IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 249 OF 2011

BETWEEN

BROWN TUNJE NDAGO ……..... 1ST APPELLANT

DONALD ONDAYO OMODO …… 2ND APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Ojwang & Odero, JJ) dated 21st September, 2011

in

H.C.Cr.A. 118 of 2009)

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JUDGMENT OF THE COURT

The two appellants ***Donald Ondayo Omodo,*** (*1st appellant*) and ***Brown Tunje Ndago***, (*2nd appellant*) were jointly charged with 11 counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code before the subordinate court at Kwale. The counts were in relation to a series of robberies that occurred on various different dates and places within Diani Location, Kwale District of the then Coast Province. The first three counts were in relation to a robbery which occurred at Daradare of Diani Location on 8th November, 2007. Count 4 related to a robbery which occurred on the 13th November, 2007 at an Italian Supermarket within Diani Location. Count 5 and 6 related to a robbery which occurred at Eden Drops and Eden Drops Hotel in Diani Location on 16th November, 2007. Counts 7, 8, 9 and 10 all related to a robbery that occurred at Asins Supermarket in Diani Location on 27th November, 2007 while count 11 referred to a robbery incident which occurred at the Leisure Golf Club in Diani Location on 27th November as well. In addition to this, the 1st appellant was charged with count 12 with being in possession of imitation firearm contrary to ***section 349(1)*** of the Firearm Act. Both appellants pleaded "*not guilty*" to all the counts.

After carefully considering the evidence before him and the law, the trial Magistrate acquitted both appellants on counts 1, 2, 3, 9, 10, 11 and 12 based on the fact that the prosecution failed to call any

witnesses and adduce evidence in support thereof and none of the complainants named on the charge sheet were called to testify.

In respect to count 4, four witnesses comprising of ***Mwajuma Juma***, PW1 who was the complainant, ***Saidi Tsungu Mrisa***, PW2 his manager and two of their employees ***Ramadhan Juma Babu***, PW3 and ***Wycliffe Gichana Onsongo***, PW4 testified. They testified as to how on the 13th November, 2007 at about 8.30 p.m., PW1 closed his supermarket in preparation for the four of them to leave. Two men suddenly approached them outside the supermarket and one of them who turned out to be the 2nd appellant, proceeded to brandish a gun he had hidden under his sweater at PW1. The four witnesses were all ordered to lie down and the two men robbed PW2 of Kshs.80,000/= and the rest were robbed of mobile phone and their personal effects. The police were called in with respect to the crime. These witnesses had positively identified the 2nd appellant during the robbery with the assistance of bright electricity lights at the scene. Some of these witnesses spent considerable time with him and even talked to him. When done, the duo escaped into the bushes. A month or so later, the 2nd appellant resurfaced at the scene at about 6 p.m. and ordered a beer. As he was paying for the beer he was looking down and when the cashier looked at him, he ordered her not to look at him. By then PW1, PW2, PW3 and PW4 had already suspected him and summoned the police! When the police led by PW12, ***Cpl. Issa Said Wachira*** arrived at the scene, the appellant took to his heels but he was cornered and arrested. These witnesses were subsequently called to a police identification parade conducted by PW8 ***IP. Gilbert Gitonga*** and they all were able to pick him out in the parade. This is the evidence that led to the conviction of the 2nd appellant on the 4th count and the acquittal thereof of the 1st appellant. None of the witnesses was able to identify the 1st appellant during the robbery though the 2nd appellant was not alone, during the robbery. He was in the company of another person during the episode. In respect to counts 5 and 6 two witnesses ***Jacob Manyara***, PW7, the complainant and proprietor of Eden Drops Hotel in Diani and ***John Kanyali***, PW9, a guest at the same hotel gave evidence that on the 6th November, 2007 at about 7.30 p.m., they were taking tea together at the hotel when two men approached them while holding the hotel guards hostage. One man had a gun in his hand, the two men proceeded to order PW7 and PW9 to lie down and robbed them of valuables. Both witnesses positively identified the 1st and 2nd appellants as the men who robbed them because of the bright lights at the scene, when PW7 pleaded for his sim card from the 2nd appellant who had taken his mobile phone when he hit the 1st appellant and he fell down. He even described their physique, weight and appearance which during the trial fitted the appellants.

