



IN THE COURT OF APPEAL

AT NYERI

(CORAM:VISRAM, KOOME & OTIENO-ODEK, J.J.A.)

CRIMINAL APPEAL NO. 285 OF 2006

BETWEEN

PATRICK MWANGI WERUAPPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court at Nyeri

(Khamoni & Okwengu, JJ.) delivered on 16th August, 2006

in

H.C.CR. A. No. 103 of 2004)

JUDGMENT OF THE COURT

1. The appellant Patrick Mwangi Weru as the 3rd accused person was charged jointly with Joseph Maina Gicheru alias kihii (1st accused); Patrick Maina Muriuki alias Baggio (2nd accused) and Victor Waweru Gichuni (4th accused) with the offence of robbery with violence contrary to **Section 296 (2)** of the Penal Code. The appellant and the co-accused faced twelve counts of robbery with violence. The 2nd and 4th accuseds were acquitted at the close of the prosecution's case with no case to answer. The appellant and the 1st accused were put on their defence as they had a case to answer. At the end of the trial, the 1st accused was acquitted of all counts; and the appellant was convicted of 5 counts for which he was sentenced to death. The appellant's appeal to the High Court was dismissed provoking this second appeal.
2. The Information is that on the night of 12th/13th April 2001 at Naro Moru in Nyeri District of the then Central Province, jointly with others not before the court, while armed with dangerous weapons namely an AK 47 assault rifle and a Barretta pistol, robbed John Ngamau Gikunju of a motor vehicle registration number KAL 986F make Peugeot 504 pick-up valued at Ksh. 1,293,162/= and at or immediately before or immediately after the time of such robbery killed the said John Ngamau Gikunju.

3. The High Court by a judgement dated 16th August 2006 upheld the conviction and death sentence meted out to the appellant. Aggrieved by the decision, this appeal was lodged citing 10 grounds compressed as follows:
 - i. ***That the learned Judges erred in law by failing to observe that the appellant was in police custody for 21 days in contravention of Section 72 (3) of the old constitution.***
 - ii. ***The learned Judges erred in law by failing to observe that when the appellant's case was taken over by a new magistrate, Section 200 of the Criminal Procedure Code was not complied with despite an application for the prosecution witnesses to be re-called.***
 - iii. ***The learned Judges erred in law by failing to observe that the bench Coram does not indicate the language that the lower court used when the plea of not guilty was entered and even when the prosecution witnesses testified.***
 - iv. ***The learned Judges erred in law in failing to find that Sections 169 (1) and Section 211 of the Criminal Procedure Code were not complied with.***
 - v. ***That the learned Judges erred in law that the person who produced exhibits in court was not a duly gazetted police officer.***
 - vi. ***The learned Judges erred by failing to re-evaluate the evidence on record.***
 - vii. ***The learned Judges erred in law using a confession statement which was not properly obtained.***
 - viii. ***The learned Judges erred in law in that no proper identification of the appellant was made.***
 - ix. ***The learned Judges erred in law in relying on the evidence of a single witness.***
4. At the hearing of the appeal, learned counsel **Muchiri wa Gathoni** appeared for the appellant while the Assistant Director of Public Prosecution **J. Kaigai** appeared for the state.
5. Counsel for the appellant adopted the home-made grounds of appeal and elaborately argued them. He submitted that the violation of constitutional right of the appellant to be arraigned in court should be remedied by an order of acquittal; that the police never explained why they held the appellant for 21 days before bringing him to court; counsel emphasized that although he was aware that this Court has time and again stated that delay in arraigning an accused person before court does not necessarily lead to an acquittal, in this particular case, the facts are peculiar. Counsel submitted that during the period when the appellant was held by the police, he was tortured and a confession extracted from him; that the learned Judges erred in relying upon the illegally obtained confession to uphold the conviction of the appellant. Counsel submitted that the violation of the right to bring the appellant before court was used by the police to torture the appellant and extract an illegally obtained confession and consequently an acquittal should ensue. The appellant submitted that the trial court held a trial within a trial to determine the admissibility of the confession and though held admissible, the trial magistrate was correct in ignoring the confession in it's judgement. Counsel submitted that the learned Judges of the High Court erred in relying on the confession which had been ignored by the trial magistrate; that the learned Judges should have overlooked the confession as the trial magistrate did. The appellant further submitted that he was not positively identified as a member of the alleged gang that committed the crime; that no physical description of the appellant was given at the earliest opportunity by the complainant and the learned Judges erred in relying on the testimony of a single identifying witness who was PW 6 (Lawrence Mwangi Gichogu). It was submitted that PW6 who identified the appellant was a conductor in the matatu allegedly stopped by the gangsters yet the driver of the matatu was not called to testify to corroborate the identity of the appellant. Counsel submitted that **Sections 200 and 169 (1) of the Criminal Procedure Code** were not complied with and this was prejudicial to the appellant.
6. The state opposed the appeal and submitted that the prosecution had proved its case to the required standard of proof beyond reasonable doubt. The Assistant Director of Public Prosecution, Mr.

Kaigai, submitted that the evidence against the appellant was given by PW6 whose testimony was clear that he positively identified the appellant. The offence was committed during daylight and the appellant and other members of the gang did not conceal or mask their identities and there was no possibility of error in the identification of the appellant. In relation to the allegedly illegally obtained confession, the state submitted that the statements in the confession were too detailed to be untrue and that the learned Judges were correct in relying upon the confession which was held admissible by the trial magistrate. It was submitted that the learned Judges duly weighed and considered the defence evidence. Counsel observed that there was concurrent findings of fact by the two lower courts and urged this court not to disturb the findings of fact by the lower courts. On the allegation that **Section 200** of the **Criminal Procedure Code** was not complied with, the state submitted that when a new magistrate took over the case, the matter did not start *de novo* but all the accused persons were given the opportunity to decide if they wished the case to start *de novo*. That the appellant elected to request the recall of witness PW 6 rather than start the case *de novo*. That the other accused persons similarly elected the recall of prosecution witnesses. The state submitted that no prejudice was caused as the appellant and co-accused elected to recall a total of 4 prosecution witnesses and production of the Occurrence Book.

7. We have considered the rival submissions by counsel. We have examined the record of appeal and the judgement of the High Court. This is a second appeal which must be confined to points of law. As was stated in *Kavingo – v – R, (1982) KLR 214*, a second appellate court will not as a general rule 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)”

8. The first ground of appeal is that the appellant contends that his fundamental rights under **Section 72 (3) (b)** of the old **Constitution** were violated in that he was held for 21 days before being arraigned in a court of law. This is not a novel point taken in appeal and we find it has no merit. A delay in arraigning a suspect in court does not necessarily entitle the suspect to an acquittal. (See *Domimic Mutie Mwalimu - v- R, Crim. Appeal No. 217 of 2005*; and *Evanson K. Chege - v – R, Crim. Appeal No. 722 of 2007*). If any constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in civil suit for damages. In *Julius Kamau Mbugua – v- R, Criminal Appeal No. 50 of 2008*, this Court stated that ***“the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, and Section 72 (6) expressly provides that such breach is compensatable by damages.***
9. We now wish to deal with the allegation of non-compliance with Section 200 of the Criminal Procedure Code. Non compliance with this provision has consequences in that the resulting conviction and sentence is a nullity. See the case of *Kariuki versus Republic (1985) KLR 50C* wherein it was held *inter alia* that:

“Under section 200 (3) of the Criminal Procedure Code an accused person is entitled to demand that any witness be recalled and reheard and a duty is imposed on the succeeding magistrate to inform the accused person of that right.... The assumption of jurisdiction by the succeeding magistrate without informing the appellant of his right was wrong and the trial by the succeeding magistrate was a nullity.”

10. In the instant case, the trial of the appellant and his co-accused commenced before the Nyeri Chief Magistrate (Hon. Kaburu Bauni) and was later transferred to the Karatina Senior Resident Magistrate’s court (before Hon. J.N. Nyagah) The contention is that when the case was transferred to Karatina, the hearing should have started *de novo*. We have examined the record of appeal and it is clear that when the appellant and his co-accused appeared before the Senior Resident Magistrate at Karatina on 19th march 2003, they were asked whether they wanted the case to start

de novo or to continue from where it had reached. The appellant responded that he wanted PW 6 (Lawrence Mwangi Gichogu) and PW 24, (IP Njeru) to be recalled and the production of Naro Moru Police Occurrence Book. It is clear from the record that the Karatina Senior Resident Magistrate gave the appellant an opportunity for the case to start *de novo* or recall of witnesses. The appellant requested that PW 6 and PW 24 should be recalled and the production of the Occurrence Book; this was allowed. As was stated by this court in ***Willis Ochieng Odera – v – R eKLR 2006***, the appellant was made aware of his rights under Section 200 of the Criminal Procedure Code and this ground of appeal fails.

11. We now address the issue that the language in which the proceedings of the court were conducted is not shown on record and that was a violation of Section 198 (4) of the Criminal Procedure Code. We have examined the record of proceedings in the lower court and find that during the hearing conducted before the Nyeri Chief Magistrate's court, the trial magistrate failed to indicate the language of the court. However, when the case was transferred to the Karatina Senior Resident Magistrate's Court, the language of the court and the interpretation provided is indicated. The Court of Appeal in considering the situation where the record did not show the language of the court stated in ***Francis Macharia Gichangi & 3 Others – v- R, Criminal Appeal No. 11 of 2004*** that there is a grave danger inherent in the failure by the trial court to record the essential details in proceedings before it and the language or languages of the proceedings and the language used by each witness. These are as important as the evidence and form part of the fair process of justice, the omissions of which might affect an otherwise sound conviction. In the case of ***Albanus Mwasia Mutua –v – R Criminal Appeal No. 120 of 2004*** and ***Swahibu Simbwani Simiyu & another –v – R, Criminal Appeal No. 243 of 2005***, this Court held that failure to indicate the language of the court results in the trial being a nullity. In the present case, the record of appeal shows that the appellant fully participated and cross-examined witnesses before the trial magistrate both in Nyeri and Karatina. Further, this ground of appeal was not raised before the High Court and the appellant cannot argue a new ground before this Court. We are satisfied that the trial of the appellant was fair and he fully participated in and understood the proceedings. This ground of appeal fails.
12. The other ground of appeal relates to identification of the appellant. The evidence identifying the appellant was given by PW 6 Lawrence Mwangi Gichogu. In order to determine the accuracy and reliability of the identification it is necessary to consider the evidence of other witnesses. The time of robbery as given by each of the witnesses is critical to this appeal.
13. PW1 SP Peter Mungai Kamau testified that on the material day 13th April 2001 he was on leave and at about **9.00 am** he was driving his motor vehicle KAJ 293B Toyota Corolla saloon. That a canter motor vehicle passed him so fast and a short while later a matatu belonging to a neighbour also overtook him; that in the front seat of the matatu he saw a passenger with an AK47 rifle; he was ordered to stop and the man in the matatu came out brandishing the gun. PW1 stated he got out of his car and started running backwards and was not able to identify the man; there were about six robbers whom he saw **but was not able to identify any of them.**
14. PW2 Edward Kithinji Mwenda testified that on the material day at **8.00 am** with his father they were on their way to their shamba and they met five people one of whom had a long jacket and his father noticed a protruding gun. His father commented that the men could be robbers and that they should report the matter to Naro Moru Police Station. Together with his father they entered his vehicle KAM 647L and as they drove towards Naro Moru, the men shot at them and his father died after 2 hours. **He stated that none of the five men was in court.**
15. PW3 Bernard Wanjohi Mundia **testified he was not able to recognize any of the robbers** and the time of the alleged offence was **8.00 am** near the forest.
16. PW4 Paul Kioko Nzioka in his testimony **did not identify the appellant as one of the robbers** but he identified the 4th accused in the dock. At the close of the prosecution case, the trial magistrate ruled that the identification evidence by PW4 relating to the 4th accused was unreliable since no identification parade was conducted to enable PW4 identify the 4th accused. The trial magistrate acquitted the 4th accused for having no case to answer.
17. PW5 Edward Mwangi Magiri testified that at about **8.00 am** six men came to his kiosk and ordered for tea and bread. After taking tea, they left. The men were strangers and **he was not able to identify any of the accused persons including the appellant.**
18. PW6 Lawrence Mwangi Gichogo is the witness who mentioned the appellant as one of the

- robbers. He testified that he is a matatu conductor and on 13th April 2001 at **8.00 am** he was at the bus stage in Kariokor market in Naro Moru waiting for passengers. While there, he saw a group of people coming with one ahead of others; they were six people in total. The man in-front arrived and asked which vehicle was leaving first, and he told him that his matatu was leaving first. The man told him to wait for his colleagues and when the other men arrived, one of them produced a gun and demanded keys to the car. That on 27th April 2001 he was summoned to Naro Moru police station for an identification parade and he was able to identify the appellant as the man who was ahead or in-front of the others. In cross-examination, PW6 reiterated it was **8.00 am**.
- 19.PW10 George Karobia testified that on the material day at around **10.00 am** six robbers stopped his matatu KAL 558J. **He was not able to identify any of the robbers.**
- 20.PW 11 Shelmith Gathigia testified that **she was not able to identify the robbers who attacked them in a Nissan Matatu at around 9.00 am** on the material day.
- 21.PW 12 Patrick Ngari testified that the robbery took place at 10.00 am and **he was not able to recognize any of the robbers.**
- 22.PW 14 John Kuria Gachoki testified that **he was not sure if any of the robbers was in the dock because it was a long time ago.**
- 23.PW 21 Charles Mbithi Mulinge testified that he was the driver to the Speaker of the National Assembly and was driving from Nanyuki to Nairobi at 5.00 am on 13th April 2001. **His vehicle was shot at and he was not able to identify or recognize any of the robbers as it was still dark.**
- 24.PW 26 IP George Mutonya testified that on 27th April 2001 at 10.45 am he conducted an identification parade whereby the appellant was identified by PW6.
- 25.In his defence, the appellant testified that he was arrested in his house in Nanyuki on 14th April 2001. He confirmed participating in an identification parade where PW6 identified him; he testified he was not satisfied with the parade since he was pointed out to PW6.
- 26.In assessing the evidence of identification of the appellant (3rd accused) by PW6, the trial magistrate expressed himself as follows:

"I however find the 3rd accused to have been properly identified by Lawrence Mwangi PW6. It was in broad day light when PW6 saw the 3rd accused during the robbery. He talked with the accused. He later on picked him from an identification parade. Three of the witnesses did not identify the accused. That is the more reason why I believe that the parade was properly conducted. I do not believe the 3rd accused's evidence that he was pointed out to PW 6 by PC Muriuki. The 3rd accused was one of the robbers who robbed PW6 of their vehicle. They were armed with guns when they did so. The driver of the motor vehicle KAA 431E one Peter Maina Kinyua ... did not testify but it is his tout PW6 who testified how they were robbed of the vehicle. The fact that the driver did not testify does not displace the fact that they were robbed of the vehicle. I have no doubt that it is the 3rd accused's gang that robbed the policeman Peter Mungai Kamau, PW1 of his vehicle registration no. KAJ 293B. They are the same people who robbed George Warobia PW 10 of his matatu registration number KAL 558J. They shot at the matatu of Bernard Wanjohia Mundia PW3 and killed his passenger. It is the same group that shot at the vehicle of the speaker of the national Assembly. The robberies took place in the same vicinity and at the same time. The 3rd accused and others must be the ones who robbed the said motorists as they tried to escape. Counts 4, 5, 8 and 9 have been proved beyond all reasonable doubt against the 3rd accused."

The policeman John Ngamau Gikunju and one Joseph Watata Gichini seem to have been killed at night as their bodies were found at 7.00 am. It is not known whether it is the same gang that had killed them. Counts 2 and 3 have not been proved.

- 27.Our evaluation of the evidence on record shows that the only evidence linking the appellant to the crime is the testimony of PW 6. The appellant was thus convicted on the testimony of a single identifying witness. It is our duty to determine whether the two courts below properly evaluated the testimony of PW 6 in identifying the appellant and linking him to and convicting him of the 5 counts of robbery with violence.

28. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances, it is safe to act on such identification. 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. In the present case, both courts below concluded that the evidence of PW 6 (Lawrence Mwangi Gachogu) as the single identifying witness was sufficient to sustain the appellant's conviction. The trial court in its judgment stated:

“I find the 3rd accused to have been properly identified by Lawrence Mwangi PW 6. It was in broad day light when PW 6 saw the 3rd accused during the robbery. He talked with the accused.”

The High Court in its judgment held:

“In this case, it was around 8.00 am, so the issue of lighting does not arise. PW 6 swore that he saw the appellant well and could recall his face because the appellant was the one who came ahead of the others and asked PW 6 whether their matatu was the one leaving first and upon confirmation asked then to wait for his colleagues. The evidence of PW 6 that the appellant was one of the robbers was fortified by his identification of the appellant at the identification parade conducted by PW 26 wherein PW 6 successfully identified the appellant. Apart from the identification of the appellant by PW 6, there was a statement under inquiry which was made by the appellant to PW 24. This statement which was a confession was admitted in evidence by the trial magistrate after a trial within a trial. ... Although retracted, we find that the confession made by the appellant was so detailed and consistent with the evidence of the prosecution witness such as PW 2, PW 3, PW 4, PW 5, PW 10 and PW 28 that in all the circumstances of this case, the confession could not but be true. We have considered the sworn defence and the alibi of the appellant cannot be true.”

30. The issue for this court to determine is whether the two courts below properly evaluated the evidence of PW 6 and the confession statement by the appellant. In the case of **Charles O. Maitanyi vs. Republic (1986) KLR 198**, this Court held that:-

“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”

31. The learned Judges of the High Court upheld that the appellant was part of the gang of six robbers who committed the crime and confirmed his conviction on counts 4, 5, 6, 8 and 9. We note that this is a second appeal and this court will not normally interfere with findings of fact by a trial court unless the findings are based on no evidence or a misapprehension of the evidence or where the Judge is shown demonstrably to have acted on the wrong principles in reaching his decision. Further, once it is established that there was evidence to support the conviction, the court on a second appeal will not examine the sufficiency of such evidence. (See **Njeri vs. Republic [1981] KLR 156**).

32. In the instant case, in relation to Count IV, PW 21 Charles Mbithi Mulinge testified that he left Nanyuki at **5.00 am** and it was dark when his vehicle belonging to the Speaker of the National Assembly was shot at. He testified he did not identify any of the robbers. The question we pose is if PW 21 did not identify any of the robbers, on what evidence was the appellant identified and

- convicted on Count IV?
33. In Count V, the motor vehicle involved was KAM 647L. The witness who testified in relation to this count was PW 3 Benard Wanjohi Mundia. He testified that the robbery took place at **8.00 am**. He testified that there were six robbers and he was not able to recognize any of them. PW 4 Paul Kioko testified that the offence in Count V took place at **8.30 am** and he did not identify any of the robbers. We again pose the question, on what evidence was the appellant identified and convicted of the crime in Count 5?
34. In relation to count VI, the appellant was charged with robbery involving motor vehicle KAA 432E Toyota matatu. PW 6 the tout in this matatu testified that he saw the appellant at **8.00 am** in relation to Count VI. PW 3 testified that the crime in Count 5 took place at **8.00 am**; PW 5 Edward Mwangi Magiri testified that six men came to his tea kiosk at **8.00 am** and he served them tea and bread. He did not identify the appellant. **These were three different places; could the appellant be at three different places at the same time? The answer is No; there is no evidence on record that a miracle happened.** Due to this time factor, a doubt is cast whether the appellant was involved in committing the offence in Count V or Count VI. We would have ignored the differences minor difference in time between PW 3 and PW 4 in Count 5; however, taking into account that the scene of crime in Count V and Count VI are different, a doubt is cast as to whether the appellant was at these different places at the same time.
35. We have read the evidence of PW 6 and it is impossible not to find that it is incredible because of all witnesses, he is the only one who claimed to have identified the appellant and yet gave no serious descriptions as to his features prior to the identification parade (See *Charles Gitonga Stephen – v- R eKLR 2006*). PW 6 should have given a detailed description of the suspect as was stated in the cases of *Moses Munyua Mucheru – v- R, Criminal Appeal No. 63 of 1987* and *Juma Ngondia – v- R, Criminal Appeal No. 13 of 1983* and *Peter Njogu Kihika & Another – v- R Criminal Appeal No. 141 of 1986*.
36. In relation to Count VII, the motor vehicle involved is KAJ 293B. The witness who testified on this count was PW 1 Peter Mungai Kamau. He testified that the offence took place at 9.00 am. He was not able to identify the appellant as being among the robbers. We again pose the question on what evidence was the appellant identified and convicted in relation to this count?
37. In relation to Count IX, the motor vehicle the subject of the robbery charge is KAL 558J. The witness who testified was PW 10 George Karobia. He testified that the robbery took place at 10.00 am. He did not identify the appellant. We again pose the question on what evidence was the appellant identified and convicted in relation to this count?
38. Having posed the same question in relation to the Count Nos. 4, 5, 6, 8 and 9, how did the trial magistrate and the learned Judges of the High Court answer the questions to find that the appellant was identified and linked and indeed committed the crimes alleged in each of the counts?
39. The trial magistrate expressed himself as follows:

“I have no doubt it is the 3rd accused’s gang that robbed the policeman Peter Kamau PW1 of his motor vehicle registration no. KAJ 293B. They are the same people who robbed George Warobia PW 10 of his matatu registration no. KAL 558J. They shot at the matatu of Bernard Wanjohia Mundia PW3 and killed his passenger. It is the same group that shot at the vehicle of the Speaker of the National Assembly. The robberies took place in the same vicinity and at the same time. The 3rd accused and others must be the ones who robbed the motorists as they tried to escape. Counts 4, 5, 8 and 9 have been proved beyond all reasonable doubt against the 3rd accused. The policeman John Ngamau Gikunju and one Joseph Watata Gichini seem to have been killed at night as their bodies were found at 7.00 am. It is not known whether it is the same gang that had killed them. Counts 2 and 3 have not been proved. The complainants in Counts 1 and 10 did not testify. There is thereby no evidence that they were robbed anything.”

40. The learned Judges of the High Court in convicting the appellant relied on the testimony of PW 6 and the retracted confession by the appellant and expressed themselves as follows:

“Although retracted, we find that the confession made by the appellant was so detailed and consistent with the evidence of the prosecution witnesses such as

PW 1, PW 3, PW 4, PW 6 and PW 10 and PW 28 that in all the circumstances of this case, the confession could not but be true....We come to the conclusion that there was sufficient evidence in support of the appellant's conviction in respect of all the 5 counts of which he was convicted."

41. The learned Judges in their analysis of the evidence on record relied on the confession which the trial magistrate had ignored to confirm the conviction of the appellant. The trial court in its judgement did not make any reference to the confession which the trial court had held admissible. Before we evaluate the appraisal of the evidence by the learned Judges, it is imperative to analyse if there was sufficient evidence on record identifying the appellant to justify the findings of the trial court.
42. The record reveals that except for Count VI, no witness identified the appellant in respect to Counts 4, 5, 8 and 9. The trial magistrate himself expressed doubt that it is unlikely that the gang that killed the policeman was the same gang that committed the robberies before 7.00 am. The trial court stated that *"the policeman John Ngamau Gikunju and one Joseph Watata Gichini seem to have been killed at night as their bodies were found at 7.00 am. It is not known whether it is the same gang that had killed them."* In Count IV, the vehicle belonging to the Speaker of the National Assembly was shot at before 7.00 am when it was dark and PW 21 Charles Mbithi Mulinge testified he did not identify any of the persons. By transposing the same reasoning, the learned magistrate erred in finding the appellant guilty of Count IV when the offence took place before 7.00 am and at the same time the trial court raises doubts that it might have been a different gang of robbers who committed the crime before 7.00 am. The benefit of doubt should have been given to the appellant in respect of Count IV. We find that the prosecution did not prove Count IV beyond reasonable doubt. Even the trial court was in doubt as to which gang of robbers committed the offence before 7.00 am.
43. We now turn to Counts V and VI. We have evaluated the evidence on record and are faced with the testimony of witnesses who state that the offences in the information were committed at 8.00 am. PW 6 was a tout in a matatu and he testified that he saw the appellant at 8.00 am at the bus stage. PW 3 Bernard Wanjohi Mundia testified that six men approached them around 8.00 am regarding the crime in Count 5 and they were near a forest; PW 5 Edward Mwangi Magiri testified that six men came to his tea kiosk located at Njoguini village at 8.00 am and he served them tea and bread. They were strangers and he did not identify any of them including the appellant. These were three different places; could the appellant be at three different places at the same time in respect to Counts V and VI? We find that both the trial magistrate and the learned Judges did not give due consideration to the time factor as given by the witnesses.
44. In relation to Counts VIII and IX, there is no direct evidence from any witness who identified the appellant. The basis for conviction of the appellant by the trial magistrate is that **"the robberies took place in the same vicinity and at the same time."** In the judgement, the trial court then raises doubt whether it was the same gang of robbers who participated in all the crimes. In the absence of any witness who identified the appellant in relation to the crimes in Counts VIII and IX, it was an error of law for the trial court to convict the appellant based on the statement that the robberies took place in the same vicinity and at the same time. The fact that the robberies took place as stated does not relieve the prosecution the duty and burden to prove that the appellant was part of the gang of robbers. The witnesses who testified did not identify the appellant and we find that it was an error of law to convict the appellant in Counts VIII and IX in the absence of any identifying witnesses.
45. Having re-evaluated the evidence on record and reasoning of the trial court, we observe that the learned Judges of the High Court did not re-evaluate the evidence on record for each and every count to determine if the appellant was linked to the crimes in each count. As this court has stated before, the first appellate court should not recount and repeat the judgement of the trial court; the first appellate court must separately evaluate the evidence and arrive at its own independent conclusions. In the present case, the learned Judges erred in not evaluating the facts of the case but instead observed that *"there was sufficient evidence in support of the appellant's conviction in respect of all the five counts"*. It was incumbent upon the learned Judges to analyze the evidence and show the "sufficient evidence". It is our considered view that when an accused person is charged and convicted of more than one count, the first appellate court in re-evaluating the

evidence should not treat the counts as a single omnibus count. The court must independently re-evaluate the evidence on identification and conviction on each count separately to satisfy itself that the prosecution proved beyond reasonable doubt the elements of crime in each count and that the accused was properly convicted in each count.

46. We now turn to address the issue of the confession relied upon by the learned Judges to uphold conviction of the appellant. PW 24, IP Benson Njeru Mucheke, testified that he obtained a confession from the appellant after inquiry. Whereas the trial court held the confession to be admissible, in its judgement, the court did not refer to the confession, whether this was deliberate or not is unclear.
47. The learned Judges of the High Court in their judgment dwelt on the admissibility of the confessions made by the 2nd and 4th accused. The learned Judges noted that the trial court held the confession of the 2nd and 4th accused to be inadmissible. It is our considered view that the learned Judges of the High Court erred in incorporating the confessions by the 2nd and 4th accused person when evaluating the evidence on record against the appellant who was the 3rd accused. Once the confessions by the 2nd and 4th accused had been held inadmissible by the trial magistrate, the appellant was prejudiced when the learned Judges held his confession was admissible. The confessions then became a statement against a co-accused and no opportunity was accorded to the appellant to comment on these confessions now held admissible.
48. Despite the admissibility of the confessions, we also examine whether there was independent corroborative evidence available on record. In the case of *Tuwamoi – v- Uganda (1967) EA 84,91*, it was stated:

“A trial court should accept any confessions which has been retracted or repudiated or both retracted and repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all material points and surrounding circumstances that the confession cannot be but true.”

49. Where there is no corroboration for a retracted confession statement made by an accused person, there is need for the court to exercise great caution and reserve before arriving at the conclusion that the confession must be true and proceeding to base a conviction on it. (See *Karani & 3 Others – v – R, Criminal Appeal No. 71 of 1989*).
50. As regards the confession by the appellant, the learned Judges stated that the confession was so detailed and consistent with the evidence of PW 1, PW 3, PW 4, PW 6 and PW 10. We have re-evaluated the testimony of these witnesses and one thing is certain. Except for PW 6, none of the witnesses recognized or identified the appellant as a member of the gang that committed the robberies described in the various counts. The consistent element in the testimony of each of the witnesses PW1, PW 3, PW 4 and PW 10 is that indeed they prove that the robberies did take place. The other consistent element in their testimony is that they did not identify the appellant as the perpetrator of the crime. As regards the testimony of PW 6, we have already indicated that his testimony is not consistent with the time of 8.00 am which was referred to by PW 3 and PW 5. The totality of the evidence is that the identification of the appellant as a member of the gang was not free from error and it is unsafe to base his conviction on such evidence. The trial magistrate held the confessions of the 1st and 2nd accused inadmissible; he did not refer to the confession of the appellant in the judgment. The law must be applied equally to all persons charged with the same offence. The learned Judges of the High Court by finding the confessions of the 1st and 2nd accused admissible tried to lock the stable when the horse had bolted. If the confession by the appellant was detailed, it was incumbent upon the first appellate court to point out the salient features in those details that implicated the appellant; a mere statement that the confession was so detailed does not suffice to prove the guilt of the appellant beyond reasonable doubt. There is need for other circumstantial evidence that proves the involvement of the appellant in the crime. (See *Karani & 3 others – v- R, Criminal Appeal No. 71 of 1989*). We find that there is absence of

circumstantial evidence which could corroborate the retracted confession made to PW 24 by the appellant.

51. As to the remaining other grounds of appeal filed by the appellant, we find that none of them has merit. In fact, these grounds are related to matters which have no evidential basis. We reject all of them.

52. On the whole, we find that the case against the appellant was not proved beyond reasonable doubt and we can only agree with the Court of appeal in ***Suleiman Juma alias Tom – v- R, Criminal Appeal No. 181 of 2002 (Msa)*** 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. The evidence of PW 6 which was used to identify and convict the appellant, looked at in the totality of the case is not watertight. We hereby quash the conviction of the appellant in respect of Counts 4, 5, 6, 8 and 9. We set aside the death sentences that were meted out to the appellant. We hereby order and direct that the appellant should be set forth at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 25th day of July, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR