REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 232 of 2006

1. MORRIS NGACHA NJUGUNA

2. MICHAEL KUBEN WAIGANJO

3. JOHN KAMAU KAGIRI

4. WILFRED MWANGI WAITHAKA…….APPELLANTS

AND

REPUBLIC……...……..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit, Makhandia, JJ) dated 27/2/2006

in

H.C.CR.A. NO. 532-2,534,535 & 538)

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JUDGMENT OF THE COURT

The four appellants, *MORRIS NGACHA, MICHAEL KUBEN WAIGANJO, JOHN KAMAU KAGIRI* and *WILFRED MWANGI WAITHAKA*, were among 17 people who were jointly charged, and tried before the Senior Principal Magistrate's court, at Kibera, Nairobi, with the offence of robbery with violence contrary to *section 296(2)* of the Penal Code. Two of the 17 accused persons faced a single count each of handling stolen property contrary to *section 322(2)* of the Penal Code, in addition. The four appellants were found guilty of the robbery with violence count, and each of them was then convicted and sentenced to suffer death as provided under the penal provision. As expected they were aggrieved by their respective convictions and sentences and promptly lodged appeals to the superior court.

The grounds relied upon in challenging their respective convictions were generally fourfold, namely, identification, insufficiency of evidence, improper reliance on repudiated and uncorroborated confessionary statements and failure to adequately consider the various defences put forward. The superior court was addressed at length on these amongst other grounds, and in a detailed judgment, *Lesiit and Makhandia, JJ*, dismissed the appellants' respective appeals and thus provoked these consolidated

appeals. As must be obvious these are second appeals, and by dint of the provisions of *section 361* of the Criminal Procedure Code (CPC) only issues of law fall for consideration. But before we consider the grounds proffered by each appellant in support of their respective appeals, we will first set out the essential background facts.

On 8th June, 2001 at about 7.30 a.m., a gang of robbers descended upon City Finance Bank, at the junction of Koinange and Muindi Mbingu streets. They positioned themselves at strategic places. At the staff entrance a Wells Fargo Company guard was waiting there. His name was Njuguna. He was regularly stationed there, and his duty was to open the door for the staff of the bank to gain entry. *Stanley Kanyungi Wakaba (PW1),* who was the Manager of that bank found him there at 7.30 a.m. Njuguna opened for him. Inside the bank he found the Computer Manager, one Kimani. Soon as he settled at his office, he was accosted by two men who were armed with firearms. They pointed the weapons at his head, told the witness that they knew he was married with children, was one of the custodians of the strong room keys the other custodian being a lady by the name Anisa, and that she usually reported on duty late. They demanded to have the strong room keys. They did not want the witness to open any drawer on his desk for fear that he would press the panic alarm. These two men stayed with him for some time, and thus provided him with an opportunity of observing them.

In the meantime they ordered him to and he opened a safe which was in his office from which they took a cash float of Kshs.150,000/=, Kshs.240,000/=, harambee money he had kept there, and some personal items including a gold pen. They then held him by the back of the waistline of his trouser and led him to the banking hall which was downstairs. He could see the Computer Manager lying down on the floor and so were other members of staff along with another Wells Fargo guard who was normally guarding the car park of the bank. Three other members of the gang were guarding them. One of them ordered PW1 to lie down as well. They did not believe PW1 that he did not have both sets of strong room keys and they therefore threatened him with dire consequences if Anisa later came and confirmed their suspicion, but soon thereafter Anisa arrived, and together they were led to the strong room which was at the basement of the building. To access it several doors had to be opened. One of the two men who had first accosted PW1 unzipped his jacket and produced gunny bags into which they stuffed all the money inside that room inclusive of coins. PW1 estimated the total amount of money which was in the strong room at Kshs.7,000,000/= (Seven million). Shortly later as PW1 did not want other members of the gang to access the strong room he tricked his captors and caused them to enter an adjoining room. As they entered he got an opportunity and ran upstairs into his office where he activated the alarm and called the police. We pause there to consider other aspects.

We earlier stated that other than the two robbers who were with PW1, there were at least three others minding the other staff members of the bank. The staff entrance was also the entrance of other people who had offices in the same premises. *Esther Adhiambo (PW2),* a secretary, was one of the people who were using the same entrance. It was her evidence that she worked as a secretary with a firm of advocates known as Singh Gitau & Co. Advocates, which had offices on the 3rd floor. She arrived at the entrance at about 7.45 a.m. found Njuguna at the entrance, but there was a brown man sitting behind him. He had brown eyes and was smoking a cigarette and his head was slightly tilted to one side. P.W.2 greeted Njuguna and inquired from him whether her boss had already reported. As she did so, she said, she was observing the person seated behind Njuguna who on realizing that PW2 was observing him, took out a pistol and ordered PW2 to go and join bank staff who were lying down inside the bank. She thus became aware the person was a robber. When she tried to walk away towards her place of work, two men who were inside stopped her and ushered her to where the bank staff were lying down. It is then she realized there was a robbery in progress and complied. She was able to observe two Wells Fargo guards standing at or near the entrance. He saw some men standing nearby communicating using their cell phones in the Kikuyu language. PW1 testified as much. His evidence was that the robbers who were with him as also those he found in the banking hall were communicating with people outside the bank in Kikuyu language.

After a short while, PW2 stated, she heard what sounded as a gun shot after which an order was made requiring all those lying down to stand up and walk to the basement. PW2 looked around. She saw her boss, along with PW1 and other people. They remained at the basement for about 5 minutes after which PW1 told everybody there to return upstairs, as the thieves had already left. It was PW2's evidence that

the incident took at least 45 minutes. She was able to identify the person at the entrance who was seated behind Njuguna. He was holding a cigarette at the bottom and was covering his mouth as he smoked. She identified the 2nd appellant as the person. She later picked him at an identification parade. During that parade PW2 asked the parade officer to give the 2nd appellant a biro pen to hold as one would hold a cigarette, which the officer did. The same thing was not done to other parade members. Counsel for 2nd appellant raised issue on this arguing that the parade was flawed as all parade members should have been asked to hold the biro pen in the same manner as had been requested of the 2nd appellant. It is however, clear from the evidence of PW2 that she asked the Parade Officer to give the 2nd appellant a biro pen to hold as a cigarette after she had already picked him.

Sylivester Totona Kibet (PW3), then a student at U.S.I.U., but who was doing his internship at the bank, like PW2, testified that when he entered the bank on the material date, at about 8.10 a.m. he saw a brown man seated behind the security guard. But unlike the case of PW2, the brown man did not order him to lie down. Instead he went to him and touched him on his shoulder. He told PW3 that there was an operation in progress. He told him to move in fast. But as he moved inside in a hurry he met two armed men who ordered him into the banking hall where he found other armed people who ordered him to lie down with other people he found there.

PW3 also gave evidence about Njuguna. He was the 4th accused at the trial, and the 1st appellant in these consolidated appeals. PW3 stated that the 1st appellant like him was forced into the basement of the bank, where he heard him complaining that he had been hit by a gun. At the time the witness met him at the entrance, he observed that the 1st appellant looked uneasy. In his defence the 1st appellant alleged he had been ordered at gunpoint by the robbers to act normally, which he did with unease.

PW3 later participated in an identification parade at Kileleshwa Police Station and identified the 3rd appellant by his appearance and his voice; and also the 2nd appellant at Makongeni Police Station. According to PW2, the 3rd appellant appeared to be the leader.

He was fast and harsh. The witness also identified the 4th appellant, who was 3rd accused, in a parade held at Kilimani Police station, by a scar on his face.

Francis Hika Kimani (PW4) was the first one to arrive at the bank. He opened the bank, went inside and after he had switched on the alarm and the server computer network he settled at his desk which was on the Mezzanine floor. It was soon thereafter that PW1 came in, and after he had gone to his office two men accosted PW4. He identified them as the 3rd and 4th appellants. These are the same two men who according to PW1, accosted the latter at his office and demanded the strong room keys. He later identified the 3rd appellant at Gigiri Police Station and the 4th appellant at Tigoni Police Station, among other suspects, whose appeals are not before us. The witness testified that the two stayed in his office for about 5 minutes within which time he was able to observe their faces and for that reason he had no difficulty picking them in their respective identification parades.

The evidence we have set out, as given by PW2, PW3 and PW4 ties in quite well with that of PW1 which we outlined earlier. This is an appropriate stage to return to PW1's evidence.

PW1 contacted the police as soon as the robbers left. They appeared to have already been informed about the robbery and went to the scene. PW1 told them he would be able to identify at least five of the robbers if he saw them. Indeed, he identified the 3rd and 4th appellants later in separate identification parades. A complaint was raised that PW1 and other identification witnesses might have seen the photographs of these appellants which were allegedly published in local dailies. We shall revert to this issue later on in this judgment.

The four appellants were arrested differently. The circumstances under which they were arrested are not material for now. Upon his arrest, the 1st appellant gave a statement under inquiry making a clean breast of the robbery. The statement was self-recorded. However, at his trial he denied it was voluntarily

given. He alleged he was thoroughly beaten by the police in order for him to give the statement. The statement was admitted in evidence after a trial within a trial.

In that statement the 1st appellant stated that he was given Kshs.240,000/= as his share of the proceeds of the robbery. Evidence was led by the prosecution to the effect that he led the police to his house at Mathare where he pointed out his wife as the person who was keeping that money. His wife who was then arrested but was later released without any charges, led police to Zimmerman Estate, Plot No. 116522, where her brother lived. Kshs.202,002/= was recovered from there under a mattress. It should be recalled that the robbery occurred on 8th June, 2001 and the money was recovered on or about 16th June, 2001.

The third appellant likewise told police he had been given Kshs.300,000/= as his share of the loot. *Cpl. Joseph Cheruiyot (PW12)* testified as much. According to PW12, the 3rd appellant led the police to his girlfriend who was then in police custody at Pangani Police Station. She in turn led police to a house at Park Road - House No. 50, which was a single room. Therefrom inside a bag of beans they recovered Kshs.300,000/=. The girlfriend was accused No. 8, but she was acquitted under *section 210* CPC as the trial court was of the view that she had no case to answer as the evidence against her was scanty.

John Ndungu (PW16) recorded a statement under inquiry from the 3rd appellant on 18th June, 2001, about 8 days after the robbery. Like 1st the appellant he alleged that the statement was extorted from him through beatings. That statement was rejected after a trial within a trial. However the statement of accused No. 8 *Mary Njeri Ngaruiya*, was admitted in evidence after a trial within a trial. It was self recorded and in it she confessed having been given Kshs.300,000/= by the 3rd appellant at about 11 a.m. on 8th June, 2001, which she later released to the police. In her statement during a trial within a trial regarding the admissibility of that statement she alleged that the money was hers and that she was induced to copy the statement from one which was given to her. These explanations were however rejected by the trial Magistrate who held that the statement was voluntarily given.

When called upon to put forward their respective defences, the 1st appellant stated that he was forced at gun point to stand at the staff entrance of the bank and to act normally to avoid attracting any attention regarding the robbery. He denied he was a member of the gang that robbed the bank. He said that when he was shown a gun by the robbers, he got confused and could not even remember seeing PW2, whom he knew well. He denied he knew any of his co-accused.

Michael Kabau Waiganjo (2nd appellant) testified that this case was framed against him because of a misunderstanding between him and a police officer from Central Police Station Nairobi over a sofa set the appellant was supposed to make for him, which he made but later sold when the police officer delayed with the payment for it. He admitted he attended an identification parade in which PW2 and PW3 were identifying witnesses. He alleged that he had earlier been exposed to those witnesses and for that reason, he stated, the parade was flawed. He denied the offence.

The third appellant, *John Kamau Kagiri* testified that he is a cereals and fruit vendor at Juja. It was his case that the money which was recovered from 8th accused were proceeds of his said business which he had given to her for safe custody. He was arrested on allegations that he had conned one of his customers, but later robbery charges were preferred against him. He denied the charge. He however admitted he was picked by witnesses at an identification parade but suggested that he had been exposed to the witnesses before the parade. Besides, he said, his picture had appeared in the daily papers before the parade.

Wilfred Mwangi Waithaka, the 4th appellant, like the 3rd appellant stated in his defence that he was a businessman, but unlike the 3rd appellant he was a dealer in secondhand clothes in Makuyu Division. His case was that this case was fabricated against him when police could not connect him with ownership of certain guns. It was his case that he was identified in an identification parade because his picture had appeared in the local dailies before the parade.

That is the summary of the evidence against the appellants. The trial Magistrate *Mrs. W. Karanja*, (as she then was) in her judgment found as fact that a robbery took place at the City Finance Bank as alleged, the robbers were armed with firearms, that the 1st appellant willingly participated in the robbery, that his statement that he was forced to act normally was unbelievable as through information supplied by him some money believed to be part of the robbery loot was recovered.

As for the 2nd appellant, she held that he was properly identified by, among other witnesses, PW2, PW3 who she said had ample time and opportunity to observe him. It was broad daylight and conditions favouring a correct identification were good. Consequently, she held, the two witnesses were able to pick him in an identification parade as the person who was standing behind the 1st appellant at the staff entrance.

As for the 3rd appellant, he was the second accused at his trial. The trial Magistrate treated his identification by PW1, PW2, PW4 and another witness as dock identification as the witnesses were not called upon to identify him at an identification parade. She however considered the fact that the 3rd appellant's girlfriend gave a statement under inquiry to the police which was admitted in evidence after a trial within a trial in which statement she stated that this appellant had given her Kshs.300,000/= to keep for him. The learned Magistrate considered the fact that acting on that information the money was recovered. Besides the 3rd appellant in his defence claimed the money belonged to him. She concluded that the evidence against the 3rd appellant was consistent, overwhelming and left no doubt in her mind that the 3rd appellant was one of the robbers as charged.

The 4th appellant was the 3rd accused. The trial Magistrate was satisfied that the evidence against him "*is simply overwhelming"*. She accepted and acted on the identification evidence of PW1, PW3, PW4 and *Anisa Murtaza (PW13),* and in that regard held that the witnesses were categorical, they had seen the appellant at the bank. He had a scar which was pointed out by one of those witnesses. She rejected the 4th appellant's suggestion that the witnesses might have seen his photograph in the daily newspapers before the identification parades in which they picked him.

The trial Magistrate after fully evaluating the evidence against these four appellants with their co-accused, came to the conclusion that each of the four appellants, amongst others, were guilty as charged, convicted them and proceeded to sentence them for the offence.

In their respective first appeals, the superior court considered each appellant's case separately although their appeals were consolidated. The first appellant here was the first appellant. Likewise, the 2nd, 3rd and 4th appellants were the 2nd, 3rd and 4th appellants respectively before the superior court. The appellants' respective grounds of appeal mainly challenged findings of fact by the trial Magistrate as earlier set out and also that their respective convictions were based on insufficient, unbelievable, uncorroborated and in some cases inadmissible evidence to sustain their conviction. The authorities are clear, and it would be clear even without them that the superior court, as a first appellate court was required, and this the court appreciated, to re-evaluate the evidence, draw its own conclusions bearing in mind the trial court's findings and itself come to its own conclusions on the evidence. In doing so, it was supposed to bear in mind that it neither saw nor heard the witnesses testify, more so, where determination of the case largely depended on credibility of witnesses, as was the case here.

The superior court in a well reasoned and detailed judgment re-evaluated the evidence against each appellant and came to the conclusion that the appellants' respective convictions were based on acceptable and sufficient evidence. The court therefore dismissed their respective appeals and thus provoked the appeals before us.

We shall deal with each appellant's appeal separately as the grounds relied upon by each of them substantially differ.

As regards the first appellant, he has in his memorandum of appeal raised four main grounds. The

first one is with regard to the regularity of proceedings at his trial. His counsel, Mr. S. O. Nyaberi, submitted before us that, a witness, Dr. Nyakeri, was not sworn before being allowed to testify. Dr. Nyakeri Stephen was a defence witness in a trial within a trial and testified on injuries allegedly sustained by the appellant in police custody. He was examined and cross-examined. The trial Magistrate did not think the medical evidence advanced the appellant's case a whit. Mr. Nyaberi, however, thought the failure to swear the witness fundamentally prejudiced the 1st appellant. We have considered this issue and in our view the apparent failure to swear the witness was a mere irregularity which is curable under *section 382* CPC. We are unable to see how the appellant was prejudiced. He called the witness. The witness gave evidence which was considered by the trial court.

The second major issue raised by the appellant was that his defence was not fully evaluated. His defence was that he was acting at gun point, and that the defence was credible. Indeed, witnesses testified that there was a person seated behind him who was armed with a firearm. The defence was, however, displaced by the appellant's confession statement, and the recovery of Kshs.202,000/= on the basis of that confession. The appellant laments, as a third ground, that the confession statement was extorted from him. The statement was self recorded. There are concurrent findings of fact by both the trial and first appellate courts, that the statement was voluntary. The 1st appellant stated in it, that he was given Kshs.240,000/= as his share for co-operating with the robbers. He gave the money to his wife to keep it for him. Police contacted his wife who led them to her brother's house where Kshs.202,002/= was recovered. There was clearly a proper basis for holding that the statement was not only voluntarily given, but also that it was true. There are other details therein as to how the robbery was planned, which details the appellant repeated in his defence. For instance, he states that one Mathai, a member of the robbery gang, came with a letter and delivery book pretending that he was to deliver the letter at the offices of James Singh Gitau & Company Advocates. In his defence, he repeated this. He was promised some reward, and the Kshs.240,000/= was the reward. These were matters within his own knowledge.

There is clearly no basis in the 1st appellant's complaint. His conviction was justified and the stationing of one of the robbers appears to us to have been aimed at ensuring that he does not shortchange the others. His defence was fully evaluated and properly rejected.

Mr. Nyaberi stated that as the said money was not recovered with the appellant, both the courts below were not justified in holding that he had possession of the money. The appellant supplied information leading to the recovery of the money. The recovery was not challenged. In the circumstances, although the appellant did not have physical possession of the money, the fact that he knew where it was and how it found its way there, he was duty bound to explain how he came by it. He explained. The explanation incriminated him. In our view, he was properly convicted. His appeal has no merit.

The second appellant, *Michael Kabeni Waiganjo*, raised six main grounds of appeal in his memorandum of appeal. We will deal with those grounds one after the other.

The first ground relates to the correctness of his identification. This appellant is, according to witnesses, the one who was standing behind the appellant at the staff entrance. PW2 testified that she observed him for about 5 minutes. Both PW2 and PW3 testified that his presence at the entrance attracted their attention as normally only the 1st appellant was stationed there. Mr. Marube for the 2nd appellant submitted before us that the period of 5 minutes within which PW2 observed the 2nd appellant was too short. It was broad daylight, and there were no adverse circumstances to impede her observation of the 2nd appellant. She was close enough to see him clearly. PW3 likewise. This complaint has no merit. 5 minutes cannot be said in the circumstances to have been too short.

A ground related to the one above is that the superior court did not re-evaluate the evidence. *Mr. Marube* submitted that PW13 testified that apart from 1st appellant there was someone else who was normally seated behind him. This evidence contradicts what both PW2 and PW3 said. *Mr. Marube* observed that both the trial and first appellate court did not take this fact into account when evaluating the evidence. The contradiction is not major. Even if we were to hold that there was normally a person seated behind the 1st appellant, that alone does not in any way weaken the identification of PW2 and PW3 of the 2nd

appellant. Moreover, under cross-examination, by Mr. Ombeta for the 1st appellant PW13 stated that "*it was unusual to have somebody sitting there*". We think that the statement in chief to the contrary was a typographical error. We are satisfied that the evidence of PW2 and PW3 on one hand and PW13 on the other do not conflict. The 1st appellate court fully re-evaluated the evidence, and the 2nd appellant's complaints on this score has no merit.

The other complaint raised by the appellant regarding his identification relates to identification parades. His complaint on this aspect was twofold. He stated that parade members did not resemble, and that only him was asked to hold a biro pen as a cigarette. The failure to give other parade members a biro to hold as the 2nd appellant alone without more would not weaken the identification parade evidence. PW2 identified the 2nd appellant before she asked the parade officer to give him a biro. It would have been more prudent to give the biro to other parade members, but the failure to do so was not fatal. It may, in an appropriate case, weaken the identification parade evidence, but in this case we do not think so as another witness also picked the 2nd appellant.

Mr. Marube appears to have taken some of the evidence out of context. The superior court remarked in its judgment that PW3 did not have an opportunity to identify the 2nd appellant before the parade. The court was dealing with the 2nd appellant's complaint that he had been exposed to the identifying witnesses before parade.

Regarding the appellant's complaint based on the provisions of S.207 CPC. We say this. The section deals with recording of pleas. *Mr Marube* submitted that in the course of proceedings before the subordinate court, the charge sheet was substituted with one consolidating the 2nd appellant's case with those of his co-accused, but no fresh plea was recorded. In his view that omission was fatal. This submission lacks any merit. The 2nd appellant had pleaded to the charge. The substitution of the charge, true, meant that a new charge, though the same as the earlier one had been substituted. Properly, a fresh plea should have been recorded. However, the omission to do so in no way prejudiced the 2nd appellant or any of his co-accused. The court proceeded with the matter as though the 2nd appellant and his co-accused had pleaded not guilty. Thus, there was no prejudice. The ground fails as well.

2nd appellant also complained about his alleged long incarceration in police custody before he was presented to the trial court. In his counsel's view his rights under *section 72(3)(b*) of the constitution were violated. Relying on the record of appeal before us, he submitted that the 2nd appellant was arrested on 9th June, 2001 but he was not taken to the court until about 18th September, 2007, a period which, according to counsel, exceeded the 14 days allowed under the aforesaid section, and thus the rights of 2nd appellant were breached. At page 6 of the record of appeal it is clear that an order was made consolidating criminal case Nos. 5468 of 2001 and Criminal Case No. 6005 of 2001. There is also a note at page 5 about other accused persons being brought to that court, as their case had been withdrawn, and apparently they were being recharged. In absence of the records of those cases, it cannot be said that the 2nd appellant's right was violated. If the 2nd appellant felt his rights under the constitution had been violated, the best course of action would have been to file an appropriate application under the provisions of the constitution to enable the relevant court investigate the issue. As the matter stands now, the issue having not been raised in the two courts below, we can only base our decision on the material before us. The material is inadequate and on that basis it cannot be said that the 2nd appellant's rights under *S. 72(3) (b)* of the constitution were breached. This ground also fails.

The last ground the 2nd appellant raised related to calling of witnesses. It was alleged that certain essential witnesses were not called to testify, notably the arresting and investigating officers. The third appellant raised the same complaint. In the Ugandan case of *BUKENYA AND OTHERS VS. UGANDA (1972) E.A. 549* at page. 550, the Court of Appeal for East Africa authoritatively stated thus:-

"*It is well established that the director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty, on the director to call or*

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

The 2nd and 3rd appellants testified about their arrest. They did not raise any issue which required clarification by the arresting officer. Formal charges were drawn and presented to the court in terms of *section 89 CPC.* A person may either be arrested and presented to the court, or a summons may issue to him requiring him to attend court to answer certain charges. The appellant was arrested and taken to court. Considering that no issues were raised as to the propriety of his arrest, we see no prejudice which was occasioned to the 2nd appellant by the failure of the prosecution to call as a witness the arresting officer.

Likewise an investigating officer, though an important witness, may not be an essential witness in certain cases. This case was investigated and witnesses were called whose evidence as touches the appellants has been outlined. Both the trial and first appellant courts considered it adequate in establishing the appellants' guilt. We find no basis for ruling that the 2nd or indeed any of the four appellants was prejudiced by the failure of the prosecution to call the arresting and investigating officers.

Turning now to the appeal by the 3rd appellant, his first ground of appeal was that some essential witnesses were not called. We have already dealt with this issue when considering the 2nd appellant's case. We find no necessity of dealing with it again.

His second complaint relates to a confession statement by accused No. 8. It was his case that promises of help were held out to her to make her confess to the robbery. He stated that she was promised that she would be released to go home to see her children. Because of that promise, he said, Accused 8 made the confession statement. It was his case that the statement should have been but was not excluded as it was obtained in violation of rules for recording confession statements. This ground has clearly no basis. Accused 8 self recorded the statement. On the basis of that she stated, and on her free will, she led the police to her house from where Kshs.300,000/= was recovered. It was kept in a bag containing beans. In her statement, she stated that the money was given to her by the 3rd appellant at about 11 a.m. on 8th June, 2001. This was only a few hours after the robbery complained of. She denied she was told from where the money had come. This conflicts with what the 3rd appellant stated in his defence. The 3rd appellant stated in his defence that he had given the 8th accused the money to buy beans from Loitoktok. We have no doubt that the statement by accused 8 was voluntary. As we stated earlier, it was self-recorded. The statement was confirmed by the recovery of the money. The statement could not be but true. Besides, accused No. 8 was unequivocal that the officer who took the statement from her did not at all make any promises to her. She stated that it was the investigating officer who made the alleged promise. The statement was properly admitted and used against the 3rd appellant, its truth having been confirmed by the recovery of the money.

The next ground is related to the one, above. The 8th accused was acquitted of the robbery count. The 3rd appellant laments that his conviction was based on recovery of the money. Yet the 8th accused from whom the money was recovered was acquitted. In his view, both the courts below applied double standards. This complaint is baseless. The 3rd appellant led the police to the 8th accused. On the basis of the information he supplied Kshs.300,000/= was recovered from the 8th accused. The 3rd appellant admitted he had given 8th accused the money. Witnesses who were at the scene of the robbery when it occurred did not testify about the presence of a woman robber. The 3rd appellant's admission that he had given the 8th accused the money exonerated the latter. There were no double standards. *Mr. Evans Ondieki* for the appellant expressed the view that the evidence of 8th accused needed corroboration. The

evidence upon which the 3rd appellant was convicted was not that of an accomplice. True, accused 8 retracted her statement. However, the recovery of the money was corroborative of it. No further evidence was necessary to support it. The 3rd appellant himself admitted he had given accused 8 the money.

We agree with *Mr. Ondieki* that the trial Magistrate made a finding that accused 8 lied on oath on some aspects. That may well be so, but on the part which affects the 3rd appellant the issue of her credibility was resolved when the money was recovered and the 3rd appellant himself admitted he had given her the money. The case of *NJUGUNA & ANOTHER V R. 21 EACA 316*, does not therefore apply to the facts and circumstances of this case.

A related point raised by *Mr. Ondieki*, is that in his view, accused 8 and not the 3rd appellant was found in possession of the money. When physical possession is considered, that is so. However, under the Penal Code, Cap 63, Laws of Kenya, "*possession"* is defined:

"…… *includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other persons"*.

On the basis of that definition, *Mr. Ondieki's* submission on this regard has no merit.

It is true as alleged by the 3rd appellant and his counsel, that some identification parade forms for the 3rd appellant were not tendered in evidence. The omission in our view, does not vitiate what we consider to be a clear case against the appellant.

A part from issues relating to the Constitution the remaining issues can be handled together. These include the complaints that the superior court did not analyse the evidence, that the burden of proof was shifted to the appellant and that the case against the appellant was not proved to the standard required. We start with the last one. This being a second appeal and the issue raised being one of fact, we do not think that it is available for consideration. As regards the complaint that the burden of proof was shifted to the 3rd appellant, we say this. The complaint relates to the last paragraph at page 6 of the trial court's judgment at page 185 in the record of appeal. In that paragraph the trial Magistrate surmised that the failure to produce some parade forms relating to the 3rd appellant was *"a calculated move by the investigating officers in this case to deliberately circumvent justice in an attempt to have accused 2 go Scot-free in spite of being clearly identified by all these witnesses as the gang leader"*.

There is nothing in that statement which casts any burden on the 3rd appellant to prove anything. The trial Magistrate expressed a view. With due respect to her, there was no evidence before her to show a calculated more to subvert justice. The remark was unfortunate, misplaced and unnecessary. The failure to avail some parade forms could well have been an innocent mistake. We say no more on this aspect.

As regards the complaint that the superior court did not re-evaluate fully the evidence, we are unable to agree as the judgment of that court speaks for itself. The learned Judges delved into the evidence, analysed it and themselves drew various conclusions based on that evidence. We cannot fault them on that.

We now come to the Constitutional issues raised by 3rd appellant. While considering the admissibility of 3rd appellant's extra judicial statement the trial Magistrate made a finding that the statement had not been voluntarily obtained as the said appellant had been tortured. In *Mr. Ondieki's* view such a finding invalidated the entire proceedings. With due respect to him, the alleged torture was with a view to extorting a confession. It did not affect the other aspects of the case, as in any case the 3rd appellant's statement was excluded. However, if as *Mr. Ondieki* suggested, the 3rd appellant's constitutional right under our constitution was violated, there is nothing to stop the 3rd appellant from proceeding under the Constitution for redress. That is not to say that we have made a finding that his

rights under the constitution were violated.

There is also the complaint that *section 72 (3) (b)* of the Constitution was breached in relation to the 3rd appellant. We earlier discussed this issue and we cannot but reiterate what we stated earlier.

In the result, we have no basis for interfering with the 3rd appellant's conviction. His conviction was based on sound and acceptable evidence. He was positively identified by several witnesses who, in our view, did so under favourable circumstances.

The last case we will consider is that of the 4th appellant. We earlier considered his complaint of long incarceration in police custody in alleged breach of the provisions of *section 72 (3) (b)* of the Constitution and find no necessity of re-visiting the issue.

As regards his complaint of torture, his counsel, *Mr. Ndegwa,* submitted before us that his client's rights under *section 74 (1)* of the Constitution were breached. Whether or not the 4th appellant was tortured is a question of fact. There is no evidence of this on record. Moreover, as we stated earlier, if a person thinks he was tortured, and can establish it, the best course of action is to seek redress under the provisions of the Constitution by filing the necessary application in the High Court under section 84 thereof. The issue of torture and indeed other Constitutional issues are being raised here for the first time. The jurisdiction of this Court being appellate only, it is not possible to investigate such complaints so as to be able to grant appropriate redress. We have no material upon which to appropriately deal with this complaint.

As we stated earlier, a complaint such as this one requires investigation. This Court may not appropriately investigate it. It is not the proper forum to raise it in absence of necessary context and evidence. *Mr. Ndegwa* for the appellant submitted before us that the 4th appellant raised the issue before the trial court. Indeed, the 4th appellant in his defence stated that he was taken to Kinale forest and beaten up. He did not raise it intending that his complaint be investigated. In the circumstances, we are unable to say that whatever torture the 4th appellant may have been subjected to prejudiced him in his trial. Besides the Constitution sets out under *section 84* thereof, what an aggrieved person is expected to do to obtain redress.

The 4th appellant's other complaints are three-fold. Firstly, that the superior court did not re-evaluate the evidence. We have already ruled that it did. It is not necessary to deal with the issue again. Secondly, the 4th appellant complained that the identifying witnesses in identification for him had seen his picture in the Taifa Leo Newspaper, a Swahili publication, before the parade. The identifying witnesses testified that they do not read the Swahili paper and could not possibly have seen his picture. The trial Magistrate and the superior court believed them. We have no basis for interfering with those concurrent findings of fact.

The third complaint is that essential witnesses were not called. We dealt with this issue earlier. We can only add that the failure to call the alleged witnesses did not prejudice the 4th appellant's case.

Lastly, the 4th appellant complained that his alibi defence was not considered by both courts below. The 4th appellant stated in his defence that he was at Saba Saba Market on the material date of the offence. The trial Magistrate set out this defence in her judgment but did not specifically discuss it. The superior court did not also specifically discuss that defence. However, considering the overwhelming evidence against the 4th appellant, the failure to specifically deal with his defence did not occasion a failure of justice.

We have said enough to show that the four appellants' respective appeals have no merit. In the result, we dismiss all these appeals. Orders accordingly.

DATED and DELIVERED at NAIROBI this 12th day of October, 2007.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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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