BENARD MAKONGO MWALE…….…….. 1ST APPELANT

ZAKARIAH BARAZA OPAKA ……..…….. 2ND APPELLANT

DAVID MATEBO ……..…….. 3RD APPELLANT

CHRISTOPHER ODUOR OWINO …..... 4TH APPELLANT

ALFRED MUSYOKI MATA ……..…….. 5TH APPELLANT

DAVID KIPKORIR KIRUI ……..…….. 6TH APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

{Being appeals from the judgment of Hon. S.N. Riechi, Chief Magistrate dated29th January, 2009 at Eldoret Chief Magistrate's Court in Criminal Case No. 7368 of 2004}

JUDGMENT

The appellants, **Benard Makongo Mwale**, ("**the appellant**"), **Zakaria Baraza Opaka** ("the **2nd appellant**"), **David Matebo** ("the **3rd appellant**"), **Alfred Musyoki Matayo** ("the **5th appellant**") and **David Kipkorir Kirui** ("the **6th appellant**") were jointly charged before Eldoret Chief Magistrate's Court with six (6) counts of robbery with violence contrary to section 296(2) of the Penal Code. The 1st appellant also faced one count of defilement contrary to section 145 of the Penal Code and one count of rape contrary to section 140 of the Penal Code. The 4th appellant also faced one count of rape contrary to section 140 of the Penal Code.

All the appellants were convicted of the robbery offences in counts 1,3,4,7, and 8 and were sentenced to death. The 1st and 4th appellants were however, acquitted of the defilement and rape charges (counts 2, 5 and 6).The appellants being dissatisfied with their convictions and sentences, have appealed to this court on various grounds.

It was alleged in count 1 that the appellants, jointly with others not before the court and while armed with dangerous or offensive weapons namely, a home-made gun, pangas and swords, on 14th September, 2004, at Kapkechui farm within Uasin Gishu District of the Rift Valley Province, robbed **Joel Laigong** (hereinafter "**the 1st complainant**") of cash in the sum of Kshs 7,000/=, two mobile phones – make Samsung and Motorolla, one camera – make Ricoh, one radio – make Panasonic and one motor vehicle Reg. No. KAR 359 E Toyota Corolla white in colour all valued at Kshs 700,000/= and at the time of such robbery, threatened to use actual violence against the said complainant.

On the 3rd count, it was alleged that, on the 15th September, 2004 at the place aforementioned, the appellants in consort with others not before the court , while similarly armed, robbed **Salome Cherono Sawe** (hereinafter "**the 2nd Complainant**)of Kshs 760/=, one pair of shoes and one mobile phone-make Alcatel all valued at Kshs 8,500/= and at the time of such robbery threatened to use actual violence against the said complainant.

On the 4th count, it was alleged that on 15th September, 2004 at precisely the same place, the appellants, in consort with others not before the court, while similarly armed, robbed **Lonah Tenai** (hereinafter "the **3rdComplainant**") of Kshs 3,200/= and at the time of such robbery, threatened to use actual violence against the said complainant.

On the count, it was alleged that on the same 15th September, 2004 at the same place the appellants, jointly with others not before the court, while similarly armed, robbed **Nathaniel KipkoechTenai** (hereinafter "**the4th complainant**") of one mobile phone -make Nokia, and a pair of shoes all valued at Kshs 7,000/= and at the time of the said robbery threatened to use actual violence against the said complainant.

On the 8th count, it was alleged that on the 14th September, 2004,the appellants,jointly with others not before the court and while similarly armed, robbed **John Kosgei Sitienei** (hereinafter "the **5th Complainant**") of Kshs 2,000/= and at the time of the robbery threatened to use violence against the said complainant.

The prosecution called twenty one witnesses in support of their case. The case revolved around a string of robberies which took place on the night of 14th/15th September, 2004, at Kapkechui farm, in Uasin Gishu District of the Rift Valley Province. A gang of robbers raided several homes in the spree of the robberies in which the said complainants were robbed of a variety of items as listed in the five counts of the charge sheet.

At the close of the prosecution case, the trial court found that the appellants had a case to answer and were placed on their defence. They all gave unsworn statements in which they denied any involvement in the robberies. On 29th January, 2009, the learned trial magistrate delivered his judgment in which he convicted the appellants on the said counts. He then sentenced them to death.

At the hearing of this appeal, the 1st and 5thappellants were unrepresented. The 2nd and 3rd appellants' appeals were argued by **Mr. Kigamwa,** whilst the 4th and 6th appellants were represented by **Mr. N'geno.** The 1st and 5th appellants chose to rely entirely upon their written submissions which had been duly filed with the leave of the court. **Mr. Kabaka**, Learned State Counsel who appeared for

the respondent state, made oral submissions in response to those submissions. He conceded the 6th appellant's appeal on the ground that his identification was not positive.

After considering all the appeals and the submissions made to us, the following issues were raised:

1) **Identification;**

2) **Insufficient, inconsistent and contradictory evidence;**

3) **Failure to call essential witnesses;**

4) **Failure to consider the appellants' defences.**

We have ourselves carefully perused the written record of the Lower Court being mindful of our obligation as a first appellate court to re-examine and re-evaluate the evidence (See **Ajode =vrs= Republic [2004] 2 KLR 32**).The State's case, at the trial, was that the complainants were attacked and robbed in the middle of the night of the material date by the appellants who were identified by **Beatrice Laigong**, (P.W.2, the wife of the 1st complainant), the 2nd complainant (P.W.3), the 3rd complainant (P.W.4), the 4th complainant

(P.W.5) and **Lilian Jepkorir Marsoi** (P.W.9).

On the state of lighting at the locus in quo, all the victims testified that the robbers flashed torches which enabled them to see the appellants. The state further adduced evidence of identification parades whereby P.W.2, P.W.3, P.W.4, P.W.5 and P.W.9 allegedly identified the appellants. It also called **I.P. Isaiah Ngetich** (P.W.17), a scenes of crime officer who photographed the scene and finger-dusted various items at the scene including P.W.1's motor vehicle registration number KAR 359 E.

The learned trial magistrate considered all the evidence and expressed his belief in the veracity of the accounts given by the prosecution witnesses and set out the court's findings as follows:

"In all the houses where the robbers went, evidence is that they had bright torches which provided enough light for the witnesses to see them. …..

P.W. 4 Lorna Tenai testified that the robbers stayed in the house for more than 30 minutes and in the other complainants' houses, they stayed for appreciative (time). This provided time for positive identification. The witnesses were able to see the accused well. The visual identification is reinforced by identification of the accused persons at the identification parades. In addition, accused 2 Benard Makongo Mwale's finger prints were taken and compared with those from the scene of the robbery……. After considering all the evidence in totality, I am satisfied that the prosecution has established its case against BenardMakongo

Mwale (Accused 5), ZachariahBarasa

Opaka (Accused 2), David Materio Olale (Accused 3), Christopher Oduor Owino (Accused 4), Alfred Musyomi Matayo (Accused 8) [and] Accused 9 David Kipkorir Kirui on the offence of robbery with violence contrary to section 296(2) of the Penal Code in respect of count 1, count 3, count 4, count 7 and count 8."

We have found nothing on record to show any concern by the trial court about witness demeanour or lack of candour on the part of any of the prosecution witnesses. We have anxiously considered the same evidence particularly that of identification. It is evident that the attacks occurred in the dead of night. The only source of light was provided by torches which the robbers had. The robbers also ordered the victims not to look at them. The quality of identification was further weakened by other considerations. The witnesses, including the complainants, did not know the appellants prior to the attacks. They did not also describe the appellants in their first reports to the police before the identification parades were mounted. In the case of **Ajode =vrs= Republic (Supra)** the Court of Appeal sitting in Kisumu held as follows:

"It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. It is also trite that before such a parade is conducted, a witness should be asked to give the description of the accused and police should then arrange a fair identification parade."

In the appeals at hand, the complainants and other prosecution witnesses did not give any description of the assailants to the police to facilitate a positive identification. That failure rendered the evidence of the identification parades weak which in effect meant that the complainants' identification of the appellants remained dock identification which, as observed above, is generally worthless.

We also observe that the evidence of **C.S.** (P.W.3) with regard to the identification of the 1st appellant and other accused persons who were acquitted was accepted by the learned trial magistrate. Yet, the same testimony was discredited by the same trial magistrate with regard to the identification of the assailants who raped (P.W.3). That amounted to selective identification. In **Peter Ngige Weru =vrs= Republic [Criminal Appeal No. 51 of 2000] (UR)**, the Court of Appeal stated as follows:

"Where one witness purports to identify two people under very similar circumstances and purported identification of one is rejected, then it would require very special circumstances to accept his identification of the other person"

In the premises, we have come to conclusion that the identification of all the appellants except the 1stappellant was not positive. With regard to the appellant, even though his identification suffered the same deficiency, the testimony of **I.P. Isaiah Ngetich,** (P.W.17) placed him at the Locus in Quo. P.W. 17 testified that he visited the scene the next morning after the robberies and dusted P.W.1's vehicle for finger prints. He sent the lifted finger prints to C.I.D. Headquarters for processing and the results, which were produced at the trial, indicted that the finger print lifted from P.W.1's motor vehicle belonged to the 1st appellant. That evidence was not challenged at the trial in cross-examination. The 1st appellant did not suggest that he lawfully had had access to the said vehicle before the vehicle was dusted for the finger prints. The further unchallenged testimony of the 1st complainant (P.W.1) and his wife, **Beatrice Laigong** (P.W.2) was that the robbers, during the robbery took P.W.1's motor vehicle registration number KAR 359 E and drove off in it. The vehicle was recovered some distance from their house. It is that vehicle which P.W.17 dusted for finger prints and testified that the 1st appellant's left thumb print was identified.

In the premises, even though the general evidence on identification was not water -tight, we are satisfied that with regard to the 1st appellant, that evidence was buttressed by the finding of his left thumb

print on the 1st complainant's vehicle stolen during the robbery. That finding buttressed the testimonies of P.W.2, P.W.3, P.W.4, and P.W.9 who testified that they identified the 1st appellant.

In the end, our conclusion is that the appellant was positively identified. There was also, in our opinion, nothing in his defence to cast doubt on the integrity of the prosecution case against him. It is also clear to us that the learned trial magistrate gave his defence due attention but found it devoid of merit. His defence was therefore properly rejected.

In arriving at the above conclusion, we are fully alive to the discrepancy concerning the date of the commission of the offence. The 1st appellant according to the charge sheet, committed the offences in counts (1) and (8) on 14th September, 2004 and the offences in the other counts were alleged to have been committed on 15th of the same month. We however, do not find the discrepancy fatal to the charge as no failure of justice occurred.

The learned trial magistrate also variously referred to the 1st appellant as appellant No.2 and appellant No. 5. However, he considered the relevant evidence against the 1st appellant and we do not find his mis-discription fatal to the case put forward against the 1st appellant

In the end, we allow the appeals by the 2nd, 3rd, 4th, 5th and 6th appellants. We quash their convictions and set aside the sentences of death meted out to them. They are entitled to their liberty forthwith unless otherwise lawfully held

The 1stappellant's appeal against conviction and sentence is however dismissed.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF SEPTEMBER 2012.

F. AZANGALALA JUDGE

A. MSHILA JUDGE

Read in the presence of:

F. AZANGALALA JUDGE