In respect to counts 7 and 8, three witnesses were called to give evidence and these were, ***Inderjit Singh***, PW5, the complainant and proprietor of Asins Supermarket in Diani, his wife ***Aisha Rajab Ali***, PW6 and ***Ali Juma***, PW10 a cleaner at the supermarket. Essentially they testified that on the 27th November, 2007 at 6.00 p.m., they were at the supermarket having drinks with four guests from England when a man armed with a gun approached and ordered all of them to go under the staircase. His accomplice brought in their two watchmen and forced them under the staircase as well. Then one of them ordered them to remove all the valuables they had including phones, money, chains, rings etc. They did so. The robbers then left via the supermarket where they helped themselves to the cash register, bottles of wine, champagne, brandy and whiskies. PW5 was able to identify the 1st appellant during the robbery due to the bright lights that were on and the robbery took 5 to 7 minutes. That enabled him to see the face of the appellant very well. However, the 1st appellant refused to participate in the police identification parade and thus he was unable identify him thereat. PW6 and 10 were however not in a position to identify the appellants or any of them. The same goes for ***Aspen Wambi*** (PW11) who was also a victim of the robbery thereat. The case was investigated by Cpl. Issa Saidi Wachira, PW12. He had on 27th November, 2007 received a report of robberies and proceeded to the scene. The complainant gave a description of the robbers. On 28th November, 2007 at about 4 p.m. the 2nd appellant was arrested on information that he had been involved in the robberies. Later an identification parade was arranged but he refused to participate. His house was nonetheless searched and a green T-shirt which he had allegedly worn during the robberies was recovered. Those items and cap were positively identified by witnesses from Asins Supermarket. Upon interrogation the 2nd appellant led the police to a house where a toy pistol kept under a mattress was recovered. On 3rd December, 2007 at about 6 p.m. the waiters at Asins Supermarket identified the 1st appellant who had come to the supermarket for a drink. They called the

police and he was arrested. He was later identified in an identification parade. On the basis of the foregoing evidence, the appellants were charged for the offence.

Put on their defences, the 1st appellant elected to give a sworn statement but called no other witnesses. The 2nd appellant could not give his defence as he had by then been banished from court. The banishment came as a result of his continuous and persistent disruption of the court proceedings. Even after the trial court had implored him and explained to him the importance of participating in the proceedings, he adamantly refused to take any further part in the proceedings. Exasperated the trial court ordered his exclusion.

In his sworn statement of defence, the 1st appellant alleged that on 3rd December, 2007 he travelled from his residence at Mtwapa to Leisure Lodge for a job interview. When done he proceeded to Italian Supermarket where his brother carried out carwash business nearby. He did not find his brother. However, he entered the supermarket and bought himself a beer. When he finished his beer and was walking away, he was accosted by two men who identified themselves as police officers and ordered him to accompany them to Diani Police Station. On 4th December, 2007 he was interrogated on the series of robberies in Diani. He was surprised to be charged with offences he knew nothing about.

In a reserved judgment delivered on 9th July, 2009, the learned Senior Resident Magistrate found the appellants guilty of the charges already set out at the beginning of this judgment. Upon such conviction the 1st appellant was sentenced to death on counts 4, 5 and 6 whereas the 2nd appellant was sentenced to death in respect of counts 5, 6, 7 and 8.

Aggrieved by the conviction and sentence the appellant separately and individually appealed to the High Court. The appeals were consolidated and heard together.

After perusing the evidence on record, the High Court was satisfied that the 1st appellant was positively identified by the witnesses. The court noted that PW5 was a competent witness since he was able to pick out the 1st appellant since he saw him clearly during the robbery as there was bright light at the scene of the robbery (*Asins Supermarket*) and the electric lights were on. The court addressed the issue of the danger of relying on a single identifying witness and found that the trial Magistrate having warned himself of the same dangers was still right in relying on the evidence of a single identifying witness who was clear and precise in his testimony and had adequate time and opportunity to see the 1st appellant with the electric lights providing a perfect aide to a positive identification. Further with respect to the evidence against both the appellants in counts 5 and 6 the court relying on the testimony of PW7 was satisfied that with adequate lighting at the scene of the robbery (*Eden Drops Hotel*) and having faced the robbers while pleading with them for their SIM cards, the witness was able to positively identify the robbers as he had ample time and opportunity to see and identify the 1st appellant as it was more than a mere fleeting glance that would leave room for mistakes. The court noted that the 1st appellant's refusal to participate in the identification parade was out of fear that the witnesses would pick him out. Further, the 1st appellant's exclusion from his trial was justifiable and did not infringe on his constitutional right to be present during trial as he was simply trying to frustrate the trial once he realized that based on the evidence at hand his fate was pretty much sealed, the Constitution provided for this exception under *Article 50(2)(f).* The High Court was satisfied that the evidence showed a clear positive and reliable identification of the 1st appellant as one of the robbers and confirmed his conviction.

As concerns the 2nd appellant, the High Court disagreed with the State Counsel's concession to the appeal against him after consideration of the weight of evidence against him. The court while looking into count 4 of the charge against the 2nd appellant was satisfied that PW1, PW2 and PW3 positively identified the 2nd appellant as one of the robbers as there was sufficient light at the Italian Supermarket in Diani in addition to giving detailed and exhaustive narrative of the role the 2nd appellant played in the robbery. Further, upon the 2nd appellant's return to the scene of the robbery (the Supermarket) for a beer, PW1 recognized him as one of the robbers and further picked him out in an identification parade, and despite

the circumstances of such an identification being superfluous since it was upon recognition by PW1 that the 2nd appellant was arrested this did not negate the weight of the evidence.

The High Court dismissed the State Counsel's submission that the 2nd appellant may have been erroneously arrested having been mistaken for his brother based on the lack of tangible evidence to support the claim of a mistaken arrest, the brothers were not identical twins and while they may resemble each other there was no evidence that one may have been mistaken for the other. The court also noted that the trial Magistrate satisfactorily addressed the issue in his judgment and the court stated thus:-

"It is clear that this allegation of a *'similar looking'* ***brother was just a red herring raised to deflect from the positive identification of the 2nd appellant at the scene … the fact that the 2nd appellant took to his heels upon seeing the police cannot be ignored. If he was this*** *'innocent'* ***brother then why did he run away?"***

The High Court upheld the conviction of the 2nd appellant on count 4 satisfied that with the evidence placed before them there was no need to hesitate in confirming the conviction and sentence of the lower court.

Aggrieved by the dismissal of their appeals, the appellants have now moved to this Court by way of a second and perhaps last appeal on a total of 13 grounds which however at the hearing were condensed into two broad grounds by ***Mr. Mutua***, learned counsel who appeared for the appellants. These grounds are:

"1. Failure by the first appellate court to re-evaluate the evidence on record exhaustively.

2. Identification of the appellants."

At this juncture this court is tasked with looking into whether the High Court erred in dismissing the appeal and confirming the conviction and sentences of the lower court against the appellants. Dwelling on the identification and arrest of the two appellants, Mr. Mutua highlighted the evidence of PW3, who claimed to know both appellants, the 1st appellant being his neighbor and having been seen with the 2nd appellant around. The witness failed to disclose to PW1, PW2 and the police that he knew the people who attacked them. Further PW3 participated in a superfluous identification parade yet the High Court failed to make any finding. Counsel emphasized that this Court has regularly held that an identification of a suspect must be proper and not speculative. Counsel further argued that the 1st appellant was arrested because of suspicion and not because he was identified as the perpetrator of the crime as claimed by PW3 and that if the witnesses were positive about the recognition of the 1st appellant there would have been no need for them to confer for purposes of confirmation.

Mr. Mutua referred the Court to the case of ***Kiarie v Kiarie*** ***[1984] KLR 739*** where this Court held that it was possible for a witness to be honest but still be mistaken. Thus the possibility that the witnesses may have been mistaken about the identity of the appellants must not be ruled out. Counsel also drew the attention of this Court to the case of ***R v Turnbull*** ***[1976] 3 ALL ER 549*** where it was held that in a case against an accused whose reliance is placed on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the court must warn itself of the special need for caution. This, counsel submits was not done by the High Court in the instant case.

Counsel further highlighted the issue that PW2 recorded his statement after attending the identification parade and that the 1st appellate court failed to evaluate this evidence and thus failed to note this contradiction in his testimony. Mr. Mutua went on to submit that the High Court erred in finding that the evidence of the identification parade corroborated PW1's evidence as this was not so and there were inconsistencies surrounding the 1st appellant's arrest. In addition to this, counsel argued that the High Court dwelled on the description of the 1st appellant given by the witnesses and paid particular regard to the description of the mode of dressing which was insufficient for purposes of identification. The issue of the attacks being sudden and fast as described by PW1, 2, 3 and 4 was noted by counsel. Thus there was

no sufficient time for the witnesses to get more than a mere fleeting glace of the attackers.

Counsel points out that there is no record of the arresting officers' evidence on the occurrences of 27th November, 2007 and there was absolutely nothing that incriminates the 1st appellant in regard to the offences upon which he was convicted. It was clear from the evidence that there was a possibility of the 1st appellant being a victim of mistaken identity and the High Court erred in failing to make a finding in support of this. Counsel emphasized the importance of evidence of the arresting or investigating officer and went on to stress that so long as there was a possibility of someone else having committed the crime there was reasonable doubt which should have been resolved in favour of the 1st appellant.

As regards the 2nd appellant, counsel stated that the evidence used to convict him in respect of count 7 and 8 was inconclusive as the evidence on the date and place of his arrest was missing. Counsel further raised the issue that it was not clear who identified the appellant for purposes of his arrest.

Counsel also faulted the multiplicity of the capital charges that the appellant confronted. The courts have held the view that the trial court ought to proceed on one charge and hold the rest in abeyance as was propounded in the case of ***Muiruri & Others v R [1980] KLR 70***. Here there were several charges. The appellants were thus prejudiced in their defences.

Peter Kiprop, Public Prosecutions Counsel in response to the appellants' arguments, submitted that this case was one of identification and not recognition and PW7 positively identified the 1st appellant. Further the security lights at the crime scenes provided sufficient light that enabled the witnesses to see the perpetrators thus the issue of mistaken identity could not arise. PW9 by his evidence indeed went ahead to corroborate the evidence by PW7 on identification of the appellants.

On the question of identification of the 2nd appellant, counsel noted that he was identified by PW1 and he admits that although the investigating officer did concede to mistaken identity where this particular appellant was concerned, counsel highlighted the issue that the investigating officer was not at the scene of the crime and was not an eyewitness to the crime thus mistaken identity was a non-issue. Counsel further stressed the issue that the 2nd appellant was positively identified at an identification parade that was regularly and legally carried out and in conclusion submitted that the joinder of charges was proper as the offences were committed by the same people. Counsel concludes by stating that the appeal lacks merit and ought to be dismissed.

We are keenly aware that this is a second appeal and under the provisions of ***section 361*** of the Criminal Procedure Code, we are confined to considering only matters of law unless it is demonstrated to us that the two courts below failed to consider matters that they should have or we considered matters that should not have or looking at the entire decisions as a whole, the decision was plainly wrong in which case the entire issue becomes a matter of law. See ***M'Irungu v R [1983] KLR 455.*** The issues of law as framed by counsel for the appellants is twofold, failure by the High Court to re-analyse, re-evaluate and re-examine the evidence on record afresh so as to reach its independent verdict and the question of identification.

On the first ground, we think that this complaint is unfortunate and has no merit at all. The learned Judges may not expressly have stated their duty on a first appeal in the body of the judgment. They may also not have cited intangible case of ***Okeno v Republic [1972] EA 32*** which sets out the duty of a court hearing a first appeal. However it is abundantly clear that the Judges set out in summary the evidence led by each witnesses relevant to the charges upon which the appellant were convicted. Parts of which they reproduced verbatim, they referred to the defence of the 2nd appellant. The Judges then revered the evidence as well as issues for determination on …….. by the trial court and reached their own conclusions. In the face of these very clear conclusions by the High Court, we are at a loss to understand the complaint. The case of Okeno (supra) did not set down any particular manner or format as to how a first appellate court is to discharge its duty on a first appeal. In our view, the High Court did a splendid job as required by law. It reached the same conclusions as the trial court did. There was overwhelming evidence to support the concurrent findings made by the two courts below and there can be no basis in

law upon which this Court can interfere. Failure to address minor and insignificant contradictions prosecution case does not amount to failure to re-valuate and re-examine the evidence tendered in the trial court as required.

With regard to the second ground, there are concurrent findings by the courts below that the appellants were identified by some of the witnesses at the scene of crime, that there were bright lights at the scene of crime that assisted in such identification, that the appellants were exposed to the witnesses for sufficient time to enable them identify them and consequently their encounter was not a fleeting chance, the witnesses narrated with clarity and precision the exact role played by the appellants in the robbery, vivid descriptions of the appellant, the 2nd appellant to participate in the identification parade was not a mask of an innocent person, his refusal to participate further in the trial after the ninth witness had testified was an act of desperation after he realized that the evidence was not going in his favour. The action of the 1st appellant running away and leaving his beer half drunk on seeing the police approach the Italian supermarket revealed a guilty mind and finally, the question of the alleged mistaken identity between the 1st appellant and his alleged brother.

Again there was sufficient evidence to support these concurrent findings, and there can be no reason for us to interfere.

The issues to be addressed in considering the evidence of identifying witnesses usually touch on the lighting available during the occurrence of the crime, the distance between the witnesses and the perpetrators, the time it took for the witnesses to observe the perpetrators before? How often if so? If occasionally, had he any special reason for remembering the accused? The time period that has elapsed between the original observation and the subsequent identification to the police? And any material discrepancy between the descriptions of the accused given to the police by the witness when seen by them and his actual appearance. All these go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.

The High Court in examining the evidence brought before it when determining the appeal noted that the witnesses' testimony highlighted there being sufficient lighting at the various scene of crime, the Court found PW5 a competent witness since he was able to pick out the 1st appellant after he saw him clearly during the robbery as there was bright light at the scene of the robbery (Eden Drops Hotel) the witness was able to positively identify the robbers as he had ample light to see and identify the 1st appellant. We are indeed persuaded that after paying due caution that PW5 and PW7 were in good position to identify the 1st appellant as one of the perpetrators of the robberies occasioned upon them due to sufficient lighting at the scene that enabled them to properly see their attackers.

On the defence's argument that PW1, PW2, PW3 and PW4 were not able to see the attackers as the robbery was fast and sudden, this is not credible at all since from witnesses' testimony the same cannot be inferred. PW1 testified that:

"I know accused 2. I saw him during the robbery … Accused 2 came with another man who was beside him … Accused 2 was in a stripped sweater … There was bright light and I saw him well,"

PW2 also affirmed his ability to identify the 1st appellant when he stated that,

"I know accused 2 … I saw a man approach. I told him we closed after he came close to me … He had a stripped pullover of green and blue and other colours."

PW3's testimony was even much weightier as his is more recognition illustrated when he stated that:

"I know both accused. Accused 1 is my neighbor. I have also been seeing accused 2, but I do not know where he stays."

And in concluding PW4 testified that:

"I know accused 2 …, I was the one who sold to him and I suspected him … I identified accused 2 as I had seen him well during the robbery."

All these statements do not support the argument of a fast and sudden robbery, they show a drawn out encounter that provided the witnesses with more than a passing glance of their attackers. PW3 is positive of who attacked him because 2nd appellant is his neighbour whom he has clearly encountered on more than one occasion and can actually positively pick out with certainty as his attacker while he knows 1st appellant and PW4 could not have been able to recognize the 1st appellant as one of the attackers when he came back to the store if all he got was a mere fleeting glance. The fact that two of the witnesses can describe what 1st appellant was wearing goes on to show they had adequate time to see him. Indeed all the above show that the witnesses were able to positively identify the robbers as they had ample time and opportunity to see and identify the 2nd appellant as it was more than a mere fleeting glance that would leave room for mistakes.

Counsel goes on to state his case for the defence by asserting that the identification parade was superfluous based on the fact that PW3 knew both the appellants, the 1st appellant being his neighbor and the 2nd appellant being someone he had seen around. The Court in considering this issue should ask itself whether the fact that PW3 knew the appellants compromises the credibility of the identification parade. Of course it does. In ***Ajode v Republic*** ***[2004] 2KLR 81*** this Court held that it is established law that there is no need for an identification parade to be conducted in cased where the witness knows the suspect as the witness will merely be demonstrating his recognition of the suspect and will not be identifying him. This shows that PW3's knowledge of the accused simply rendered the identification parade unnecessary in as far as he was concerned in identifying the perpetrators of the offence it did not add or take away from the process. Indeed the Judges were emphatic that the identification parades were superfluous in particular with regard to the 1st appellant since they are the very witnesses, are the ones who pointed out to the police as he ran away and he was subsequently arrested.

Counsel for the appellants has referred this Court to the case of ***Kiarie v Republic*** (supra) where it was noted that it was possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken and where evidence relied on to implicate an accused was entirely of identification the evidence ought to be watertight to justify a conviction. Both the trial court and the High Court addressed the issue of identification of the two appellants as perpetrators of the crime and found it to be satisfactory. The two courts actually noted that 1st appellant did indeed try to frustrate the identification parade process when he realized that he would be positively identified by the witnesses. An innocent party would duly participate in a process that would exonerate him of what he is being accused of as opposed to objecting to take appropriate steps to clear ones name. On the issue of mistaken identity of the 1st appellant for his brother the court aptly found that there was lack of tangible evidence to support the claim of a mistaken arrest. The assertion by counsel for the appellants that the High Court failed to exercise the caution when relying on the correctness of one or more identifications as called for in the case of ***R v Turnbull*** holds no ground as the High Court did indeed examine the circumstances surrounding the identification of the two appellants and found it to be satisfactory. As per the requirements of careful examination of evidence of identification and recognition to ascertain such evidence is free and favourable, laid out in the case of **Wamungu v Republic** it is clear that both the trial court and the first appellate court conducted such an examination raised touching on the identification of the appellants such aspersions held no merit as the evidence of their identification was watertight.

We cannot conclude this judgment without making reference to the complaint that the appellants were inappropriately charged with several capital offences, the proper thing for the trial court to do is to proceed on one charge and hold the rest in abeyance. See ***Muiruri & Others v Republic*** (supra). Appellants were charged with ten counts of capital robbery. The 1st appellant was convicted on 3 counts as charged while the 2nd appellant was convicted of 3 counts. They were both sentenced to death. The first appellate court went on to confirm the convictions and sentencing by the trial court. This Court notes

that the holding in the Muiruri case was not couched in mandatory language. It is a preference as the working is "*It is preferable to proceed on one capital charge*" thus the fact the prosecution brought forward eleven capital against the appellant may not as such occasion an injustice on the appellants.

Actually, what may be the reasoning behind such a suggestion would be that proceeding on one capital charge and holding the rest in abeyance is that upon being found guilty the convict cannot suffer death more than once. Indeed the case of ***Ganzi & 2 Others v Republic* 6 ULR 161**, states that where a person faces a number of capital charges in the same information, it is preferable to proceed with only one of the charges and leave the rest in abeyance even if the charges appear inter-linked. When the prosecution decides to proceed with all the charges simultaneously and a person has been convicted of several capital charges, it is good practice to pass the sentence of death on one count only and leave the sentences in other charges in abeyance. This Court thus ought to find that while it would have been in good practice to charge the 1st and 2nd appellant on one count of capital robbery, the prosecution proceedings with all the counts did not really occasion any injustice against them, as the appellants actively participated in the trial by cross-examining witnesses; save for the 2nd appellant who after the 9th witness declined to participate in the proceedings, the 1st appellant was throughout the trial represented by counsel who did not as much raise objection to the joinder of charges. We also note that the appellants were sentenced to death on the counts they were convicted of. That sentence was irregular as an accused can only die once. The trial court ought to have imposed one sentence of death of each one of them and held the rest in abeyance. We are surprised that the High Court did not notice this anomaly. Finally, we note that the offences were committed at different places, times, dates and on different victims. It was not there desirable to have all those charges confined in one charge sheet as they never arose in the same transaction. The joinder of the charges was therefore not proper. The offences committed on 8th November, 2007, that of 13th November, 2007, those of 16th November, 2007 and 27th November, 2007 should have been preferred separately. However, we hasten to add that no prejudice was occasioned to the appellants by such joinder nor did they raise the issue with the trial court, noting in particular as we have already stated that the 1st appellant was represented by counsel throughout the proceedings. But again the High Court was only bound to comment on this anomaly. Nonetheless based on the aforementioned, the two courts came to a proper conclusion supported by the evidence placed before them. Both the trial court and the High Court exercised due caution while relying on the evidence on identification of the appellants as the perpetrators of the crime, they satisfactorily addressed the circumstances surrounding the identification and aptly addressed the doubts of possible errors and found evidence to support such aspersions lacking. For these reasons these appeals hold no merit and are accordingly dismissed.

Dated and delivered at Malindi this 22nd day of May 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

…….

JUDGE OF APPEAL

F. SICHALE

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR