IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ONYANGO OTIENO, KARANJA & MARAGA, JJ.A)

CRIMINAL APPEAL NO. 312 OF 2005

BETWEEN

DANIEL GUCHU MWANIKI

REUBEN NGUGI MWIKIA

ELIUNDI GUCHU MUIRURI.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi

(Lessit & Mutungi, JJ.) dated 26th July, 2005

in

H.C.CR.A. Nos. 543, 544 & 545 of 2002)

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JUDGMENT OF THECOURT

The appellants before us in this appeal ***Daniel Guchu Mwaniki***, ***Reuben Ngugi Mwikia*** and ***Eliud Guchu Muiruri***, the first, second and third appellants respectively, were the second, first and third accused persons before the Chief Magistrate Court at Thika. Their appeals to the High Court at Nairobi were numbers 544, 543 and 545 respectively. These were consolidated and heard together in that court.

They faced two charges in the Chief Magistrate's Court. The first count, as we can decipher from the record was robbery with violence contrary to ***section 296(2)*** of the Penal Code whereas the second count though reading robbery with violence was contrary to **section 296(1)** of the Penal Code. The difference between these two charges becomes more pronounced when the particulars are cited and considered. The particulars of the first count were that:

"On the 20th day of April 2006 at Githunguri Village in Maragua District of the Central Province, jointly with others not before court robbed Douglas Gitau Njenga of one T.V. set make Kondio, two hats god father, one hunters knife, one muttock and cash Kshs. 7,200/= and at or immediately

before or immediately after the time of such robbery wounded the said Douglas Gitau Njenga;

Whereas the particulars of the second count are that: -

"On the 20th day of April, 2001 at Githunguri Village in Maragua District of the Central Province, jointly with others not before court robbed Francis Mburu Njenga of one power saw make Hesgaruana valued at 43,000/= and cash Shs.4,000/=. All to the total value of Kshs.47,000/."

They pleaded not guilty to first count, but the record does not show that plea was taken on count 2. After full trial in which four prosecution witnesses gave evidence and the appellants gave their unsworn statements and called one defence witness, the learned Senior Principal Magistrate (H. Omondi) (as she then was) found each appellant guilty of the two offences, convicted them of the same and sentenced each of the them to death. We make haste to add here, that although the second count, badly drafted as it was, infact laid out the charge under ***section 296(1)*** of the Penal Codewhich is a charge for robbery only and not robbery with violence under ***section 296(2)***, the trial magistrate in her judgment referred to it as robbery with violence under ***section 296(2)*** and sentenced the appellants to death as if it was a charge contrary to ***section 296(2)*****.** We shall revert to this hereinafter in this judgment. Suffice it to say at this stage that in her finding the appellants guilty as stated, the learned magistrate stated *inter alia* as follow:

"My finding is (sic) that there was ample opportunity for identification in terms of time spent together. There was sufficient light from the solar system, the accused were identified by PW1 and PW2 and they are fellows who were known to them even before the incident. It wasn't just accused 1 foot that led to identification but PW1 saw him under the light as they moved about in the room. I note that accused 1 and accused 2 do not talk about their whereabouts as at 19/20th April at 1.00 a.m. Accused 1 refers to that date until about 11.am (sic).

I have considered submission of accused 1 authorities cited can be distinguished from this case. I am persuaded they have been sufficiently identified and the evidence sustains a conviction on both counts. There (sic) defence are rejected and are convicted as charged."

They were all not satisfied with the convictions and sentences. They moved to the High Court by way of appeals, the numbers of which are as above. These appeals were consolidated and as we have stated, were heard together. After full hearing, the learned Judges of the High Court (Lesiit and Mutungi, JJ.) dismissed them in a judgment dated and delivered on 26th July 2005. In dismissing the appeals, the learned Judges went through each complaint raised by the appellants, considered it and dismissed it entirely with a conclusion that none of the grounds relied upon in their appeal had merit. Again we pause here to observe that the learned Judges of the High Court likewise proceeded as if the two counts before them were both of robbery with violence contrary to ***section 296 (2)*** even though the second count was not. They also did not observe that the record did not demonstrate that the appellants' pleas were not taken or if taken were not recorded in respect of the second count. As we said earlier, this also will be revisited hereinafter in this judgment.

The appellants were still not satisfied with the decision of the learned High Court Judges and hence this appeal premised on eight grounds cited in a Supplementary Memorandum of Appeal filed on their behalf by Ondieki & Ondieki, Advocates a firm of advocates who conducted this appeal on their behalf. The original Memorandum of Appeal filed by each appellant in person, the first Supplementary Grounds of Appeal filed by the first and second appellants as well as a Supplementary Memorandum of Appeal filed by Betty Rashid & Company advocates, former advocates for the appellants in this appeal, were all abandoned by Mr. Ondieki. The grounds relied on in the relevant supplementary grounds of appeal were: -

"1. The superior court erred in law by relying on evidence of identification that did not meet the required legal standards.

2. The superior court erred in law by confirming the conviction on the basis of a defective charge sheet.

3. The charges were not proved beyond reasonable doubt as critical witnesses never testified.

4. The superior court erred in law by relying on circumstantial evidence that did not meet the required legal standards.

5. The superior court erred in law by relying on evidence of PW1 which was not credible.

6. The superior court misdirected itself in legal issues.

7. The superior court erred in law by failing to consider the plausible defence by the appellants.

8. The superior court erred in law by failing to re-evaluate the entire evidence and draw their own conclusions."

The brief facts giving rise to the entire saga were, in our view straightforward. ***Douglas Gitau Njenga*** (PW1) who lived in Githunguri and was running a cycle repair business at Kabati was asleep in his house on 20th April, 2001 at about 1.00 a.m. He heard his dog backing. He woke up, peeped through the curtain and saw through his glass windows about ten people. He did so aided by solar power light. Those people were within his compound and were about 20 feet away. One of those people appeared to be in handcuffs and others wore official police uniform i.e. coat, berets and other police uniform. They ordered Douglas to open the gate alleging that they wanted to carry out a search in his compound as a motor vehicle had been stolen. Together with solar as a source of light, there was also moonlight. They were armed with crowbars, axes and pangas. Douglas told them it was too late and he could not open for them. A brief exchange ensued between the attackers and Douglas with the attackers insisting on the gate being opened while Douglas resisted. The man in handcuffs alleged that he had sold a tyre to Douglas. On believing that they were genuine policemen, he opened the gate. They went into the compound and they ordered him to accompany them into the house. He complied but once in the house, specifically in the sitting room they ordered him to lie on the ground. He was then cut on the face with an axe and he fell down bleeding. He pleaded with them not to kill him. He was then ordered to stand up. He then looked up and saw a foot which he recognised as that of the second appellant, ***Reuben Ngugi*** as Reuben's feet had major swellings on the upper part. At that time the solar light was still on. They accompanied him to the bedroom demanding money. He gave them Kshs.3000/-. At that juncture second appellant was behind them and was being addressed as "*corporal*". He insisted on more money but Njenga said he had no more. He was led to the sitting room and hit again on the face and ordered to give more money. One of the attackers who was being called "*Gachucha*" placed a pistol on the side of his face. Another attacker he identified as ***Daniel Guchu Mwaniki***, the first appellant herein who had appeared handcuffed earlier suddenly rushed and carried away a television. Others continued ransacking the entire house and took his two godfather hats, wrist watch and hunters knife. They demanded car keys but as Douglas opened the boot of the car outside the compound, one of the attackers saw a mattock and claimed it was his. He allowed them to take it as well. They then ordered him to park what they had stolen in the car boot and he obliged. After that Douglas, devised a way that enabled him to open the gate and to escape. After escaping, he heard screams from his house and decided to return to his house, this time with members of the public who had responded to his distress call. He had informed them that he had recognised a number of his attackers. The thieves had gone. They tried to trace them but with no success. They went to second appellant's house but he was not there. He then went and made a report to the police and together with the police they went to second appellant's house a second time. They found him washing clothes which appeared to Douglas to have been blood stained. Meanwhile, members of the public arrested the other two appellants. In his evidence, Douglas was certain he had known the appellants prior to that incident. He described the first appellant as the one who appeared to have been handcuffed and who took his T.V set and third appellant as the one who took away his mattock from the boot of his vehicle claiming it was his. He also described what first and second appellant wore. He was injured on the left side of his face and on his back. He further described what weapon each appellant had. Lastly he was taken to Thika District Hospital where he was treated, discharged and issued with a P3 form duly filled. The same night ***Francis Mburu Njenga*** (PW2) a brother of Douglas Njenga whose house was only forty (40) metres from that of Douglas, heard dogs barking and noise outside together with people speaking in Swahili language saying "*Hapa ndiyo kwa Gitau nyumbani*." Those people said further that

they were policemen. Shortly thereafter, he heard Douglas opening the door. He heard all exchanges between Douglas and the attackers. He heard the people entering Douglas's house. He then peeped through his window and saw many people outside Douglas's house. There was solar light as well as the moonlight. When he came out of his house, he met four of the attackers who forced him back into his house. Those people ransacked his house and took his power saw. They also demanded money and he gave them Kshs.4500/=. He was then freed to go back to sleep as they left. Thereafter he went outside and screamed also as the attackers fled. He recognised among those attackers, the three appellants before the court and although his house did not have lights, nonetheless the attackers had torches, and there was moonlight as well as nearby solar light from Douglas's compound. It was also his evidence that they first went with members of the public to the house of the second appellant but did not get him. Thereafter they went to the houses of the other two appellants but they were not in their houses. They then reported the matter to the police and the police went to the second appellant's house, found him and arrested him. He also maintained in cross-examination by the first appellant that he gave the appellants' names to the police and described the way they were dressed. ***Pc. Frankline Babu*** (PW3) was attached to Kabati Police Station. On the same night at 1.30 a.m. he received and recorded a report from Douglas Njenga that the latter was attacked by a gang of ten armed people dressed in police jungle jackets who robbed him. He issued Douglas with a note to go to hospital. As the complainant identified to him three of his attackers, he went to the house of the second appellant, found him, arrested him and recovered a crowbar from his house. He proceeded to the house of the other two appellants but they were not in their respective houses. He said in his evidence that Douglas named the appellants to him as Ngugi and each of the other two as Guchu. The other two were thereafter taken to the police station by members of the public. On the same night, ***Joseph Mukoma*** (PW4) a clinical officer at Thika District Hospital, examined Douglas and found he had a cut wound on the left cheek and cut wound on the shoulder. He assessed the degree of the injury as harm as filled in the P3 which he produced in court.

At the close of the prosecution's case the learned Senior Principal Magistrate found a *prima facie* case had been established against all appellants and put them on their defence, the first appellant Daniel Guchu Mwaniki who was the second accused at their trial stated in an unsworn statement that on 28th April he went to work as he was a farmer. He passed through the shops and entered into a hotel to take tea. He then went and bought cigarettes from a shop. As he came out of the shop, a motor vehicle stopped near him. Inside it were two young people. They asked him to go with them to cut grass. He obliged, but those people drove the vehicle to the police station. He was then arrested and was placed in the cells and was thereafter charged with the offence he knew nothing about.

The second appellant Reuben Ngugi Muikia in an unsworn statement said on 19th April, 2001, he woke up and went to look for grass for his livestock. In the evening he went with his brother-in-law to a trading centre where they had few beers till late evening. At 10.00p.m. Douglas together with his wife approached them and greeted the other people seated with him but left him out because they had family differences. Douglas said he would take him somewhere else. The second appellant did not respond to that remark and Douglas and his wife left. At the close of the bar, the second appellant went home and slept. At night he heard a knock at the door and on inquiry, those people knocking told him they were police. He opened for them and they were with Douglas. They searched the house and thereafter arrested him and took him to Kabati Police Station. He was charged with an offence he knew nothing about.

The last appellant Eliud Guchu Muiruri likewise gave an unworn statement in his defence. On 28th Douglas and his brother Kamau went to his house at about 7.30 a.m. and demanded that he accompanies them to the police station as they heard some people at the quarry where the appellant was working alleging that they heard some of the appellants tools had been stolen. He obliged and accompanied them to the police station. He was re-arrested and locked in the cells as the complainant Douglas was alleging that the third appellant was very proud that his quarry was doing well and they wanted to ensure he was unable to control it. ***John Kamande Ngugi***, (DW4) was a witness called by the said appellant. He (witness) was his son. His evidence was that on 19th April, 2001 his father arrived home and told him of his arrival but at 1.00 a.m. he heard screams and went out. After half an hour screams died out and he returned to his house to sleep but after half an hour he heard a knock at his father's door. When he went out to find out what was happening, he found police officers who arrested and went away with his father.

The above were the facts. Mr. Ondieki, the learned counsel for all appellants, addressed us at length in support of the grounds cited in the supplementary Memorandum of Appeal which we have reproduced above. He submitted first that both charges were defective in that the charge in respect of the first count was at variance with the evidence adduced in court as the charge stated the amount taken from Douglas as Kshs.7200/= whereas in evidence Douglas said the amount stolen was Kshs.3000/= and as to the second count, the appellants were charged under ***section 296 (1)*** yet the particulars still stated that it was robbery with violence whereas the particulars constituting the robbery with violence limb were not stated. Secondly, Mr. Ondieki submitted that no plea was taken in respect of count 2. Thirdly, he contended that there was no evidence that the appellants committed the offence as charged in count 2 as in any event, the particulars of that charge were incomplete. His fourth point was on identification which he said was not reliable for purposes of a conviction as required by law. The next issue he raised was that the members of the public who allegedly arrested the first and second appellants were not called to give evidence on the reasons why they arrested the two appellants. He concluded his submission by stating that considering the case in its entirety, the evidence that was adduced was not credible and could not support a conviction. In his view, had the first appellate court properly revisited the evidence a fresh, analysed it and re-evaluated it as required by law, the appeal would have been allowed. He asked as to allow the appeal.

Ms. Nyamosi, the learned Principal State Counsel, on the other hand while conceding the appeal in respect of the conviction and sentence on second count, nonetheless supported the conviction and sentence on the first count submitting that there was sufficient evidence upon which the court could and did rightly convict and sentence all appellants. According to her, identification was the main issue and the identification in this case was by recognition and further, Douglass stated what part each appellant played in the furtherance of the offence. She submitted that conditions for proper identification were favourable as there was security light and Douglas was able to identify the attackers long before they entered the house. Besides that, she said, the incident took about 30 minutes which was sufficient time for recognition of the appellants. She submitted lastly that the appellants' defences were considered. She urged us to dismiss the appeal against conviction and sentence on first count.

In our considered view, the learned Principal State Counsel was plainly right in conceding the appeal against conviction and sentence in respect of the second count. We too, with respect agree with Mr. Ondieki that the appeal on this count must succeed. First the record shows that when the appellants appeared in court for the first time on 7th May, 2001, only one charge was read out and explained to each of them. Their plea in that count was taken and each pleaded not guilty. There was an application for adjournment by the prosecutions to enable them consolidate the case with another which was in another court but after the case was adjourned on several occasions that attempt to consolidate it with the other case fizzled out and the case was set down for hearing and heard to its completion without the plea being taken on the second count.

Section 77 (2) (b) of the retired Constitution required an accused person to be informed of the offence facing him in a language he understood and its ingredients fully explained to him. It is upon that information that the accused person sets out to prepare his defence as it is then that he is made aware of the allegations made against him. It goes without saying that if the charge is not read and explained to the accused as happened here in respect of count 2, then the accused cannot be expected to understand what allegations are being made against him and cannot be expected to prepare fully to meet the same see **John Kimani Gitau vs. Republic, Criminal Appeal No. 314 of 2006 (ur)**. It becomes even more difficult in a case such as this where there was already another charge existing as in such a case the mere fact that the witnesses have given evidence in court in the presence of an accused person would not in itself help the situation as the accused would likely think that all that evidence is in respect of the charge read out to him and in respect of which his plea was taken - in this case the first count. He would not be expected to know, particularly in a case such as this where the appellants conducted their cases in person, that there is another charge very close to the one read out to them but which is under a different provision of the law and is in respect of a different complaint. This error was not detected by the learned Senior Principal Magistrate who took over from another magistrate after the original plea was taken. It was also not brought to the attention of the first appellate court. It is in our view enough to vitiate the proceedings in respect of that count. However, here there was more. As we have stated above although the second count

was brought under *section **296 (1)*** of the Penal Code, the learned Senior Principal Magistrate did not appreciate this. She proceeded on the basis that:

"Reuben Ngugi Muikia, Daniel Guchu Mwaniki and Eliud Guchu Muiruri (the accused 1 accused 2 and accused 3 respectively (sic) are jointly charged with two counts of Robbery with violence contrary to section 296 (2) PC." (Underlining supplied)

This was a misapprehension of the charges that faced the appellants for the second count was under ***section 296 (1)*** and not ***296 (2)***. This mistake was carried into the sentences awarded to the appellants. The sentences read as follows:

"Each accused's plea in mitigation considered and being 1st offenders.

COUNT 1 - Each accused will suffer death as authorised by law.

COUNT 2- Each accused will suffer death as authorised by law."

Had she appreciated that the second count was that of robbery under ***section 296 (1)***, she would have not sentenced the appellants to death in respect of that count for the sentence under that provision is not death. The High Court's attention was not brought to this glaring mistake with the result that it also fell in the same trap. At the commencement of its judgment, the High Court stated:

"The 3 appellants herein, Reuben Ngugi Muikia, Criminal Appeal NO. 543 of 2002; Daniel Guchu Mwaniki, Criminal Appeal NO. 544 of 2002 and Eliud Guchu Muiruri, Criminal Appeal No. 545 of 2002 were jointly charged with two counts of Robbery with violence contrary to section 296 (2) of the penal Code, in Criminal Case No. 2283 of 2001 at the Senior principal Magistrate's Court, Thika."

We have already said that this represented a misapprehension of the charges that the appellants faced particularly count 2. We add that as the trial court and the High Court treated count 2 as that of Robbery under ***section 296 (2)*** that it was not, they must have applied standard of proof and ingredients that could not apply to that charge and that was not proper in law.

We now turn to the first count. Mr. Ondieki's complaint in respect of convictions on this count are first that the charge is defective in that the charge talks of Kshs.7200/= as the amount stolen during the alleged robbery whereas the complainant, Douglas in his evidence said Kshs.3000/= is what he was forced to depart with. He referred us to this Court's decision in the case of **Yongo vs. Republic (1983) KLR 319** in which this Court held that a charge is defective where *inter alia*, it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses or where it does not for such reasons, accord with the evidence given at the trial. Secondly, that the appellants were not properly identified within the standards acceptable in law, and thirdly that the members of the public who arrested the first and the third appellants were not called as witnesses.

On the claim that the charge in respect of the first count was defective, we are of the view that a charge cannot be defective merely because the witness gives evidence that does not accord to any part of it. In our view the case of ***Yongo vs. Republic*** (supra) was dealing with a situation where an ingredient of a charge is not included in the charge sheet, but not with a discrepancy in the amount as appears in the charge sheet and as given in evidence. That is no more than a discrepancy and goes to the credibility or otherwise of a witness. Indeed ***Yongo's case*** (supra) which is a good law, was dealing with a situation when committal proceedings were still part of our criminal proceedings. We do not think that a charge would be defective any time a witness does not reproduce what is stated as part of the robbery. Whether it was Kshs.3000/= as stated by the appellant or Kshs.7200/= as the charge states are all matters of whether the respondent gave a correct figure to the police before the charge was prepared or whether he forgot the exact amount stolen. Further in this case where apart from the money allegedly stolen, other properties

namely T.V, two hats god father, hunters knife and mattock were also stolen, the charge would still stand even if the evidence relating to money was ignored. We do not see any merit in that complaint.

The next issue is that of identification. In the case of **RORIA v. REPUBLIC (1967) EA 583**, the predecessor of this Court stated:

"A conviction resting entirely on identity invariably causes a degree of uneasiness."

and went on to quote what ***Lord Gardner***, LC said in the House of Lords in the cause of a debate on ***s.4*** of the **Criminal Appeal Act 1966** of the United Kingdom which was as follows:

"There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine out of ten – if there are as many as ten – it is in a question of identity."

We do agree fully with the above sentiments. To avoid that situation where an innocent person may be convicted on evidence of identification which may very well be mistaken, this Court has time and again stated in various judgments that evidence of identification of a stranger in cases where the accused denies being at the scene, must be examined with the greatest care before a conviction is based on it. This should be done even in case of identification by recognition for as was stated in the case of **R v. Turnbull and others (1976) 3 All ER 549**, even in cases where witnesses purport to identify friends etc, mistakes can be made and as was held by this Court in the case of **Kiarie vs. Republic (1984) KLR 739**: -

"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken."

Thus in our view, whenever the trial court is dealing with evidence of identification of a stranger or of identification by recognition of a person he claims to have known before the incident, the court still has to examine with greatest care such evidence. In doing so, however, the court has to bear in mind that in cases of recognition, the witness, having already seen the accused before and having mastered in his mind the salient features of the accused, would find it easier to ascertain the accused and to hold firm views of who he saw at the time of the incident than would be for a stranger he saw for the first time at the time of attack when he was probably scared as he feared for his life. In the case of **Anjononi & others vs. R. (1980) KLR 59** this Court stated at page 60 as follows:

"Being night time the conditions for identification of robbers in this case were not favourable. This was, however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We draw attention to the destinction between recognition and identification in Soire ole Guteya vs. Republic (unreported.)"

In this case Douglas says solar powered lights were in his compound and inside the house. The one inside the house was lit and broken later but this was towards the end of the robbery incident. The house of Francis Mburu Njenga, his brother, was only 40 metres away from the compound of Douglas. Mr. Ondieki says there was no evidence of how far the source of light was from the scene. The evidence on record is that the security light in the compound remained and was not interfered with. The light was clearly available in the compound where the appellants were before they entered the house. In the house there was light before it was broken later. The appellants entered the house and particularly the first and second appellants for one of them took the T.V while the other received money. In the compound the third appellant took the mattock from Douglas's vehicle.

We are satisfied that there was light outside and in the house before the one in the house was later cut. That light was at the scene and thus the question of its distance from the scene is not an issue. Thus the conditions obtaining at the time of robbery were favourable for positive identification. Douglas described what each appellant did in the course of the robbery. He knew each of them prior to the incident. The incident took over ten (10) minutes and that was in our view sufficient time for one to

recognise people he knew. Francis also knew them before and saw them that night. Some of the robbers went to him and forced him to go back to the house. It must also be considered that he was able to see them from a safe distance through his window as there was light in Douglas's compound which was only 40 metres away before he ventured outside. Lastly, Douglas, the same night even as he escaped leaving behind the robbers screamed and said he informed the neighbours of who were attacking him. When he went to the police station, the evidence of ***Pc. Babu*** leaves no doubt that he gave the police the names of his attackers and took Pc. Babu to second appellant's house that same night. All these leave us with no doubt that Douglas and Francis properly identified the appellants as some of the perpetrators of the robbery with violence upon them. We have anxiously considered the judgment of the trial court and that of the first appellate court and we cannot see reasons for any interference on the aspect of identification.

Lastly Mr. Ondieki raised the issue that the conviction was entered notwithstanding that members of the public who arrested two appellants were not called as witnesses. We agree that at least one of them should have been called but that notwithstanding, we see no prejudice suffered by the two appellants by failure to call them. It must be remembered that Douglas said he gave the names of his attackers to the neighbours who responded to his screams that night. It must also be remembered that these appellants were neighbours and indeed one of them alleged grudges which clearly demonstrated that they were from one locality. In such a scenario, the neighbours knew on the night of the incident, the names of the assailants and they together with Douglas and Francis, went for them as is in evidence but first did not find them in the house so that when Douglas and Pc. Babu visited second appellant's house the second time, members of the public, having known from Douglas who his attackers were, could very well have arrested them and handed them over to the police. Once in the police hands they were charged and they are not complaining that they were illegally before the court. We see no prejudice in failing to call the members of the public who arrested them at the first instance.

We think we have said enough to demonstrate that the convictions and sentences in respect of the first count were safe and we have no reasons to disturb them. They will stand. As to second count the appeal succeeds, it is allowed, convictions set aside and sentences of death are also set aside. The appellants are set free as to that count.

The appeal by each appellant is dismissed in respect of first count.

Dated and delivered at Nairobi this 28th day of March, 2012.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR