Case Number:	Criminal Appeal 54 & 47 of 1995
Date Delivered:	18 May 1995
Case Class:	Criminal
Court:	High Court at Nyeri
Case Action:	Judgment
Judge:	Mary Atieno Ang'awa
Citation:	Joseph Miana Karuga & another v Republic [1995] eKLR
Advocates:	-
Case Summary:	**Joseph Miana Karuga & Benson Maingi v Republic** **High Court, at Nyeri** **May 5, 1995** **Ang'awa, J** **Criminal Appeal No 54 and 47 of 1995** ***Evidence*** *– proof of – standard of proof – standard of proof in Criminal cases – where case is not proved to required standards due to poor investigation – whether conviction against accused should stand.* **Summary of The Facts** The accused 1,2,3 were charged with offence of theft of motor vehicle contrary to section 278(a) of Penal Code. The original 4th accused's charge was withdrawn, as he was prosecution witness No 1. PW1 stated that there had been theft of his motor vehicle. The Police officer (PW 3) and PW 2 came

	across appellant No 1 and after further investigation and upon his arrest, he was able to lead them to the accused No 2. Identification parade was however not conducted for PW1 to identify the thieves.There was generally par investigation of the case by the prosecution **Held:** 1. Dock identification is generally worthless and the court should not place much reliance on it unless it has been preceded by properly conducted identification parade. 2. By being a co-accused, the appellant No 1 evidence becomes that of a confession carried against his co-accused. 3. The applicant No 1 evidence must and should have been investigated further by prosecution as to who was present when appellant No 2 gave him the vehicle. *Appeal allowed.*
Court Division:	Criminal
History Magistrates:	-
County:	Nyeri
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 54 AND 47 OF 1995

JOSEPH MIANA KARUGA……..……..……APPELLANT

BENSON MAINGI…….....……APPELLANT

VERSUS

REPUBLIC……..……...RESPONDENT

JUDGMENT

On the 15/6/94 the case against a 4th accused was withdrawn and a charge sheet substituted for accused No 1,2 and 3. all three were charged with the offence of theft of a motor vehicle contrary to section 278 (a) of the penal code. Accused No 1 was charged with an alternative offence of Handling suspected stolen properties.

It is most obvious that the police did not adequately investigate this case. The 4th accused formerly charged with the other three accused because a prosecution witness as PW1.

In brief P.W1 was robbed of a motor vehicle. As soon as it was practical he made a report to the police and to his employer (PW.2). His employer made all efforts to trace the stolen vehicle with the assistance of police constable P.W.3 as they were traveling towards the Nairobi area they came towards an area known as Ruiru. There they then sported the stolen vehicle with a driver inside. The vehicle was parked at Ruiru nursery school. Inside the vehicle was accused No 1. He was immediately apprehended. He gave a statement under inquiry in which he implicated accused No 2 whom he claimed to be a close friend of his. He then said how the accused No 2 gave him she vehicle to look into same attention required to it. It is as a result of his statement under inquiry that the accused No. 2 was arrested and duly charged. Evidence against No 3 was that he was seen standing next to the vehicle. That he was not known to the accused No 1.

The 3rd accused was acquitted. The 1st and 2nd accused were convicted and duly sentenced to 5 years with hard labour and 5 strokes of the cane although section 278 (a) does not provide for the sentence of HARD LABOUR.

The 1st accused story was the same as his statement under inquiry whilst 2nd accused stated he did not know the 1st accused at all nor were they friends.

The two accused have now appealed against both conviction and sentence. This is under appeal No 54 of 1995 and appeal No 47 of 1995. For case of and purposes of his judgment the court under its own motion consolidated the two appeals though the appeals were heard separately.

The failure of this case is the mistrust of the witnesses by the police. PW. 1 a key witness did not hesitate to make a report that the police of the robbery. He went houses nearby to borrow clothes as he was left nude. He found his close soon after and returned his clothes. The prosecution ought to have confirmed his story by calling those who had lent him the clothes. This is to confirm the witnesses story

as to its truth. The witness reported to his employer. It was his employer who recovered PW.1's jacket contrary his ID card. PW 2 talked to a farmer who stated the jacket had been thrown out of a passing car. This witness ought to have been called to give evidence. He was not. This is to confirm P.W. 1's story and that of P.W. 2's story. Instead the police arrested P.W.1 pending investigations.

This means that very few people would be willing to make a complaint fear of being arrested. From that point investigations appeared to have corroborated without P.W.1.

It is P.W.2 and a police officer P.W.3 who then came across appellant No. 1 and the original 1st accused in this case. He in turn after further investigations was able to lead them to the appellant No 2 and the second accused in this case.

It is at this point that the police ought to have conducted an identification parade for P.W.1 of accused No. 1 and 2. It was crucial that P.W.1 was able to identify his attackers. This unfortunately was not done. If it had been done, the dock identification of the 2nd appellant would not arise. That is P.W.1 identified the appellant No 2 from the witness box. He was unable to identify accused No 1. He advocate thus has brought out this point in the case of Gabriel Kamau Njoroge versus Republic 1882 – 88 1 KAR 1134 in which it held that "a dock identification is generally worthless and the court 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 accused and the police should then arrange a fair identification parade.

If this procedure had been done by the police then appellant No 1 would have been a witness to the state. He gave one story from the time of arrest till his trial which he relied on till the time of his defence. By being a co-accused his evidence becomes that of a confession carried out against his co-accused. Where two accused are charged together the convict may not permit a co-accused confession. In the case of Vincent Munyi Boni Karukenya and others versus Republic. (1982 – 88) 1 KAR 510. The appellants all accused having been charged together it was held that the implication of the first appellant in the other appellant's confession could not form the basis of the case against him and was evidence of the weakest. The only exception is under section 32 of the evidence act where proof of such confession must be established. The court further notes that applicant No 1's evidence must and should have been investigated further by the prosecution namely who was present when appellant No 2 gave him the vehicle"

In his instance accused No 3 would have been a witness for the state – if he never participated in the commission of the offence to confirm that he was present with appellant No 2 when they went to get the vehicle from appellant No 1.

What the police did is to lock up all their potential witnesses that their case has been left deficient.

It is a result of this poor investigations, distrust of potential witnesses that this appeal must succeed although there is a strong suspicion against appellant No 2. The two appellants appeal is allowed conviction quashed and sentence set aside. The two appellants are set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 5th day of May, 1995

M.A. Ang'awa

Judge