IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CRIMINAL APPEAL NO. 13 OF 2013

BETWEEN

MOSES MWANGI KANYEKI.....1ST APPELLANT

JOHN KAGONDU MACHARIA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction/Judgment of the High Court of Kenya at Nyeri (Wakiaga & Sergon, JJ)

Dated 3rd October, 2012.

in

H.C.CR.AP.NO. 133/06)

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JUDGMENT OF THE COURT

Introduction and Background

The two Appellants ***Moses Mwangi Kanyeki*** alias ***John Wachira*** alias ***Wagachogo (Moses)*** and ***John Kagondu Macharia*** alias ***Njamba Ngaru (John)*** were tried and convicted on 3rd April, 2006 by the Chief Magistrate at Nyeri ***(R. Nyakundi)*** on two counts of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. In count 1, it was alleged that on the night of 26th and 27th of September, 1999 at Kimathi Estate in Nyeri District of the Centrol Province, jointly with another not before court while armed with dangerous weapon (sic) namely *Pangas* and *simis* jointly robbed one ***Lucy Wairimu Kamotho*** of cash **Kshs.150/=** and at or immediately before or immediately after the time of such robbery injured the said ***Lucy Wairimu Kamotho***. In count 3, that on the night of 26th and 27th of September, 1999 at Kimathi Estate in Nyeri District of the Central Province, jointly with another one not before court, while armed with dangerous weapons namely *pangas* and *simis* robbed one ***Mwangi Wahome Karuhi*** of Cash **Kshs. 3,400/=** and at or immediately before or immediately after the time of such robbery injured the said ***Mwangi Wahome Karuhi***. Upon their conviction, the appellants were sentenced to the only sentence known in law for this offence- death.

The brief facts are that on the material night of 26th -27th September, 1999 at about 11.30pm (PW1)

Lucy Wairimu Kamotho (Lucy) was on her way home from work at Gikondi bar where she worked as a bar attendant. She was in the company of one ***Macharia*** who used to work in a neighbouring bar known as Unity. They shortly noticed ahead of them three people walking the same direction as the duo. ***Lucy*** and her companion ***Macharia*** were able to see the three allegedly with the help of electricity light from the nearby secretarial college. On nearing them, the trio appeared as if they were separating. On catching up with them ***Moses*** held ***Lucy.*** On sensing danger, ***Macharia*** took off. Two of the trio pursued ***Macharia*** but he disappeared. The two came back and that is when ***Lucy*** realized that they were armed. ***Moses*** and ***John*** were armed with *pangas* while their companion had *a simi*. They cut her on the head and hands. She was robbed **of Kshs.150/=.** She raised an alarm and an old man called ***John Edede*** responded. The assailants fled. ***Edede*** took her to the police station and then to Nyeri Provincial General Hospital where she was admitted for three weeks. When cross-examined, she maintained that she knew ***Moses*** and **John** as she had previously served them with drinks at Gikondi bar. ***Moses*** was the most frequent customer at the said bar. She recognized them with the help of electricity light from the gate of the secretarial college about 10 meters away from the scene of the attack.

On the same night of 26th September, 1999 at about 11.00pm, PW2 ***Mwangi Wahome (Mwangi)*** was approaching the gate to his home when he met with three people whom he knew very well as local residents. ***Moses*** asked Mwangi for cigarettes and a match box. Mwangi took out a match box and handed it to ***Moses*** *who* then asked for **20/=.** As Mwangi was checking for **20/=** from his pocket, ***Moses*** cut him on the head with a *panga* which he had. ***John*** stabbed him in the chest with a knife. The 3rd assailant removed ***Kshs. 3,400/=*** from Mwangi's jacket. He screamed for help and neighbours responded. The three attackers fled. He was taken to the police station where he told police that he could identify his assailants, and then taken to Nyeri P. General Hospital for treatment. He later on attended two identification parades where he picked out ***Moses*** in one of these**.** When cross-examined he maintained that there was electricity light and moon light.

PW4 No. ***PC Thomas Muriuki Koro then*** attached to CID Nyeri was on the same day of 26th September, 1999 just arriving at his apartment when he heard a scream from a woman in distress. PW3 decided to respond to the distress call. On the way, he was confronted by three men who at first pretended to be under attack from robbers. PW3 challenged them to identify themselves. Instead of doing so, they started strategizing themselves. He became suspicious and he warned them he could shoot. They dared him to shoot as they fled. PW3 pursued two who had run in the same direction. One staggered. He caught up with him and arrested him. He is ***Moses*** the 1st appellant. He took him to the police station. PW3 later on arranged for an identification parade in which Mwangi (PW2) identified Moses. The second appellant (***John)*** was arrested much later.

PW4 ***CIP Abdul Muhika***, conducted the identification parade in which the first appellant ***Moses*** was identified by PW2. PW5 ***Dr. Kibiru Ann*** produced P3 forms for PW1 and PW2 as exhibits on behalf of ***Dr. Okullo*** who had filled them, while PW6 ***PC Lawrence Wamugunda*** produced exhibits of OB extracts of the reports made by complainants.

The first appellant gave sworn evidence stating that the offence had been fabricated against him by ***PC Muriithi*** who had requested him to accompany him to the police station sometime in the year 1999 in connection with an investigation into theft of a motor vehicle. He was surprised. After interrogation, he was released to go, but then ***PC Muriuki*** who had a grudge with him over a girl the appellant had employed in his hair salon with whom ***PC Muriuki*** had had an affair before, arrested him and caused him to be charged with an offence he not only knew nothing about but also never committed. The second appellant, John also gave sworn evidence stating that he was never involved in the offence which occurred in 1999. It was not until six years later on 27th July, 2005 when he was arrested and charged jointly with the first appellant whom he did not know before. He took issue with the testimonies of PW1 and PW2, who, though they had claimed that they knew their assailants, never gave any description or names of the assailants to the police as at the time of making the report. He also alleged that ***PC Koro*** (PW3) fabricated the case against him because they had differed when ***PC Koro*** photographed him without his consent.

The Appellants were charged, prosecuted, found guilty, convicted and sentenced to death. They were

aggrieved by that decision. They appealed to the High Court (***J.K. Sergon, Wakiaga, JJ.)*** which in its judgment of 4th day of October, 2012 dismissed the consolidated appeals. The appellants are now before us on a second appeal, first in homemade grounds of appeal filed separately by each Appellant; subsequently supplemented by separate sets of grounds of appeal were filed on the 22nd April, 2015. qwFurther supplementary grounds of appeal were filed by learned counsel for the Appellants on the 13th April, 2015. Initially, three grounds of appeal were raised. Ground 2 was abandoned at the hearing leaving only ground 1 and 3, which state:-

> ***The learned Judges of the appellate court erred in law and facts in finding that the circumstances at the alleged scenes of robbery were conducive for PW 1 and PW2 to positively identify the appellants.***
>
> ***The learned Judges of the appellate court erred in law and facts in failing to re-evaluate properly the evidence before them, thus arriving at a wrong decision.***

The appellants' submissions.

On ground 1**, *Mr. Kimunya,*** learned counsel for the Appellants urged that the prosecution evidence on identification cannot hold because PW1 and PW2 did not give evidence with regard to the proximity of the location of the electricity light which allegedly enabled them to identify the said assailants to the exact spot where the robberies allegedly took place. Neither party gave evidence as to the intensity of the said light he contended, nor was evidence given as to how bright, dim or clear the said lighting was. As for the testimony of PW3, ***Mr. Kimunya*** argued that all that this witness said was that he chased the assailants and managed to arrest the 1st Appellant but he never mentioned what enabled him to chase the 1st appellant, or for how long the chase lasted or the distance it took from where he had allegedly spotted the group.

Turning to ground 3, ***Mr. Kimunya*** argued that had the first appellate court re-evaluated the evidence properly, it would have arrived at the conclusion that the circumstances displayed herein were not conducive to positive identification; the evidence of the identification parade in which PW2 allegedly identified the 1st appellant was of no value as PW2 knew the 1st appellant; All these flaws went to demonstrate that the prosecution evidence was below the required threshold and should not have been relied upon by the 1st appellate court to confirm the Appellants' conviction and sentence.

Respondent's submissions

In response to the Appellants' submissions, ***Mr. K. Kaigai*** the Assistant Director of Public Prosecutions urged us to dismiss the appeals because the conviction and sentence are proper; the surrounding circumstances were favourable to positive identification as the assailants were known to the victims; this was a case of recognition and not identification and as such there was no mistaken identity. He further submitted that PW2 picked out the 1st appellant at an identification parade; all ingredients for the offence of robbery with violence had been demonstrated to exist. The issue of lighting was well established as PW1 said the light was only 10 meters away which was in close proximity to where she was with the assailants; the attack was not sudden; both PW1 and PW2 conversed with the assailants while not under any apprehension of fear and therefore had ample time to register the assailants' appearances considering that PW1 had sold drinks to the Appellants severally at her place of work, while PW2 had also interacted with them before. Lastly, he conceded that it did not come out clearly as to whether the two courts below interrogated the intensity of the light used to identify the assailants or how bright, dim or clear it was, but submitted that the two courts below believed the testimony of the two crucial witnesses when they said that the mentioned light enabled them to identify the assailants, which finding should not be disturbed as the two courts below looked at the evidence of identification in its totality with the rest of the evidence on the record.

Analysis and determination

This being a second appeal, this court is restricted to address itself on matters of law. As this Court has

stated many times before in a long line of its own decisions, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence or the courts below are shown demonstrably to have acted on wrong principles in making its findings. See the decision in the case of ***Karingo versus Republic [1982] KLR 213*** at pg.219.

We have considered the two grounds in the supplementary grounds of appeal, the record of appeal, the rival arguments and the law.

On the basis of the observations made by the trial court on the testimony of PW1 and PW2, it delivered itself thus:-

> ***"On synthesizing and anxiously evaluating, I am satisfied that there was enough light to adequately see the accused persons. That advantage which the 1st complaint had has been supported by PW2 and PW3. In the initial arrest evidence was led that the second accused absconded. He was only to be arrested in connection with another robbery when the police officer PW3 spotted him in court...***
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> ***On weighing the defence by each of the accused, the same does not controvert or challenge the testimonies of PW1, PW2, PW3, PW4, PW5 and PW6...***
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> ***Evidence by prosecutions witnesses on identification was cogent and truthful. The witnesses were consistent and candid despite the various questions put to them at the time of cross-examination by the accused witnesses remained constant and firm. Their evidence both at the time of giving evidence and how the identification parade was conducted where PW2 picked the 1st and 2nd accused though not subject of identification parade was consistent and accurate. There is no evidence that the witness mistook the accused person on the night of the robberies. The second accused's' testimony that his vehicle had been hired by Wahome Mwangi previously had no basis. The defence that his arrest arose as a result of dispute between P.C. Koro who photographed him does not negative the identification evidence by complainants.***
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> ***...***
>
> ***Upon full consideration of the evidence adduced by prosecution to support count 1 and 3, I am satisfied that the identification evidence is water light*** (sic). ***I rely on it having had the advantage to observe the demeanor of the witnesses. They impressed me as truthful witnesses. The circumstances as explained on how the robbery took place giving rise to one conclusion that the two accuseds were part of the three others who harassed people on the road on the night of 26th and 27th September, 1999. They were armed with dangerous weapon. They inflicted personal injuries on the complainants on the instant case (***sic) ***as confirmed by the P3 tendered in evidence by medical officers at Nyeri General Hospital. The charge as found and defined under section 295 of the Penal Code has been proved beyond reasonable doubt..."***

The first appellate court on the other hand had this to say:-

> ***"From the evidence tendered before the trial court is clear to our mind that the appellant*** (sic) ***were properly identified. PW1 testified that there was adequate light from the secretarial college and that she was able to properly see the first appellant. She also testified that she was able to see the second appellant whom she had known since 1999 as he used to come to the bar where PW1 was working. PW2 Mr. Mwangi Wahome also testified that he met the appellant*** (sic) ***and that they asked for a match box from him and that he was able to pick the same (***sic) ***from an identification parade. We have also looked at the evidence of PW3 P.C Thomas Muriuki Koro who arrested the first appellant immediately after the attack and that it is this first appellant who gave the name of the second appellant. He was also able to recover one cap, a pair of leather saddles (***sic). ***We therefore find no merit on (sic) the appellants ground of appeal to the effect that they were not properly identified since we are of the considered opinion that the same were***

properly identified. On the issue of the non availability of two vital witnesses, we find that no evidence was tendered to prove that there was a grudge between the OCS and the first appellant. We therefore find no fault with the trial courts' holding both in (sic***) conviction and sentence and therefore dismiss the appellants appeal herein as lacking merit."***

The crucial concurrent findings set out above are that, the appellants were positively identified as some of the assailants who attacked PW1 (***Lucy)*** and (PW2) ***Mwangi*** on the material night. Time and again this Court has emphasized that evidence of visual identification in Criminal cases can cause miscarriage of justice if not carefully tested. This caution was well put by the ***Dicta*** in the judgment of ***Lord Widgery C.J*** in the case of ***Republic versus Turn bull and others [1976] 3 ALLER 549.*** The learned law Lord had this to say:-

"***First whenever the case against an accused depends wholly or substantively on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often?. If only occasionally had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancies between the description of the accused given to the police by witness when first seen by them and the actual appearance?***

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Recognition may be more valuable than identification of a stranger but often when the witness is purporting to recognize some one whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are some times made"

The evidence of PW1 (***Lucy)*** that was believed by the trial court and affirmed by the first appellate court was that the first Appellant, ***Moses,*** was a frequent customer at Gikondi bar where PW1 had served him drinks on a number of occasions under calm and rather homely circumstances. It is not however clear as to whether PW1 had ever engaged Moses in any conversation. PW1 also said that at one time, the 1st appellant, ***Moses,*** had been accompanied by the second appellant ***John*** although the number of such accompanied visits was not given on the material day. When she and ***Macharia*** caught up with the trio of assailants, it was at the gate to the secretarial college. There were electricity lights. It was 10 meters away. Indeed the intensity of this light was not given. However, PW1 was not controverted on her assertion that after two of the assailants chased ***Macharia,*** she remained with ***Moses***, chatting. When the duo came back, they also engaged her and that is when she recognized ***John*** but not the 3rd person who was with them. They knew she was on her way home. When they requested that they take a certain route with her and she resisted, that is when she was attacked and robbed and left, until an old man ***John Edede*** intervened to rescue her. This ***John Edede*** did not testify. He arrived at the scene immediately. PW1's evidence is silent as to whether she immediately named her assailants to the said ***John Edede*** who responded to her distress call**.** It is on record that she was taken to the police station before being taken to the Nyeri Provincial General Hospital where she was admitted. The officer who received and booked the report from PW1 did not testify. It is not clear as to whether she named the two appellants to the police officers. It is on record that PW3 who had in fact intended to respond to her distress call traced at Nyeri General Hospital where she was admitted but semi-conscious. He appears not to have talked to her in that state. There was mention that an identification parade took place at the hospital but evidence of what actually happened is lacking. But it is clear that she did not identify any one at the hospital. Neither did she participate in any other identification parade thereafter.

As for PW2's evidence, he indeed asserted there was electricity lights and moon light. Once again the intensity of this light and how far it was from him were not given. PW2 however asserts that he conversed with the assailants whom he knew as local residents. He however does not mention that he knew the trio by name. PW2 also mentions that he reported to police the same night. The officer who received the report did not testify. He however says that he told police that he could identify the assailants if he saw them and that is how he participated in the identification parade where PW2 identified the first appellant who remarked that PW2 knew him. The first appellant Moses abandoned an earlier request for the OB of 26th/27th September 1999 to be tendered in evidence. The second appellant ***John*** insisted for production of the OB. Extracts of these were tendered in evidence by PW6, ***PC Lawrence Wamugunda.*** We are however disadvantaged as the trial court did not make note of their content on the court record. We are further disadvantaged by the fact that these extracts were not made part of this record. The first appellant ***Moses*** had this to say in his examination in chief:-

> ***"I pray that the Court looks at the case critically. I have been in custody for seven years for an offence I did not commit. There were witnesses for state but were never called to testify to confirm the issues which emerged. PW2. Wahome stated that we lived in the same plot. He could have gone to the police and made a report to that effect***." The second appellant ***John,*** on the other hand, had this to say in his examination in chief:-
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> ***"The incident of the robbery was said to have taken place in the year 1999. I do not know the co-accused. The complainant then gave evidence that I was one of the robbers having been identified by the electricity lights. Mwangi Wahome also gave testimony that he saw three people who asked for a metal*** (sic) ***box. At the same time, he gave evidence that he had hired my vehicle few days to the robbery. When reading the report no name or physical description given by the complainant and witnesses.***
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> ***This case is a fabrication as Wahome did even go to the OCS Nyeri insisting that I had a case pending which he required me to be charged. The charge before court I do not know. The police officer P.C. Koro was the one who fabricated the offence."***

Both appellants were cross-examined. Nowhere were they confronted with the content of the extracts in the OB showing that both PW1 and PW2 told police that they knew the suspects either by name or appearance or that they even disclosed the names of the assailants in the said report.

The evidence of PW3 ***P.C. Muriuki*** has been given prominence by both courts below. The appellants have raised issue with this evidence because PW3 did not say what enabled him in the chase i.e lighting in order to follow the person he was chasing or the distance covered in the chase. There appeared to be a suggestion in his evidence that the shot he fired in fact grazed the 1st Appellant and that is why he staggered, but it is common ground that the 1st Appellant ***Moses*** had no injuries notwithstanding that the alleged chase and arrest of the 1st appellant occurred the same night that PW1 and 2 alleged to have been violently robbed.

In ***Maitanyi versus Republic [1986] KLR 198*** at page 201 the court made the following observation:-

> ***"It is at least essential to ascertain the nature of light available, its size and its position relative to the suspect which are important matters helping to test the evidence with the greatest care.."***

The court then followed up the above by laying down the following guidelines in its holding:-

> ***Although it is trite law that, a fact may be proved by the testimony of a single witness, this 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.***
>
> ***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.

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 a decision, it must do so when the evidence is being considered and before the decision is made.

Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction."

Applying the above principles to the rival arguments herein, on identification we find that both PW1 and PW2 were allegedly robbed separately. They therefore fell into the category of single identifying witnesses. The incident took place at 11.00pm for PW2 and 11.30 pm for PW1. It was therefore at night. Both PW1 and PW2 assert that there was electricity light. It is only PW1 who said it was 10 meters away although she did not give its intensity. PW2 gave no estimate of the proximity of the source of the light to the scene of the robbery. In addition to the above, PW3 also gave no hint as to the source of the light that enabled him in the chase, the distance of the chase etc. We also find that nowhere on the record did the trial court warn itself of the dangers of acting on the evidence in the circumstances displayed above. We also find that the first appellate court did not re-interrogate these issues before reaffirming the trial court's findings. This may have been occasioned by the finding that the assailants had known to the victims before the incidents. Even if this were to be taken as the position taken by the two courts below, they were still enjoined to exercise some caution before accepting such evidence.

In the same decision of ***Matanyi versus Republic*** ***(supra)*** this Court made the following other observation at the same page 201.-

"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police."

The appellants have contended that no such description was ever made of them notwithstanding that both PW1 and PW2 claimed to have known them prior to the alleged robberies. They were supported on this assertion by the prosecutions failure to confront them with such reports from the extracts of the OB tendered in evidence. The consequences of failure to so describe or mention in the prosecution case were well set out by this Court in the case of ***Simiyu & another versus Republic [2005] 1KLR 192*** at page 195 where the following observation was made:-

"If PW1 and PW3 recognized the appellants as their immediate neighbours then why did they not give their names to the police soon after the attack upon them. In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given . See ***Republic versus Kabogo S/O Wagunyu 23(1) KLR 50.***

The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity."

Neither the alleged old man ***John Edede*** who intervened in the case of PW1, nor the police officer who received first hand reports from the two witnesses gave evidence. This would have been crucial evidence of consistency considering that both PW1 and 2 had claimed that they had reported that they knew the assailants very well and could identify them a matter not borne out by the OB extracts tendered in evidence.

In ***Bukenya & another versus Uganda [1972] EA 549,*** the predecessor of this Court held thus:-

"It is well established that the Director has discretion to decide who the material witnesses are

and whom to call, but this needs to be qualified in three ways first, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be in consistent. Secondly, the court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witness, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecutions case"

In the case of ***Kariuki Njiru & 7 others versus Republic*** Criminal Appeal No.6 of 2001 this Court stated thus:-

"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. See also ***Wamungu Versus Republic [1989] KLR 424*** *for the same reiteration that:* ***"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence and to be fully satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis for a conviction. Second, that recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made."***

From the record the trial court appears to have accepted the evidence on identification at its face value. The role of the first appellate court then ought to have been as was spelt out by this Court in the case of ***Kiilu and another versus Republic [2005] KLR 174*** wherein, it was held thus:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

(ii) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support, the lower courts' findings and conclusions; it must make its own conclusion only then can it decide whether the magistrates findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

In this case the observation made on the findings of the first appellate court set out above fell short of the above thresh hold. They are in line with what this Court encountered in its observations in the case of ***Simiyu and another versus Republic*** (supra) at page 195 thus:-

"***The failure by the superior court to consider this aspect of the evidence shows that the superior court dealt with the evidence in a perfunctory manner. There was no exhaustive appraisal of the evidence tendered to connect each appellant with the commission of the offence to see whether their respective convictions were safe..."***

In circumstances such as those demonstrated herein where key witnesses namely PW1 and PW2 failed to shed light as to why they did not give names and descriptions of the assailants whom they allegedly knew at the earliest opportunity and which evidence was taken at its face value by the trial court and which the first appellate court failed to subject to a fresh re-interrogation and arrive at its own conclusion, raises reasonable doubts in our minds that this Could very well have been a case of mistaken identity. Indeed PW2 picked out the 1st appellant on the identification parade but that identification stands shaken by the 1st appellant's insistence that his name should have been given when the report was first made to the police. Likewise no witnesses pointed out the 2nd appellant to PW3 for arrest. PW3 therefore relied on the 1st appellant's mentioning of the 2nd appellant as an accomplice. Accomplice evidence in law requires corroboration. There was no corroboration for the said evidence. It was further shaken by the

2nd Appellant's insistence that if it was true that PW2 knew him very well, PW2 ought to have named him or described him at the earliest opportunity to the police.

As for the issue of an alleged grudge between the 1st Appellant and PW3 over a hair salon girl, the 1st Appellant assumed no responsibility to prove it. The role of both courts below was to weigh it against the totality of the prosecution evidence and give reasons as to why they felt that it was displaced. The burden appears to have been shifted to the 1st appellant to prove it. This was contrary to law.

For the reasons given above, we are inclined to interfere with the findings of the two courts below for the sole reason that they were based on no evidence and had the two courts below properly directed their minds to the prosecution case and considered it in line with the applicable principles of law set out above, they could not, in all probability, have reached the conclusions they reached.

In the result, we allow the appeal, quash the conviction, and set aside the sentence. We direct that the appellants be set at liberty forthwith unless they are otherwise lawfully held.

Dated and delivered at Nyeri this 17th day of June 2015.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O.KIAGE

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JUDGE OF APPEAL