion and according to him once the Judges did so, they acquitted a 4th accused on all counts and also acquitted the appellants in respect of some counts. According to counsel there was proper identification of the appellants to found a conviction. He defended the courts below for relying on a single identifying witness submitting that a court is entitled to rely on a single identifying witness to found a conviction as long as the court is satisfied of the soundness of the evidence. Counsel appeared to admit that the trial Magistrate did not warn himself on the danger of relying on a single identifying witness. According to counsel however, the robbery took place at 9.00 am; there was a struggle between Mungai and the appellants which took about 15 minutes and Mungai must have had an opportunity to see the 3 appellants. Mungai in evidence having given details on what each of the appellants did in the robbery his evidence should believed. On alibi raised by the appellants, it was counsel's view that the appellants had no duty in law to prove the defence of alibi but that the trial court had given weight to that evidence and found it to be discounted by the prosecution evidence. Counsel cited the case of **Nathan Kamau Mugwe VS. R. [2009] eKLR** for the proposition that it is good practice for police to ask for description of an attacker but that failure to do so does not render evidence of identification worthless. On sentence, it was counsel's view that after the Supreme Court decision in **Francis Muruatetu vs. R [2017] eKLR**, the Attorney General was ordered to constitute a framework to re-look into the issue of death penalty and we should await the determination of the taskforce that has been constituted by the Attorney General. He therefore asked us to dismiss the appeal.

In a brief reply, Mr. Ngarua submitted that the credibility of the evidence of Mungai was questionable. According to him, the dock identification by Mungai should not have been relied on the trial magistrate having not warned himself on the danger of relying on a single identifying witness without corroboration. According to counsel the High Court did not re-evaluate the evidence but only summarized what the trial magistrate had found.

According to Mr. Wahome, the High Court did not re-evaluate the evidence and did not consider that the trial magistrate had not warned himself on the danger of relying on a single identifying witness.

Dr. Khaminwa submitted that Mungai could have been honest but mistaken.

We have considered the whole record, submissions made before us both written and oral and the law.

As we have already stated, our duty on a second appeal like this one is consideration of issues of law but not matters of fact. One of the issues that has been taken in this appeal is whether the appellants were properly identified to found a conviction. We recognize this to be an issue of law calling for our consideration.

All counsel for the appellants submit that there was no identification of the attackers by Mungai who did not give any description when he reported the matter to the police. In evidence before the trial magistrate Mungai related how while walking from Equity Bank, Muranga, was tricked into going near a motor vehicle and then was told by the occupants that they were police officers. They apprehended him and put him in their motor vehicle where despite his screams nobody came to his aid. In the cause of the struggle in the motor vehicle they broke his glasses. When later that day he reported the matter at Murang'a Police Station, he did not give any description of the people who had attacked him. On whether

Mungai was able to identify his attackers, this is what the trial magistrate said in the judgment.

> ***"It was during the day. PW1 had his glasses on them (sic). He talked of the 3 people he saw, he did not talk of accused 3, he said he did not see him, then he did not go to identify any accused in an identification but his identification is from the dock, but nothing shows it is not credible and genuine. He impressed court as a truthful and factual man".***

On the evidence of PW2 (Muchai) who was at the scene and gave the registration Number of a motor vehicle, the trial magistrate held that failure to call a man called Kamau Ndugire who had telephoned police was of no substance because Muchai had given the registration number of the motor vehicle to the police.

On the issue of identification this is what the High Court said in its judgment:

> ***"The only person who saw and identified the complainant's attackers was the complainant himself; he was, in the common legal parlance a single identification witness. As we understand the appellants, the trial court should have dismissed the complainant's evidence on identification of the appellants in the absence of an identification parade and that the learned Magistrate erred in law in relying on the evidence of dock identification".***

The High Court then went on to hold that the evidence of Mungai was consistent and credible and that he had been able to positively identify his attackers. The High Court relied on the case of **Muiruri & Others vs. R** (supra), where this Court addressed the evidence of a single identifying witness. The relevant text of that judgment is reproduced in the judgment of the High Court but because of its importance to the issue calling for our determination, we shall reproduce it here:

> ***"It is believed because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of……we do not think it can be safe that all dock identifications are worthless. If that were to be the case, then decisions like ABDULA BIN WENDOH [1953] 20 EACA 166, ROLIA VS. R [1967 EA 583 and CHARLES MAITANYI VS. R. [1986] 2 KLR 76 among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases the courts have emphasized the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that the evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if it is satisfied on facts and circumstances of the case. The evidence must be true and if prior to, the court warns itself of the danger of mistaken identification."***

In the **Maitanyi case** (supra)**,** on the issue of the evidence of a single identifying witness, it was held that although it is trite that a fact may be proved by the testimony of a single witness, it does not lessen the need to test 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. It was further held:

> ***"2. When testing the evidence of a single witness, a careful inquiry ought to be made into the nature of the light available, conditions and whether the witness was able to make a true impression and description.***
>
> ***3.The court must warn itself of the danger of relying on the evidence of a single identifying witness, it is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.***
>
> ***4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction."***

In the earlier English case of **Rv Turnbull vs. r [1976] 3All ER 549,** it was held that a witness may be honest but be mistaken.

Looking at the record before us, 12 witnesses testified before the trial court. Mungai was the person who was attacked; Muchai was near the scene and he only noted the registration number of the motor vehicle but did not give any description of the people who attacked Mungai who was a person known to him. The only other civilian witness called by the prosecution was Ruteere who dealt with motor vehicles. All the other witnesses were police officers who gave various evidence to link the appellants to the offences of robbery with violence, personating a public officer, making a document without authority, being in possession of public stores and having suspected stolen property.

It was the prosecution case before the trial court that the appellants were apprehended and arrested in a motor vehicle in Kitale. That motor vehicle was searched by the police in Kitale, was again searched in Nakuru and Nairobi. When it was finally searched at Muranga Police Station, various items were alleged to have been found. Upon analysis, the High Court found that it was not possible for all those searches to have been undertaken in police stations in the various towns we have spoken about and thereafter items to be recovered in the motor vehicle at Muranga Police Station, which items had not been found before. That is why the High Court without saying so loudly found that those items could have been planted in the motor vehicle either in Nairobi or Muranga. Thus the appeals in respect of counts 3, 4, & 5 succeeding

at the High Court. Having found that the police could have done so, we are disturbed that the High Court could turn around to believe the case made by the prosecution in respect of the robbery with violence charge. Mungai did not give any description of his attackers when he reported the incident to police later the same day and Muchai who was at the scene memorized the registration number of a motor vehicle but did not notice who the attackers were or give any description. The police then go on a mission to look for guns and other items set out in the various counts that were preferred against the appellants but did not bother to look for any person in Murang'a town who could have witnessed the robbery to corroborate evidence of Mungai. Dr. Khaminwa, learned counsel of the 3rd appellant could well be right in his submissions that the case was poorly investigated. It appears that the police were out to look for guns and handcuffs and omitted the important mission of getting a witness or witnesses who would give credible evidence in support of the prosecution case. In the case where Mungai had not given any description of the attackers, Muchai's evidence could not corroborate anything at all. There was need to find credible evidence in the absence of which the High Court was wrong to sustain the charges.

The other disturbing aspect of the case relates to the findings of the trial court and the High Court on production of electronic evidence.

Ruteere testified that he was able to use a tracking device of an unnamed company to track his motor vehicles. He produced data before the trial court to show movement of his vehicles. The trial court was impressed by that evidence. The witness did not produce any certificate to show that he was qualified to produce electronic evidence. Production of electronic evidence is essentially governed by the provisions of Section 106 A and 106 B of the Evidence Act, Cap 80 Laws of Kenya. By those provisions contents of electronic records may be proved in accordance of Section 106 B. Section 106 B provides that:

> ***"106 B. (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.***
>
> ***(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following-***
>
> > ***(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;***
> >
> > ***(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;***
> >
> > ***(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and***
> >
> > ***(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.***
>
> ***(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub-section (2) was regularly performed by computers, whether-***
>
> > ***(a) by a combination of computers operating in succession over that period;***
> >
> > ***Or***
> >
> > ***(b) by different computers operating in succession over that period;***
> >
> > ***(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this section to a computer shall be construed accordingly.***
>
> ***(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following-***
>
> > ***(a) identifying the electronic record containing the statement and describing the manner in which it was produced;***
> >
> > ***(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;***
> >
> > ***(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and***
> >
> > ***(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant***

device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities".

In a recent case by this Court sitting at Kisumu, **County Assembly of Kisumu & 2 Others vs. Kisumu County Assembly Service Board & 6 Others [2015] KLR,** it was held that the provisions of Section 106 B of the said Act were mandatory in nature and that a court should not admit in evidence or rely on manipulated electronic evidence or record. At paragraph 67 of the judgment in relation to production of electronic evidence, it was held that:

"….the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that persons activities using a computer or some other electronic device and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was produced."

In the matter before the trial court, Ruteere did not testify that he had control over the computer, he did not testify how the computer or its output was recorded and how the computer operated during that period and he did not give any certificate as required by the Evidence Act. We agree with Mr. Wahome, counsel for the 2nd appellant, that it was wrong for the trial court to rely on that electronic evidence when that evidence had not been properly produced before the trial court. It was wrong for the High Court to rely on the same on first appeal.

We have found identification of the appellants in the case before the trial court to have been wanting and we think that the conviction was unsafe. We have also found that the courts below were wrong to rely on electronic evidence without following the law on production of such evidence. We find that this appeal has merit and we allow it. The convictions of the appellants are hereby quashed, the sentences are set aside and the appellants shall be released forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri, this 13th day of February, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR