



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, SICHALE & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 88 of 2013

BETWEEN

WALLEN NYANDO MAKOMEREAPPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court of Kenya at Nairobi (Warsame & Khaminwa, JJ.) dated 16th May 2010

in

H.C.CR. A No. 680 of 2007)

JUDGMENT OF THE COURT

1. The appellant, **Wallen Nyando Makomere**, was charged with a total of five counts; three counts related to the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code, Cap 63 of the Laws of Kenya**. The particulars in Count I were that on 14th December 2004, at Eastleigh 7th Street in Nairobi within Nairobi area, jointly with others not before court while armed with dangerous weapons namely pistols robbed **Abdirazak Mohammed** of his cash Ksh.1,200/= and a Nokia phone all valued at Ksh.7,200/= and at or immediately after the time of such robbery threatened to use personal violence to the said **Abdirazak**. Particulars of Count II were that on the same day and place jointly with others not before the court while armed with dangerous weapons namely pistols robbed **Biri Ahmed Abdi** cash Ksh. 3,070/=, a wrist watch make Casio and a mobile phone make Motorola T190 all valued at Ksh. 10,570/= and at or immediately after the time of such robbery threatened to use personal violence to the said **Biri Ahmed Abdi**. In Count III, the particulars were that on 14th December 2004 at Eastleigh 7th Street, jointly with others not before court while armed with dangerous weapons namely pistols robbed **Bilal Osman Hassan** cash Ksh. 2,500/= and mobile phone make Nokia 3310 all valued at Ksh. 7,500/= and at or immediately after the time of such robbery threatened to use personal violence to the said **Bilal Osman Hassan**. Count IV was possession of a firearm without a firearm certificate contrary to **Section 4 (3) of the Firearm Act, Cap 114, Laws of Kenya**; the particulars were that on 14th December 2004 at Eastleigh 7th Street, jointly with others not before court he was found in possession of a Baretta Pistol Serial no. A69265 without a firearm certificate. Count V was the

charge of being in possession of ammunition without a firearm certificate contrary to **Section 4 (1)** as read with **Section 4 (3)** of the **Firearm Act, Cap 114** of the Laws of Kenya.

2. The prosecution case rested on the testimonies of **PW1 Biri Ahmed Abid**, **PW2 Police Constable No. 69405 Nelson Muereithi**, **PW3 Police Constable No. 60401 Okumu Thomas Otieno**; **PW4 Lawrence Ndiwa** firearms examiner; **PW5 Police Constable Morrison Gituku** and **PW6 Police Constable No. 54298 Morrison Kituki**.
3. The trial magistrate convicted the appellant on Count II and sentenced him to death. There is no express pronouncement of acquittal of the appellant by the trial magistrate in relation to the other Counts in the charge sheet.
4. **PW1, Biri Ahmed Abid**, testified as follows:

“On 14th December 2004, I was in Nairobi at Eastleigh walking from Jam Street to 12th Street. I met five (5) thugs. One of them, the accused in court, was arrested. They shot me and robbed me. They stopped me like policemen. They hit me with a gun. It was a small gun. They stole my Ksh.3,070/= from my shirt pocket and my motorolla phone and watch from my pocket. The watch was casio. I went a few steps and met police officers and told police I had been attacked as they asked why I had blood and mud. They had pushed me in muddy water. I could see them robbing other people I told the police they were the ones. Police went and followed and killed four (4) of them. The accused in court lay down and was not killed. My money, phone and watch were recovered. I saw a pistol recovered from the accused. I was hit with a gun not bullet, it was this small gun. It was 6.00 am, there was a church and school and there was enough electric lighting; the sun had started rising about 6.45 am.”

5. In cross-examination, PW1 stated that the appellant was lying down between the four thugs who had been shot dead and items were recovered from the appellant. He stated that his wallet was recovered from the appellant's trouser pocket.
6. **PW2, PC Nelson Mureithi**, testified as follows:

“On 14th December 2004, I was on foot patrol within Eastleigh 7th Street at 6.30 am. Civilians came to us while at work with the late PC Langat, PC Emmunio, PC Okumu, PC Nyagah, PC Akwima, PC Kariuki and PC Nyaloti. The complaint was that a gang of four (4) had robbed them using guns within 7th Street and 1st Avenue just some distance away. They pointed them from a distance and they were a group of five (5). They were walking in the street. We ordered them to stop. They defied our orders and others started running, others removed guns and started shooting at us. We followed one who had passed 1st Avenue until 10th Avenue. When we arrested him PC Apima covered me as I searched him. I got a mobile Motorola T190 value Ksh.5, 500/= identified as MFI 1 and a casio watch valued at Ksh. 2,000/= identified as MFI 2 with Ksh. 2,000/=. We escorted him to where we had left other officers and I found the police officers had gunned down four (4) suspects and recovered a Berrata Pistol identified as MFI 4 with five (5) rounds of ammunition and 2 cartridges. At the scene, one the civilians who is PW1 identified the phone, money and watch as his. He also saw the gun. The gun and recovered ammunition were sent to the ballistic examiner.”

7. In cross-examination, PW2 testified that he was with **PC Langat** and **PC Akima**. Initially, the police were unwilling to produce the Statement of PC Langat. Eventually, after a warrant of arrest was issued to the investigating officer the Statement of PC Langat (now deceased) was read in court; the statement is to the effect that the appellant was lying among the dead. PW 2 in re-examination emphasized that he and PC Langat chased the appellant and did not lose sight of the appellant and the gun was recovered from those who had been gunned down. It is noteworthy that

PW1 testified that the gun was recovered from the appellant.

8. **PW3, PC Okumu**, testified that on the day of the offence, they gave chase to the thugs who opened fire and they returned fire killing four of them. That one of the thugs was chased by **PC Akima** who caught him and recovered Ksh. 2,000/=, a wrist watch and mobile phone and a Baretta Pistol; that the gun was recovered from one of the deceased thugs and it was sent for ballistic examination. In cross-examination, PW3 stated that the appellant was arrested between 7th and 8th Street; that most of the passersby who heard gun shots lay down but those who were running were chased.
9. **PW4, Lawrence Ndiwa**, testified as a ballistic examiner and identified the Pistol and ammunition and confirmed that indeed they were a firearm and ammunition and was in serviceable condition and could fire.
10. In his defence, the appellant gave sworn testimony stating:

“I recall on 14th December 2004. I was from Mathare collecting my alcohol which I sell. I met Police Constable Langat whom I had differed with as I had failed to give him money for my payment for selling alcohol. He threatened me saying I would see and he arrested me. We reached 7th Street near Chief’s camp. He told me to lie down. I did. There were many people nearby. He asked me for money. I told him I had a Motorola Phone, Ksh. 2,000/= and a casio watch which I gave him. He told me to board a car. Shortly, other people were brought in the car sleeping. We went with them to Pangani Police Station where I realized they were dead. Later I was charged. I thought I was to be charged with the alcohol offence. I was shocked as I was charged with a different offence. I was from Mathare and was taken to 7th Street by PC Langat and PC Akima. It is not true that my four colleagues had been killed. I bought the Casio watch at Garissa Lodge. I have the receipt for the mobile phone and wish to produce it in court. “

11. The prosecutor objected to the appellant’s production of the receipt as the maker was not called to testify. The trial court ruled that as the maker of the receipt was not before court, the receipt was not admissible in evidence. The appellant stated he could not get the maker.
12. In convicting the appellant, the trial magistrate stated that the complainant, PW1, was a very forthright witness. After evaluating the evidence, the magistrate expressed herself thus:

“From the prosecution evidence, the incident occurred between 6 am and 6.45 am by the complainant’s testimony. There were not many passers by which greatly reduce an incident of mistaken identity of the accused. This coupled with the fact that PW1 stated when he met the police immediately after the robbery the gang was still visible and as they walked he pointed them out to the police. The area was well lit with there being a church and school nearby and the sun was rising. PW2 PC Nelson Mureithi who chased the accused and subsequently arrested him was very categorical in his evidence that as he chased the accused he did not lose sight of him. Upon searching him as his colleague PC Akima covered him, he recovered a pink motorolla phone, casio watch and Ksh. 2,000/= which the complainant identified as his. The fact that PW2 who arrested the accused did not lose sight of him during the chase and subsequently recovered the complainant’s stolen property on the very suspect he was chasing rules out all possibility of the accused having been mistakenly identified. The doctrine of recent possession also applies rendering the accused’s defence null. The accused in his defence stated that the phone and watch belonged to him maintaining that he had bought the watch at Garissa Lodge. The phone being a data bank, if indeed it belonged to the accused, I am sure he would have been able to show the court some of his personal information he had stored. The fact that he did not only serves to show this was a frivolous unsupported claim. I note the complainant had nothing to show the phone was his; however, during trial I took note of the unique pink purple colour of the motorolla phone; it is not a common colour for a

phone and it would be coincidental that the accused would have a similar phone make and especially colour of the phone on the material day and time a short distance from where the complainant was robbed. Failure to present receipt for the same by the complainant in face of overwhelming evidence against the accused does not negate his claim of ownership and I find I am convinced the phone recovered on the accused together with the casio watch were the very ones that the complainant was robbed of. I take note of the slight contradictions in regard to the manner of arrest of the accused; however, in so far as the complainant's property was recovered on the accused, I find the said anomalies are not fatal to the well corroborated prosecution case. The accused was in the company of four others who were armed with a pistol the ingredients of the offence of robbery with violence having been satisfactorily proved. I find the accused defence has not cast any doubt on the prosecution case. I find the accused guilty.”

13. The appellant's appeal to the High Court was dismissed. In dismissing the appeal, the learned judges expressed themselves as follows:

“The defendant in his defence claims that there was a long standing grudge between him and the late PC Langat over illicit brew business which he was involved. The trial court considered that defence and found it wanting on the grounds that the defendant wanted to transfer his guilt because the late Langat could not defend himself against the allegations by the appellant. As rightly pointed out by the trial court, there is no evidence to show that the late PC Langat stage managed the robbery in order to fix the appellant. There is no evidence to show that the late PC Langat together with PW2, PW3, PW4 and PW5 conspired and stage managed the alleged robbery. The appellant confirmed that he was arrested by PW2, PW3 and PW4 within the area where the subject robbery took place. He also confirmed he found dead bodies in the Land Rover that took him to Pangani Police Station. However, he avoided mentioning that the said bodies were in any way connected to the said robbery and the shooting that took place after they were ordered to stop. It is clear that the appellant laid claim to the items that were recovered from him but the trial court correctly found that the said defence was false. We too agree. In short we are in total agreement with the trial court that the appellant was arrested a few metres away from the scene and after his friends were shot. We are in agreement with the trial court that the prosecution had proved its case beyond reasonable doubt....We uphold the conviction and affirm the sentence.”

14. Aggrieved by the dismissal of his appeal at the High Court, the appellant has lodged this second appeal on the following grounds:

- “a) The learned judges erred in law and fact in upholding conviction and relying on evidence of identification when the same was not conclusive as the conditions for identification were not favourable.*
- b. The judges erred in law and fact in upholding conviction and sentence without considering that the prosecution had not proved its case beyond reasonable doubt.*
- c. The judges erred in law and fact by failing to draw adverse inference against the prosecution in failure to call material witnesses.*
- d. The judges erred in failing to critically re-evaluate and analyze the evidence on record which does not accord with fair trial.”*

15. During hearing, learned counsel Mr. Mbugua Mureithi appeared for the appellant while the State was represented by Senior Assistant Director of Public Prosecution, Mr. Vincent Macharia Wohoro.

16. Counsel for the appellant submitted that the issue in this appeal is one of fair trial; that on the face of it, the case looks a simple robbery with violence followed by an almost immediate arrest,

- recovery of items and the appellant being taken to Pangani Police Station. It was submitted that a critical look at the evidence shows the case is not that simple; that although PW 1 stated he was at the scene all the time, as per the initial charge sheet against the appellant, PW1 was not the complainant. The complainant in the initial charge sheet was **Mr. Abdirizak Mohamed** the alleged complainant in Count I. The complainant who has put the appellant in this case is not **Abdirizak Mohammed** but PW1; that PW1 only appears when a substituted charge sheet was prepared and then PW2 and PW3 are introduced into the case as witnesses.
17. Counsel for the appellant observed that the first and third complainants never turned up during trial; that there was allegation of use of firearm and its recovery on the spot; that the firearm was a baretta pistol. The firearm and ammunition was the subject of Counts IV and V that were subsequently included in the substituted charge sheet. Counsel urged that the critical question is, if the firearm was recovered why was it not part of the initial charges; that the police stated that the rest of the gang had been shot dead, if the pistol was Baretta and the complainant who is a civilian also called it a Baretta pistol, when the pistol was submitted to the ballistic examiner (PW4), the gun submitted bore a different serial number from what was recovered; the gun was not a Barretta but an Italian pistol. Counsel submitted that the ballistic report pre-dates the date of the 2nd amended charge sheet. Counsel posited the question that when the Police were including the 2nd and 3rd complainants, why didn't they include the firearm issues?
18. The appellant's defence is that he must have been fabricated by the late **PC Langat**. This defence was dismissed by the trial court on the ground that **PC Langat** was dead and the dead tell no tales. It was submitted that the appellant was in custody when he made his defence of framing right from cross-examination of PW1; that there is no date of the demise of **PC Langat**. Counsel emphasized that there is possibility that **PC Langat** framed the appellant; that it took the prosecution more than two years to disclose its case to the appellant. This Court was urged to note that the witness statement of **PC Langat** was produced after a warrant of arrest had been issued against the investigating officer and the question is why were the police reluctant to produce the same?
19. The appellant raised the issue of identification and submitted that the circumstances for positive identification were not conducive as narrated by PW1; that PW1 stated he was tense and was not capable of positive identification; that he was blindfolded and thrown into the mud and it was 6.45 am. Counsel submitted that the lighting situation was not clearly explained; that the evidence of a chase did not come out in examination in chief but in cross-examination of PW2; that the appellant claimed ownership of the Motorola phone and the complainant had no receipt. Counsel submitted that the trial court shifted the burden of proof as to the ownership of the casio watch when the court stated that the complainant could have demonstrated that his personal data was in the watch.
20. Counsel for the appellant submitted that in totality, the burden of proof was not discharged by the prosecution and it was shifted to the appellant; that the evidence of PW1 should be approached with a pinch of salt as he was a person prone to exaggeration; that nowhere did the police allude to recovery of PW1's wallet; that the appellant was accused of robbing other people in Counts 1 and 3 yet the police said nothing about this and that the officer who filled the exhibit form was not called to testify.
21. In support of his submissions, counsel for the appellant cited the following authorities: **Peter Maina Mwangi & Another -v- R, Court of Appeal at Nyeri CR.A. No. 389 of 2009 (2013) eKLR**; **Wardi Yussuf & 2 others -v- R, (2007) eKLR**; **Joel Saiyanga Ole Mwaniki & Another, (2007) eKLR**; **Arnold Odhiambo Ogolla & Another -v- R, (2013) eKLR**.
22. The State in opposing the appeal urged that the prosecution had proved its case to the required standard; that the burden of proof was never shifted to the appellant. It was submitted that there was nothing sinister in the police substituting and amending the Charge Sheet to include more Counts; that what commenced was trial on Count II and it is the evidence on Count II that led to

conviction of the appellant. The State submitted that the appellant had not demonstrated how he was prejudiced by substitution of the Charge Sheet and the failure to call witnesses in Counts I and III; that there was nothing on record to indicate that the witnesses in Counts I and III were together with PW I who was the witness in Count II. It was submitted that the learned judges of the High Court properly and rigorously re-evaluated the evidence and arrived at correct conclusions. The State submitted that the issue of the pistol was settled by the ballistic expert PW4 and it is not for lay persons to state the type of Pistol or firearm that was recovered. The State submitted that much had been said about **PC Langat** who is deceased; that the prosecution could not verify any allegations against **PC Langat** as he was dead and the investigations on his role in arresting the appellant had come to a dead end. It was submitted that fate of this appeal rested on the evidence of the complainant and PW2, that the critical issue is whether the complainant and PW2 lost sight of the appellant. The State noted that ownership of the items recovered was claimed by both the appellant and PW1 and submitted that the items were positively identified by PW1. On identification, it was submitted that PW1 testified that he pointed the appellant to the police and this was not a coincidence because would the appellant and PW1 be both at the scene of crime?

23. Counsel for the appellant did not make any submissions in reply.

24. We have considered the grounds of appeal as well as submissions by the State and counsel for the appellant and the authorities cited. This is a second appeal and as was stated in **Kavingo -v- R, (1982) KLR 214**, a second appellate court will not interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. This was further emphasized in **Chemagong vs. Republic (1984) KLR 213** at page 219 where this Court held:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146).”

25. There are five issues relevant to the determination of this appeal. These are: evidence on positive and conclusive identification of the appellant; positive identification of the recovered items; burden of proof; whether the prosecution proved its case beyond reasonable doubt and whether the High Court properly re-evaluated the evidence on record.

26. The prosecution evidence relevant to identification of the appellant is the testimonies of PW1 and PW2. PW1 testified that he was able to point out the appellant to the police; PW2 testified that he gave chase to the appellant and never lost sight of him until he was arrested. Does the testimony of PW1 and PW2 support positive and conclusive identification of the appellant? The answer becomes clear when one evaluates the evidence on record relating to the exact place where the appellant was arrested and by whom.

27. The scene of crime is stated to be at 7th Street Eastleigh. PW1 testified that the appellant was arrested as he lay down between the bodies of the four (4) thugs who had been shot and killed by the police. The statement of **PC Langat** (now deceased) that was read in court is to the effect that the appellant was lying among the dead. PW3 testified that the appellant was arrested after chase by police between the 7th and 8th Street. Could the appellant be at two different places at the same time? Mere presence at the scene of crime is not proof of participation or being an accessory to the crime. Lying among the dead and mere presence at the scene is not enough, the prosecution must lead evidence implicating and incriminating the appellant beyond reasonable doubt.

28. PW1 testified that there was light coming from a nearby church and school and the sun was rising. What is glaringly absent in the judgment of the trial court and the High Court is analysis and re-evaluation of the lighting conditions that existed at the time of the offence. The intensity of light from the church and school and its position relative to the appellant and PW1 is not stated and was not evaluated by the two courts below. In **Wamunga vs. Republic, (1989) KLR 424** it was stated

that:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

29. From the evidence adduced, no information was given as to the intensity and brightness of the light from the church and school. This information was necessary to enable the court carefully test the identification evidence. The evidence of identification at dawn must be tested with the greatest care using the guidelines in **Republic - v- Turnbull, (1976) 3 All ER 549** and must be absolutely watertight to justify conviction. (See **Nzaro -v- Republic, 1991 KAR 212** and **Kiarie -v- Republic, 1984 KLR 739**). In the case of **Maitanyi - v- Republic 1986 KLR 198**, this Court stated that in determining the quality of identification using light, it is at least essential to ascertain the nature of the light available, what sort of light, its intensity and its position relative to the suspect.
30. In the present case, no inquiry was made by the learned judges as to the nature of the alleged light or its intensity. No inquiry was made to determine its brightness and position in relation to the appellant. In the absence of such inquiry, the evidence of identification of the appellant cannot be held to be free from error (See **Simiyu & Another -v-Republic [2005] 1 KLR 192**). We are convinced that there was no proper testing of the evidence of identification of the appellant by the two lower courts.
31. On the issue of chase, it was the testimony of PW2 that he together with **PC Akima** arrested the appellant. PW3 testified it was him and **PC Akima** who arrested the appellant after a chase and it was **PC Akima** who caught the appellant and also recovered a Barreta Pistol. PW3 testified that **PC Langat** did not arrest anyone and he did not know why **PC Langat** stated in his statement that he was the only one who arrested the appellant. The trial magistrate appreciated the contradiction in the evidence and circumstances relating to arrest of the appellant and discounted the same based on the doctrine of recent possession. The learned judges upheld the trial magistrates finding and conclusion on the contradictory evidence. On our part, taking together the fact that there was no conclusive and positive identification of ownership of the recovered items and considering the contradictions in evidence and circumstances of arrest of the appellant, we are of the view that the prosecution did not lead evidence on continuous chase and arrest of the appellant to the required standard. There is plausible doubt that the appellant could not be lying down among the dead and at the same time being chased while running away.
32. PW1 testified that his wallet was recovered from the appellant. Nowhere in the testimony of police officers PW2 and PW3 is recovery of a wallet listed as among the items recovered at the scene of crime.
33. Burden of proof has been urged as a ground of appeal. This ground is tied to the question whether the prosecution proved beyond reasonable doubt that the Motorola phone and the Casio watch recovered at the scene belonged to PW1. The issue of recovery of the Motorola phone from the appellant is not disputed because the appellant admitted he had possession and the phone was his. The legal question is whether the phone belonged to the appellant or PW1 the complainant. In **Peter Kariuki Kibue vs. Republic, Criminal Appeal No. 21 of 2001** at Nairobi (unreported) where the appellant was found in possession of recently stolen items and he failed to give a satisfactory explanation as to how he came by them, this Court stated that:

“The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items, otherwise than as the thief or guilty receiver. This is a rebuttable presumption of law based on the provisions of Section 119 of the Evidence Act”

34. The above statement by this Court is a correct exposition of law where the doctrine of recent possession is applicable. One of the conditions to be fulfilled before the doctrine of recent possession is applied is that there must be proof that the recovered item belongs to or was in possession or custody or control of and or is owned by the complainant. Proof of ownership and or prior possession by the complainant is a must. When the appellant testified that he owned the recovered casio watch and motorola phone, the burden to prove beyond reasonable doubt that the recovered items belonged to PW1 remained with the prosecution. Faced with the allegation that the appellant owned the recovered items, it was incumbent upon the prosecution to adduce evidence beyond reasonable doubt that PW1 owned the recovered items. Such proof cannot and could not be inferred from the trial magistrate's own observations in court; proof of ownership by PW1 can not be established by the fact that the appellant did not demonstrate that he had any personal data in the Casio watch.

35. In **Okethi Okale & others -v- R, (1965) EA 555**, the predecessor of this court correctly held that in every criminal trial, a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadmissible for a trial court to put forward a theory not canvassed in evidence. In arriving at the conclusion that the recovered items belonged to PW1, both the trial magistrate and the learned judges erred in law as they shifted the burden of proof to the appellant. The following statement by the trial magistrate shifted the burden of proof:

“The watch being a data bank, if indeed it belonged to the accused, I am sure he would have been able to show the court some of his personal information he had stored. The fact that he did not only serves to show this was a frivolous unsupported claim.”

36. In our considered view, both the trial court and the learned judges erred in drawing inference from the trial court's own opinion and not an inference drawn based on evidence on record. Trial magistrate erroneously drew inference when she stated as follows:

“I note the complainant had nothing to show the phone was his. However, during trial, I took note of the unique pink purple colour of the Motorola phone, it is not a common colour for a phone and it would be coincidental that the accused would have a similar phone make and especially colour of the phone on the material day and time a short distance from where the complainant was robbed. Failure to present receipt for the same by the complainant in face of overwhelming evidence against the accused does not negate his claim of ownership and I find I am convinced the phone recovered on the accused together with the Casio watch were the very ones that the complainant was robbed of.” (Emphasis ours).

37. The learned judges of the High Court erred by adopting, upholding and affirming the above quoted erroneous inference. The trial magistrate further erred on the question of burden of proof and standard of proof although the trial court correctly noted the complainant had nothing to show the phone was his. The trial court erred by finding that the watch did not belong to the appellant because the appellant did not show any personal data stored in it. This is not a sound reason for making such a finding. There is no evidence on record to prove that the complainant PW1 was required on his part to show any personal data that he (PW1) had stored on the phone. In demanding that it was the appellant who was to show his personal data was in the phone and not the complainant, the trial court erred and shifted the burden of proof.

38. It is our finding that the learned judges erred in law in adopting and affirming the erroneous application of the burden and standard of proof by the trial magistrate. In **Suleiman Juma alias Tom -v- R, Criminal Appeal No. 181 of 2002 (Msa)**, this Court stated that where the life of an individual is at stake, the prosecution must be extremely careful not to bring evidence that is less than watertight. Our consideration of the record of appeal and the grounds of appeal lead us to arrive at the determination that the learned judges erred in law and failed to properly re-evaluate the evidence on record; the judges erred in affirming the erroneous application of the burden and

standard of proof in relation to the recovered items. We come to the conclusion that the prosecution failed to prove its case beyond reasonable doubt and hence this appeal has merit. We allow it.

39. Accordingly, we hereby set aside the conviction and sentence meted out to the appellant by the trial court and upheld and affirmed by the High Court. The appellant shall be released and set free forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 12th day of February, 2016.

G. B.M. KARIUKI

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR