REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 229 of 2003

1. JOEL SAIYANGA OLE MWANIKI

2. JOSEPH OTIENO OGUTU……APPELLANTS

AND

REPUBLIC…….…….…….RESPONDENT

(Appeal from a judgment of the High Court of Kenya Nairobi (Mbaluto & Onyancha, JJ) dated 12th June, 2003 In H.C. Cr. Appeal No. 838 of 2001)

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JUDGMENT OF THE COURT

This is a second and final appeal from the decision of the superior court in Criminal Appeal Nos. 835 of 2001 and 838 of 2001 which were consolidated and heard together by the superior court (Mbaluto and Onyancha, JJ.) at Nairobi. The first appellant, Joel Saiyanga Ole Mwaniki, who was the second accused in the subordinate court at Kibera and the second appellant, Joseph Otieno Ogutu, who was the first accused in the same case were jointly charged before the Senior Principal Magistrate at Kibera with three counts of robbery with violence contrary to section 296(2) of the Penal Code, one count of malicious damage to property contrary to section 339(1) of the Penal Code, and two counts of attempted robbery with violence contrary to section 297(2) of the Penal Code. They both pleaded not guilty to the charges but after full hearing, Ms Siganga, the learned Senior Resident Magistrate (as she then was) found the second appellant, Joseph Otieno Ogutu, guilty of the first count of robbery with violence contrary to section 296(2) of the Penal Code, convicted him and sentenced him to death as mandatorily provided by the law. She acquitted him of all the other charges brought against him. She also found the first appellant, Joel Saiyanga Ole Mwaniki guilty of the second and third counts of robbery with violence contrary to section 296(2) of the Penal Code, convicted him of the two offences and sentenced him to death in respect of each of the offences. He was acquitted of all the remaining charges. For ease of reference, and for clarity, we reproduce herebelow the particulars of the offences with which each appellant was charged, found guilty and sentenced to death.

The particulars of count I in respect of which Joseph Otieno Ogutu was found guilty were:

"**On the 3rd day of April 2000 at Ong'ata Rongai Township in Kajiado District within the Rift**

Valley Province, jointly with others not before court while armed with swords, rungus, metal bars and a grill cutter robbed Joseph John Amin Nyaminde of his National Star radio and cash Kshs.700/= all valued at Kshs.3,400/= and at immediately before or immediately after the time of the said robbery threatened to use actual violence to the said Joseph John Amin Nyaminde."

As we have stated above, both appellants faced this charge but the first appellant was acquitted of it whereas the second appellant was found guilty of it. The particulars of the charges for which the first appellant was found guilty were, first on second count as follows:

"**On the 12th day of April, 2000 at Ong'ata Rongai Township in Kajiado District within the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely metal bars, swords, rungus, a hammer and a metal cutter, robbed Peter Kagiri of his safari boot shoes and cash Kshs.1,000/= all valued at Kshs.2,400/= and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Peter Kagiri."**

And on the third count as follows:

"**On the 12th day of April 2000 at Ong'ata Rongai Township in Kajiado District within the Rift Valley Province, jointly with others not before the court, while armed with metal bars, swords, rungus, a hammer, an axe and a grill cutter robbed Peter Njoroge Twenje of his shoes and cash Kshs.500/= all valued at Kshs.2,100/= and immediately before or immediately after the time of such robbery wounded the said Peter Njoroge Twenje."**

The appellants were not satisfied with the convictions, and sentences entered against them by the trial court and they appealed against the same to the superior court. Their appeals were, as we have stated above, consolidated, heard together and dismissed and hence this appeal which is premised on each appellant's memorandum of appeal (erroneously referred to as "Petition of Appeal") filed on 20th June 2003. The learned counsel for both appellants, Mr. Muriuki, in arguing the appeals before us, adopted the grounds of appeal raised in each memorandum of appeal filed by each appellant in person. The brief summary of the grounds of appeal is that each appellant is raising the issue of identification and each is claiming that the conviction was not proper as the identification of each appellant was not watertight and proper for purposes of a conviction.

Joseph John Amin Nyaminde (PW 1) (Nyaminde) is a retired education officer. At the relevant time, he was living at Ong'ata Rongai together with his family. On 2nd April 2000 at 3.00 a.m. he and his family were asleep in their house. He heard his neighbour Nehemiah Otieno Adinda screaming and saying that thieves wanted to rob him of his vehicle. Nyaminde woke up, peeped through the window and with the help of security lights which were on, he saw robbers standing at his door. At that time, his bedroom window was hit and broken by a hammer. The man at the window is the one who hit his bedroom window with a hammer. That man ordered him to open the door or else they would break into the house. He had a grill cutter. The man then joined others at the main door and he then easily opened the main door. Nyaminde met that man in the corridor and saw he was armed with an axe and a somali sword. The man told Nyaminde's wife not to wake up and demanded cash from Nyaminde. He took cash from Nyaminde's wallet, and a radio. He gave those two items to a man who was earlier at the window but who had gone to the door. That man then went for the T.V but by that time, Nyaminde had removed the T.V to the children's bedroom so he did not take it. The children started screaming and the robbers ran away with the radio and cash. The other robbers were at the gate. The thug that talked to Nyaminde was talking in Luo language. Nyaminde claims to have clearly seen the man who entered the house and took the radio and cash. He identified that man as the second appellant in this appeal. Nyaminde alerted the neighbours and they pursued the robbers but they had escaped. The matter was reported to the police at Ong'ata Rongai Police Station. Apparently, the police, if they took any action at all, did not apprehend whoever were the attackers of Nyaminde and his neighbour that night.

On 12th April 2000 at about 2.30 a.m. Nyaminde was in his house asleep, when he heard a commotion as somebody was touching his bedroom window. He woke up and found somebody cutting the sitting room

window grill. Nyaminde opened the bedroom door and a man said he had returned to collect the T.V and Ksh.20,000/=. Nyaminde saw that man's face and identified him as the second appellant. The security lights were on. He ordered Nyaminde to open the door but Nyaminde retreated to his bedroom and armed himself. As Nyaminde left the bedroom armed and approached the sitting room, that man was still there holding something but as Nyaminde's wife and children started screaming, the man ran away. Nyaminde said he woke up neighbours and together, they pursued the robbers but did not get them. They went to the police station and made a report. On their way back, they met two people. Police interrogated the two people who said they were watchmen from duty. They had a grill cutter which one of the neighbours recognised as one of the things that had been used by the robbers. The two alleged watchmen were chased and according to Nyaminde, one of them was arrested. He identified the arrested person as the first appellant, but Nyaminde said that as to the first appellant, he saw him for the first time when they met the two men who alleged to be watchmen. He stated that as the two robbers fled, they dropped a pair of shoes which Nyaminde identified in court. Nyaminde did not know when and how the second appellant was arrested although after his arrest, police informed Nyaminde of the arrest and he went to the police station and identified the second appellant. On the night of 12th April 2000, Peter Kagiri (PW 2), a taxi driver at Ong'ata Rongnai was hired by Peter Njoroge Twenje to take Peter Njoroge Twenje to his home in Ong'ata Rongai. He did so. As he was waiting for the gate to be opened for Twenje, they were suddenly approached by people who had torches and were armed with rungus and axes. Those people were four in number. They forced Kagiri out of the vehicle. They demanded money and they took Ksh.1,000/= which he had and his safari boots. They hit Twenje on the right eye which bled. Neighbours came to their rescue and Kagiri reported the matter to the police station. He recognised one of the robbers due to the peculiar or funny looking ears. Later on 15th April 2000, he went to the police station, attended an identification parade and identified the first appellant as one of their attackers. Twenje or Tony who hired Kagiri's taxi was an accountant with KTDA. He was living at Ong'ata Rongai where Kagiri drove him to his house. On reaching the gate to his house, he alighted to open the gate. As he walked from the gate he heard footsteps behind him. As he bent to open the gate and turned to see who was behind him, something hit him on his right eyebrow. His spectacles broke and he sustained a cut on his right eye and started bleeding. The object with which he was hit was heavy, but he did not know what it was. He fell down after he was hit and the attackers removed his pair of shoes and took it together with his identity card, driving license and Ksh.500/=. The robbers heard the neighbours approaching and fled. Twenje was taken to Mt. Sinai Hospital by neighbours. He was transferred to Aga Khan Hospital where he was admitted for one week. After his discharge, he was informed that a report on the incident had been made to the police. Later, a police officer went to his house and told him the robbers had been arrested on the day of the robbery and that his pair of shoes had been recovered. He asked him to go to the police station to identify the shoes. He went to the police station, identified the shoes and he was shown the appellants. He could not identify those who robbed him.

On the same night of 12th April, 2000, Jackson Lemeso (PW 4) (Lemeso) a watchman at Wainaina's plot was on duty. Robbers found him outside Wainaina's plot as he was on patrol. The robbers were four in number. Security lights were on and he said in evidence that he clearly saw the four thugs. They held him, tied his hands and blind folded him, but the blindfold was not properly in place so he could still see what was happening. The robbers were armed with iron bars and cutters. He saw the thugs go to Nyaminde's house which they tried to open but failed and so they cut window grills with a fence cutter. The thugs then went to another door in that plot where Nyaminde's house was but failed to break it. All this time one of the thugs stood guard over Lemeso as the others were moving to Nyaminde's house and the other house. After failing to break open the other door, they ran away. Neighbours heard the commotion, and went and untied Lemeso's hands. They then proceeded to the police station where they made a report. According to this witness, on their way from the police station, they met the said robbers. On seeing them, two of the robbers ran away and the other two also started running away but one was caught while the police officers fired in the air. He identified the one arrested as the first appellant. The next day the second thug was arrested.

Pc. Festus Musyoka (PW 5) was at Ong'ata Rongai Police Station on 3rd April 2000 at 8 a.m. when a mzee reported a robbery to him. He made an entry of that report in the O.B. Later, Nyaminde made a similar report. On 14th April 2000 at 3.00 a.m., he was on standby duties at the station when a crowd of people reported to the station that there were robbers in their plot. He entered that report in the O.B.

Thereafter, Kagiri also reported the attack on him and Tony. Pc Festus decided to go to the scene, but as he was on the way, two reportees shouted at them that robbers were nearby. They stopped the motor vehicle in which they were and alighted. They started running after the alleged robbers although the evidence is silent as to who pointed out the alleged robbers they were chasing, but that is subject of a later discussion in this judgment. As they were running after the alleged robbers, they fired in the air to stop the fleeing robbers. The first appellant who was carrying a red iron cutter was shot in the leg and he fell down. On the way, Pc Festus and others found a pair of shoes. He arrested the first appellant and escorted him to the police station. Later as Pc Festus was on patrol at Quarry Slams, Lemeso pointed out the second appellant and Pc Festus arrested him and took him to the police station. Pc Festus said further that the second appellant was arrested together with two other people who were released before any charges were preferred against them. Dr. Zephania Kamau examined Tony alias Twenje and assessed the degree of his injury as grievous harm.

Put to their defence, the second appellant stated that he was arrested together with one Gecau on 12th April 2000 when they went to look for a lorry to carry stones for a customer who had ordered for them from the quarry where he was working. They were arrested after police officers asked Gecau for a pistol. He was released from the cells after four days but when he asked the police officers for his cap which they took when he was arrested, he was returned to the cells and later charged with this offence which he denied. The first appellant stated in defence that he sells meat. On 11th April 2000 at 5.00 a.m. he was on his way to Kiserian to buy meat as Ong'ata Rongai Slaughter House had been closed by Health Authorities. As he was going to the bus stop, he heard footsteps behind him. A torch was flashed at him and he was ordered to stop. Then he heard a bang. It was a bullet fired. He was shot on his leg and on the right ribs. He was immediately surrounded by people and beaten senseless. He regained consciousness at Ong'ata Rongai Police Station. He remained in the cells till 18th April, 2000 when he was charged with the offence he knew nothing about. He ended his defence by saying he did not know Lemeso and that Lemeso told the court lies.

The above were the brief facts that were before the subordinate court and which the superior court on first appeal needed to revisit a fresh, analyse and evaluate before coming to its own conclusion always bearing in mind that the trial court had the advantage of seeing the demeanour of the witnesses and hearing the witnesses and giving allowance for the same.

Mr. Muriuki, the learned counsel for the appellant, in his submission before us, mainly highlighted that the evidence before the trial court did not prove beyond reasonable doubt that the two appellants or either of them were involved in the robberies that took place on 3rd April 2000 and on 12th April 2000 as the evidence on identity of the appellants did not meet the standards required in law. Mr. Kivihya, the learned Senior State Counsel, on the other hand felt otherwise and thus opposed the appeal in respect of both appellants.

In convicting the second appellant of the offence of robbery in count I, the learned trial Magistrate demonstrated in her judgment that she was aware that the only evidence against the second appellant was that of a single witness Nyaminde. She considered that evidence in detail after cautioning herself of the dangers inherent in convicting an accused person on the evidence of a single witness. Having done so, she concluded as follows:

"**PW 1 by his demeanour on the witness stand gave truthful evidence. I am satisfied that he had ample opportunity to clearly see accused 1's face and that the lighting at the scene was adequate. I am therefore satisfied that PW 1 positively identified accused 1 as one of the robbers who robbed him on the material night of 3.4.00. There is no possibility that he was mistaken in any way. Accused 1's defence is no defence at all as it does not touch on the material night of 3.4.00. I find that accused 1's guilt has been proved to the required standard. I convict accused 1 of the offence he faces in count 1 accordingly."**

As regards the first appellant, the trial Magistrate, again after analysing the evidence, convicted him on counts 2 and 3 stating in pertinent part of her judgment:

"**As for counts 2 and 3, these robberies were committed simultaneously on the complainant's (sic) (PW 2 and 3 respectively) as PW 2 and PW 3 were together during the incident. PW 3 who was injured during the incident (as is confirmed in the P3 Form – exhibit 3) did not see the robbers and thus could not identify them.**

PW 2 said he said said (sic) he saw accused 2 at the scene and noticed holes in the accused's ears. He clearly saw accused 2's face from the torch light which he said did not burn his eyes during the robbery. He further said that it was accused 2 who took his Ksh.1,000/= and shoes.

…….

At the same time as PW 2 was being robbed, PW 3 was also robbed of his shoes (exhibit 2) and cash Kshs.500/=.

These are the same shoes which accused 2 was seen dropping less than an hour later by PW 4 (watchman) and PW 5 (the investigating officer herein) as he was (accused 2) being chased. The fact that accused 2 was found in possession of PW 3's stolen shoes corroborates the evidence that accused 2 was involved in the robbery against PW 2 and 3. I am satisfied beyond doubt that accused 2 was involved in the robberies in counts 2 and 3 as he was positively identified by PW 2 and the stolen shoes belonging to PW 3 were recovered from him (accused 2) less than an hour after the robbery. Accused 2's defence is no defence at all.

I convict accused 2 of the charge he faces in counts 2 and 3."

The superior court in its judgment delivered on 12th June 2003 dismissed the appellant's appeal as we have stated above, addressing itself thus on the conviction of the second appellant by the trial court:

"**As to the 2nd appellant, his conviction on count 1 was solely based on the evidence of PW 1 ……..**

On our own re-evaluation of the evidence on the record, we are satisfied that the learned Magistrate proceeded properly and arrived at a correct decision."

And on the conviction of the first appellant by the trial court, it stated:

"**In our judgment all the evidence available inescapably points to the 1st appellant as one of the robbers in the robberies charged in count 2 and 3 (sic). We are therefore satisfied that his conviction on those two counts was proper."**

We now propose to consider the appeal in respect of each appellant separately as indeed that is what the law requires particularly as the main legal point raised by each appellant is identification. However, before we consider each accused person's case, we note, and it was not in dispute, that in respect of each appellant, the evidence of visual identification was by a single witness. In respect of the robbery that took place on 3rd April 2000, only Nyaminde (PW 1) claimed to have visually identified the second appellant, whereas for the robberies upon Kagiri and Twenje (referred to at times as Tony) only Kagiri (PW 2) claimed to have seen the first appellant. PW 4 said in evidence that he saw the first appellant whom he knew very well but that was in respect of the attempted robberies in counts 5 and 6 in respect of which the appellants were acquitted. His evidence however became handy when other matters such as the recovery of shoes allegedly stolen from Tony were being considered but he did not for certain see any of the appellants actually committing the alleged offences for which they were convicted.

The law as regards the circumstances under which a court of law can convict a suspect on the evidence of visual identification and particularly by a single witness is now well documented. In the well known case of **Abdalla Bin Wendo & Another vs. Reginam (1953) 20 EACA 166**, the predecessor to this Court was clear that evidence of a single witness as to identification needs to be tested with the greatest

care before a conviction is based on it so as to eliminate the possibility of an error or a mistake.

Secondly, the extra care required when considering evidence on visual identification is not confined to evidence of a single witness in difficult circumstances but the care is required in respect of visual identification in all circumstances. In the case of **Roria vs R. (1967) EA 583 at page 584**, Sir Clement De Lestang V.P had this to say:

"**A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C. said recently in the House of Lords in the course of a debate on S.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the Court to interfere with verdicts:**

"***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 cases out of ten – if there are as many as ten – it is in a question of identity.*""**

And in Kenya, the sentiments of Lord Gardner were in the comments made by the predecessor to this Court in the case of **Kamau vs. Republic (1975) EA 139** where it was stated:

"**The most honest of witnesses can be mistaken when it comes to identification."**

As a result of the concerns shown by the courts as indicated above on the need to ensure that no person is convicted of an offence on the basis of the untested evidence of visual identification by a witness, this Court has set out certain guidelines that would help the trial courts and the first appellate courts to ensure that a person is convicted only when it is beyond *per adventure* that he was properly identified. In the case of **Cleophas Otieno Wamunga vs. Republic (1989) KLR 424**, this Court set out the guidelines as follows:

"**Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well known case of R. vs. Turnbull (1976) 3 ALL ER 549 at page 552 where he said:**

"***Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.*""**

In order to ensure that courts do properly test the evidence of visual identification, this Court has made it clear that courts should not rely on dock identification as evidence upon which conviction should proceed. In the case of **Gabriel Kamau Njoroge vs. R (1982 – 88) KAR 1134**, this Court stated, *inter alia*, as follows:

"**A dock identification is generally worthless and courts should not place much reliance on it unless this has been preceded by a properly conducted identification parade. A witness should be asked to give the description of the suspect and the police should then arrange for a fair identification parade."**

This is the view also taken in the parts of the case of **Cleophas Otieno Wamunga** (supra) (which we have not reproduced).

With the above legal principles for guidance, we now consider the evidence that was adduced in the trial court against the second appellant. On count 1 on which he was convicted, only Nyaminde gave evidence against him. Nyaminde gave evidence in cross examination and stated as follows:

"**You were one of the robbers. I did not know you prior to the robbery. The lights in my house were on during the robbery so I clearly saw you. I described your mode of dressing to the police and I told police I could identify you. I did not describe you to the police. No identification parade was conducted at the police station."**

Earlier, in his evidence in chief he had stated:

"**I do not know how accused 1 was arrested but police informed me of his arrest. I went to the police station and I identified him as one of the robbers."**

It is clear to us from the foregoing that the police who investigated this case did not, with respect, carry out a professional job. The witness was robbed at night by a number of people. He said he did not describe the appellant to the police although he described the appellant's mode of dressing to the police. The witness did not know the robber before the robbery. He did not point out the appellant to the police at the time the appellant was arrested. Under those circumstances, once the police arrested a person they suspected to have been involved in crime, they had to organize a proper identification parade, call the witness and let him see if his attacker was in the parade. That is what would have been professionally expected of the police. Instead, when the appellant was arrested later, the police called the witness to go and informally identify the person they had arrested meaning that they were the ones who pointed out the appellant to the witness as the person they had arrested in respect of robbery on him on 3rd April 2000. That was clearly prejudicial to the appellant and in our view, identification in court remained dock identification and no more. It was as pointed out above in the case of **Gabriel Kamau Njoroge vs. R.** (supra) worthless. Further, Nyaminde is the witness whose evidence contradicted that of Lemeso as regards who was standing outside his window and who was at the door of the victim in count 4. That conflict in evidence led the trial court into acquitting both the appellants on count 5. The learned Magistrate remarked:

"**Regarding count 5, the prosecution relies on the testimony of PW 1 (complainant) and PW 4 (watchman) to implicate the accused. However, there is contradiction in the testimonies of these two witnesses."**

The trial Magistrate set out the contradiction and acquitted the two appellants solely because of the contradiction. If Nyaminde's evidence on identity of the appellant on 12th April contradicted that of Lemeso on that day, who can safely hold that his identity of the appellant on 3rd April 2000 was water tight? He was the sole witness on identification of the second appellant which was visual identification untested by any identification parade. He was contradicted on another occasion on his visual identification of the same appellant by the evidence of Lemeso. That leaves no reliable evidence, nay, no evidence whatsoever to base a conviction upon.

On the first appellant, the main reason for convicting him is in the judgment of the trial court which the superior court accepted. There are however, certain disturbing aspects in the trial court's judgment. Two of these pertain to factual aspects and particularly, the trial Magistrate's perception of the factual evidence that was before her and the way she applied the evidence to the decision. The learned trial Magistrate convicted the first appellant on counts 2 and 3 on grounds that she was –

"**Satisfied beyond doubt that accused 2 was involved in the robberies in counts 2 and 3 as he was positively identified by PW 2 and the stolen shoes belonging to PW 3 were recovered from him (accused 2) less than an hour after the robbery."**

(underlining supplied)

First, were the shoes recovered from the first appellant? Nyaminde said in evidence that the first appellant who, as we have said, was the second accused in the trial court was found with a grill cutter which was used during the robbery. However, as to the shoes, what Nyaminde said was:

"**The robbers dropped a pair of shoes as they fled"**

and he identified the shoes. He did not say the shoes were recovered from the first appellant. Peter Kagiri only talked about his safari boots which were taken by the thugs and which apparently were not recovered. He never talked about shoes that were exhibited in court. That was as it should have been as he was not there when the appellant was arrested. Tony or Twenje also did not talk of how the shoes which were his were recovered. He, too, was not there at the time of the arrest of the first appellant. Lemeso's evidence on that aspect was as follows:

"**As we chased the robbers, they dropped the fence cutter (scissors) and a pair of shoes which police took to that house"**

and he identified what he was calling the fence cutter and a pair of shoes. Pc Festus in his evidence stated as follows concerning the shoes:

"**One of the robbers – Joel Saiyanga (accused 2) was shot in the leg and he fell down. Joel (accused 2) was carrying a red iron cutter (mfi 1). We found dropped on the way a pair of shoes (mfi 2)".**

The answer to the question we posed above as to whether the shoes were recovered from the first appellant is and must be no. We feel, with respect, that the learned trial Magistrate did not have full grasp of the facts as far as that aspect was concerned. She had wrong facts and based the decision on those wrong facts. It is important to note that Lemeso was talking of four thugs, two of whom escaped completely whereas one was arrested and he could not explain properly what happened to the last thug. It could not, in our view, be said, without knowing those four, that all of them were thugs and therefore the doctrine of common intention could apply to all including the first appellant. The other witnesses talked of two people but even in that case one cannot assume that whatever was found abandoned without saying who actually dropped it, must have been recovered from the person arrested. The best one can say is that it was dropped by one of the people who were running away but certainly not that it was recovered from the first appellant. It was also wrong for the trial Magistrate to state in that judgment that the first appellant was seen dropping some shoes. No evidence supports that. That was an error on facts. That was not correct. Basing her decision on that wrong fact, she inevitably came to a wrong conclusion.

The second ground for her convicting the first appellant was that Kagiri positively identified the first appellant. Kagiri's evidence was, as we have said of Nyaminde's evidence, dock identification evidence. He said he attended an identification parade when members of the parade were six as opposed to the required 8. No evidence of that parade was adduced in court. We note however that on 10th November 2000, the prosecution applied for adjournment on grounds, among others, that:

"**IP Mwaura who conducted the identification parade was not bonded."**

and on that ground, the trial court adjourned the hearing to another date. It was therefore interesting that the prosecution grew cold feet and ended up not tendering any evidence on the identification parade that was apparently conducted and in which Kagiri says he participated. The trial Magistrate addressed herself to that omission by the prosecution to adduce evidence on identification parade but ignored it and proceeded to believe the witness, Kagiri, whose evidence, lacking the proper identification at a properly organised identification parade, remained dock identification only. In our view, the deficiency that emerged from the prosecution case as a result of failure to tender identification parade evidence was such that the trial court should have concluded that the failure to adduce identification parade evidence by the prosecution was because such evidence could have weakened the prosecution case. In the case of **Bukenya and Others vs. Uganda (1972) EA 549,** it was held:

"**(ii) The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.**

(iii) The court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.

(iv) Where the evidence called is barely adequate, the court may infer that the evidence of

uncalled witnesses would have tended to be adverse to the prosecution."

Likewise, we are of the view that as the evidence of the identification parade where Kagiri participated and of which the prosecutor was aware was withheld by the prosecution, what remained of Kagiri's evidence was dock identification which could not sustain a conviction. Further, we doubt whether Kagiri could have identified his attackers if, as he testified, they were the ones having torches and flashing the same on his eyes so that his eyes were "*burning*" whatever that means. Thus, the two major grounds upon which the trial Magistrate found the first appellant guilty of the two robberies in counts 2 and 3 cannot stand. As we have stated above, the evidence of Lemeso could only be used to lend a hand on whether or not the shoes were dropped by the thugs and on the arrest of the first appellant. His alleged recognition of the first appellant sounds interesting when one considers that he was with PW 5 when the first appellant was arrested yet he does not appear to have known that the first appellant was the one shot during the arrest. He said:

"**The police officers who were with us shot one of the fleeing robbers while one was caught."**

While Pc Festus says:

"**One of the robbers – Joel Saiyanga (accused 2) was shot in the leg and he fell down."**

And the first appellant said in his statement in defence:

"**I was shot on my leg and right ribs."**

All the above were not considered by the trial court. Unfortunately, the superior court also did not, with respect, live upto the standard required of it as a first appellate court.

That standard is well set out in the case of **Gabriel Njoroge vs. Republic (1982 – 88) 1 KAR 1134 at page 1136** where this Court was emphatic on the duty imposed on the first appellate court. It stated:

"**As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya v. R. (1957) EA 336, Ruwala vs. R. (1957) EA 570. If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly misdirection and non-direction on material points are matters of law."**

Although the superior court stated in its judgment that it did evaluate the evidence that was before it, in our view, it did not in actual fact do so. If it did so, it did not do so sufficiently. We are at any rate certain, the superior court did not direct itself to the matters raised above and its attention was not drawn to the same. In our view, if the issues were considered, that court might have reached a different conclusion. In any case, on the matters raised herein above, both appellants are entitled to the benefit of doubt.

For the foregoing reasons, the appeal is allowed, convictions quashed and sentences set aside. Each appellant is set free forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 27th day of July, 2007.

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR