**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: OKWENGU, MAKHANDIA, SICHALE, JJ.A)**

**CRIMINAL APPEAL NO. 265 OF 2008**

**1. MAXWELL KARANJA**

**2. THEOPHILAS MUTHAMI**

**3. JUMA NYAMAI WAMBUA…..……....……..………APPELLANTS**

**AND**

**REPUBLIC…………………..……………………………..RESPONDENT**

**(Appeal from a Judgment of the High Court of Kenya at Mombasa (Sergon & Njagi, JJ.) dated 27th October, 2008**

**In**

**H.C.CR.A. Nos. 367,368 & 372 of 2003)**

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**JUDGMENT OF THE COURT**

[1] ***Maxwell Karanja, Theophilas Muthami*** and ***Juma Nyamai Wambua*** hereinafter referred to as the 1st, 2nd and 3rd appellants respectively, have each filed a second appeal to this court following the dismissal of their first appeal to the High Court **(Sergon & Njagi JJ.)** The criminal proceedings against the appellants were initiated in the Chief Magistrate's Court at Mombasa wherein the appellants were jointly charged with the offence of robbery with violence contrary to ***section 296(2***) of the Penal Code. The particulars of the offence stated that the three appellants:

> ***"On the 30th day of June 2003, at Mathare village Changamwe, in Mombasa District within the Coast Province, while armed with offensive weapons namely: Knives, an iron bar, and a rungu, jointly robbed Linet Lumumba Minayo of one (1) handbag containing assorted clothes, one radio cassette make Sony, personal documents, and cash Kshs.300/- all valued at Kshs.18,700/- and immediately before or immediately after the time of such robbery, threatened to use actual violence to the said LINET LUMUMBA MINAYO".***

[2] The suit was heard by a principal magistrate in Mombasa, who upon hearing four witnesses for the prosecution, the sworn defence of the 1st appellant and the unsworn defences of the 2nd and 3rd appellants found each of the appellant guilty of the offence as charged. The appellants were each

convicted of the offence under ***section215*** of the Criminal Procedure Code and sentenced to death.

[3] Each appellant filed an appeal to the High Court against the conviction and sentence, which appeals were consolidated and heard by ***Sergon & Njagi, JJ. In their judgment the Honourable judges delivered themselves as follows:***

> ***"We have perused the charge sheet, we are unable to detect any material defect on it. We reject that ground. The appellants have claimed that they were not properly identified by the complainant. We have carefully examined the evidence of PW1 and we are satisfied that she identified the 1st appellant by name and the 2nd and 3rd appellants by their appearances. The trio live within PW1 's neighbourhood. The identification by PW1 therefore is that of recognition. PW1 even led the police to the homes of the 1st and 2nd appellants where the complainant's (PW1 's) bag containing her clothes was recovered. The 1st and 2nd appellants were unable to explain how they came into possession of PW1's bag. PW1 identified the bag to be hers. The 1st and 2nd appellant led the police to the house of the 3rd appellant where PW1 's radio was recovered.***
>
> ***Again, the 3rd appellant was unable to explain how he came into possession of PW1's radio. The bag containing clothes and the radio were lost when the complainant (PW1) was robbed on 30/6/2003. The doctrine of recent possession squarely applies to this case. We are satisfied that the trio acted with a common intention to violently rob the complainant.It has been said that there were contradictory evidence which the learned principal magistrate relied on to convict the appellant .We have examined the entire evidence and we do not find any serious contradictory evidence which could alter the outcome of the case. It has also been said that the trial court did not consider the appellants' defences. We have perused the judgment and we are satisfied that the learned principal magistrate considered the appellants' defence and properly rejected them. We have also reconsidered the same and we find that the same did not shake the prosecution's case.***
>
> ***In the end and for the above reasons we dismiss the appeal in its entirety".***

[4] Being dissatisfied with the judgment of the High Court, each appellant filed a second appeal to this Court. The initial grounds of appeal that were filed by each of the three appellants in person, were generally identical. The grounds alleged: that the charge sheet was incurably defective as crucial particulars were either omitted or was contradictory. Such particulars included, the omission of the time the alleged offence was committed; contradiction regarding the alleged stolen items, and contradictions between the details contained in the occurrence book and the charge sheet. The issue of identification was also raised in this initial grounds, as was the recovery report which was alleged to be in contravention of ***Section 109*** of the Evidence Act. Further, the judges were faulted for relying on evidence that was not adduced before them, and failing to sign the judgment contrary to ***Section 169*** of the Criminal Procedure Code.

[5] On 10th January 2012, ***S.K. Kimani,*** learned counsel who was then acting for the 2nd and 3rd appellants filed a comprehensive memorandum of appeal on behalf of the two appellants. We reproduce the same verbatim as follows:

> **"1. Notwithstanding the provisions of section 361 of the Criminal Procedure Code, the appellants shall urge the court to allow them to address both matters of law and facts given that the limitation on the jurisdiction of the Court of Appeal is no longer tenable with the establishment of the Supreme Court and promulgation of the new Constitution of Kenya, 2010.**
>
> **2. The trial before the subordinate court and the appeal to the superior court took too long to determine (i.e. from July 2003 and October 2008) as to render the entire criminal justice process and the punishment and sentence of death cruel, inhuman and degrading**

**and a contravention of the inherent human dignity, security of the person and right to a fair and expedited criminal justice.**

**3. The superior court erred in law and fact by lightly (almost casually) upholding the evidence of identification and arrest of the suspects and directions which led to the recovery of the stolen goods tendered against the 2nd and 3rd appellants without resolving in favour of the said appellants the glaring contradictions that arose on the face of the record as to:**

**a. The date of the alleged offence**

**b. The offensive nature of the items enumerated in the charge sheet,**

**c. Want of a description to police at the earliest opportunity of the suspected robbers who stole from the complainant,**

**d. The pointing out of the 2nd and 3rd appellants by the complainant after the arrest by the police,**

**e. Who gave directions that led to the recovery of the goods allegedly stolen from the complainant?**

**f. Whether or not the 2nd and 3rd appellants led the police to their respective houses**,

**g. The possession and control of the premises where the stolen goods were reportedly recovered,**

**h. The missing or deceased owner and landlord of the premises where the stolen goods were reportedly found,**

**i. The fleeting moment when the alleged robbery took place,**

**j. The amount of light available to the complainant at the time of the alleged robbery,**

**k. The sufficiency of the investigations into the incident of robbery reported to the police by the complainant,**

**I. The alleged tampering with the marks on the radio reportedly recovered by the police from an abandoned house,**

**m. The role of the arresting officers in identifying the suspects who were ultimately arrested.**

**4. The complainant only had a fleeting encounter at dawn with the persons who reportedly robbed and assaulted her and notwithstanding her insistence that the "robbers" were previously known to her and that the church lights were on, an identification parade was necessary to render the identification and conviction safe. As it is now, the conviction of the 2nd and 3rd appellants who all along protested their innocence, was rendered unsafe for want of an identification parade and lack of a warning on the dangers of mistaken identity on the part of the subordinate court and the first appellate court.**

**5. The evidence of PW4 and PW5 as to custody, possession and recovery of the reportedly stolen items were hearsay evidence of the weakest kind and ought to have been rejected at the trial. The conviction of the second and third appellants on the force of this tainted and inadmissible evidence was gravely prejudicial to the appellants**

**and is thus untenable.**

**6. The investigation process and evidence of recovery and identification of the radio was so tainted and prejudicial to the third appellant's case that it ought to have been excluded altogether. Without this evidence, there is nothing to place the second and third appellants on the scene of the alleged robbery.**

**7. The appellate court erred in law by upholding the finding that the first appellant was a brother to the third appellant and that the former directed the police to the home of the latter, which finding was as baseless as it is untrue. No evidence was led on the relationship between the two appellants or their houses or residences. The appellate court fell into error by making general assumptions on these issues, among others, which were not based on evidence.**

**8. The appellate court erred by delivering a slipshod judgment in the face of very serious allegations on appeal. The judgment is not supported by evidence that was tendered before the trial court, nor grounded on the law (on identification, res gestae and recovery) applicable to the case".**

[6] Mr. ***A. Atancha*** learned counsel for 1st appellant also filed supplementary grounds of appeal on 5th July 2012 in which the following grounds were raised:

**"1. The Hon. Superior court failed in law to find that the 1st appellant was not sufficiently identified.**

**2. The Hon. Superior court failed in law to find that the evidence as regards recognition of the 1st appellant was not sufficiently adduced by the prosecution to warrant a conviction.**

**3. The Hon. Superior court being the first appeal (sic) failed in law to re-evaluate sufficiently the evidence tendered by the prosecution and also take into consideration the defence of the 1st appellant.**

**i) The starting evidence of the complainant that** "on 31st June at 6 a.m. I alighted from an upcountry bus" **was not sufficiently analysed**.

**ii) The inconsistency between the PW1 and PW3 was not taken into consideration in favour of the 1st appellant.**

**iii) There was a break in the sequence of events as no evidence was tendered of any of the persons who allegedly gave a chase when the complainant was attacked.**

**4. The Hon. Superior court failed in law by finding that the doctrine of recent possession applied in the instant circumstances of the case.**

**5. The Hon. Superior court failed in law to find that there was no corroborating evidence to warrant a conviction.**

**6. The Hon. Superior court and the learned trial magistrate erred in law to warn themselves and take extra care as they were relying of on the evidence of a single eye witness.**

**7. The Hon. Superior court failed in law and the learned trial magistrate** (sic) **as they could have found that both the evidence on recognition and identification was not sufficient".**

[7] Upon Mr. Kimani counsel then appearing for both the 2nd and 3rd appellant indicating that there was conflict of interest between the two appellants' defences, ***Miss Maureen Anyumba,*** learned counsel was given a pauper brief to take over the representation of the 2nd appellant. On 17th January 2014, she filed a further supplementary memorandum of appeal on behalf of the 2nd appellant raising two further grounds as follows:

> ***"1. The learned judges erred in law by upholding the 2nd appellant's conviction and sentence when there were no ingredients establishing the offence were thus contravening section 296 (2) of the Penal Code.***
>
> ***8. The learned judges erred in law by upholding the 2nd appellant's conviction and sentence by relying on evidence that was not sufficient to draw the inference of guilt on the part of the 2nd appellant thus contravening the Evidence Act".***

[8] Mr. Kimani indicated a wish to argue his first ground which in his view raised an important constitutional issue, for which he sought a five judge bench. However, this court found no justification for the constitution of a five judge bench or the issue being argued as a preliminary issue. The request was therefore declined and direction given that the issue be argued within the appeal before a three judge bench.

[9] Following directions given by this Court, Mr. Kimani filed submissions which he titled as talking notes. He also filed a summary of his written submissions. During the hearing of the appeal, Mr. Kimani was given time to highlight these submissions. In brief, the constitutional issues raised by Mr. Kimani was the issue of the jurisdiction of this Court which he argued had been enlarged by ***Article 164*** of the Constitution to include hearing second appeals on both issues of law and fact. Mr. Kimani compared ***Article 164*** of the Constitution, which in his view gave the Court jurisdiction to hear appeals from the High Court without any limitation, and ***Section 64*** of the former Constitution which provided for statutory delimitation of the jurisdiction of the Court to hear appeals from the High Court.

[10] Mr. Kimani submitted that in light of ***Article 164 (3)*** of the Constitution, there was no room for statutory limitation of the jurisdiction of the Court of Appeal and therefore ***section 361*** of the Criminal Procedure Code and ***Section 2*** of the Appellate Jurisdiction Act which limited the jurisdiction of the Court on second appeal to matters of law were unconstitutional.

[11] To buttress his submissions, Mr. Kimani compared the jurisdiction of the Court to the jurisdiction of the Supreme Court. He opined that ***Article 163*** of the Constitution was unfettered and allowed the Supreme Court to hear appeals on points of law and fact. In counsel's view if the jurisdiction of the Court of Appeal on second appeal was limited to matters of law only, there would be discrimination and absurdity, as a party going to the Supreme Court would be able to raise issues of facts while a party going to the Court of Appeal would be denied that opportunity. He argued that such an occurrence would occasion a miscarriage of justice.

[12] Mr. Kimani further supported his arguments by drawing comparison from comparative jurisdiction such as England, India, Uganda and South Africa. He urged the Court to interpret ***Article 164*** as enlarging the jurisdiction of this Court on second appeals to entertain matters of law as well as facts.

[13] The second issue raised was the delay in hearing the appellant's appeal, which in counsel's view was contrary to ***Article 159(2)(b***) of the Constitution. He pointed out that the appellant had been waiting for the hearing of his appeal for over ten years and that the anxiety of waiting with the sentence of death hanging over his head was tantamount to inhuman punishment and degrading treatment. He therefore urged the Court not to countenance this situation by upholding the appellant's conviction.

[14] In regards to matters of facts and law, counsel pointed out that there was no evidence placing the 3rd appellant at the scene of the alleged robbery and that the conclusion of the first appellate Court in re-evaluating the evidence was unreasonable. Counsel pointed out what he considered as weaknesses

in the evidence of the identifying witnesses. He noted that the complainant was basically the only identifying witness and criticized the 3rd appellant's identification by the complainant as not being watertight. Counsel argued that the circumstances were not conducive to a positive identification, nor was there any evidence regarding the sufficiency of the lighting or any other corroborating evidence. In addition, the identification of the 3rd appellant by the complainant was faulted as the 3rd appellant was exposed to the complainant at the police station and no identification parade was carried out.

[15]Regarding the recovery of the alleged stolen items, it was submitted that proof of ownership of the residential room from which the stolen goods were recovered was crucial yet there was no such evidence. Further, that the recovered radio was not positively identified as the one stolen from the complainant, nor was any nexus established between the 3rd appellant and the radio. Finally the investigations done in the case was criticized as shoddy and the Court was urged to draw an adverse inference from the prosecution's failure to call crucial witnesses.

[16] No written submissions were filed on behalf of the 1st appellant. However, Mr. Atancha counsel for the 1st appellant, adopted the submissions made by Mr. Kimani. He further argued that there was no sufficient evidence of positive identification of the 1st appellant. He pointed out that the complainant relied on the evidence of PW1 who claimed to know the attackers by appearance. However, PW1 in his evidence had testified that he only knew 1st appellant by name. There was therefore a need for an identification parade for PW1 to identify the person whom he knew by name only.

[17] As regards the recovery of the stolen goods, Mr. Atancha submitted that nothing was recovered from the 1st appellant or from the 1st appellant's house, and that the items were recovered from a house whose ownership was not established. Counsel therefore submitted that the doctrine of recent possession was not applicable as no possession was established. Finally Mr. Atancha argued that the Court failed to consider the 1st appellant's defence and to take into account the evidence of bad blood between the complainant and the 1st appellant.

[18] ***Mr. Mutiso*** who argued the appeal on behalf of the 2nd appellant, also associated himself with the submissions made by Mr. Kimani. He further pointed out that there was contradiction between the evidence and the particulars on the charge sheet. He noted that the 2nd appellant was charged with the offence of robbery contrary to ***Section 296(2)*** of the Penal Code. He argued that this section does not create an offence but provides the punishment only. He further submitted that no weapon was found on the 2nd appellant nor was any medical report produced to prove injury. Finally Mr. Mutiso submitted that the sentence of death was contrary to the Constitution.

[19] ***Mr. Jami Yamina*** Prosecuting Counsel, opposed the appeals. He noted that ***Article 50(2)(q)*** provides a right of appeal for a convicted person to a higher Court as prescribed by law, and that the appellants' appeal was an appeal prescribed by Article ***164(3)(b***) as read together with Article ***50(2)(q)*** of the Constitution. He submitted that ***Section 361*** of the Criminal Procedure Code restricts the appeal to matters of law only. In this regard, counsel relied on **Civil Application No. 78 of 2011 <u>Equity Bank Limited v West Link MBO Limited.</u>**

[20] As regards the identification of the appellants, counsel pointed out that two of the appellants were identified by recognition by the complainant who knew them before, and that the complainant also positively identified the goods which were recovered from the 1st and 2nd appellants. Counsel further noted that the 2nd and 1st appellants gave information which led to the arrest of the 3rd appellant. Relying on **Criminal Appeal No. 5 of 2008 <u>Joseph Njuguna Mwaura & 2 Others v Republic,</u>** counsel argued that the charge sheet was properly drafted. He maintained that the severity of sentence was a matter of fact and that the sentence of death was not unconstitutional. He therefore urged the Court to dismiss the appeal.

[21] We wish first to deal with the issue of jurisdiction which was raised by Mr. Kimani. The jurisdiction of the Court of Appeal is provided for under ***Article 164(3)*** of the Constitution as follows:

**"164**

**(1)……**

**(2) .....**

**(3) The Court of appeal has jurisdiction to hear appeals from-**

**(a) The High Court; and**

**(b) Any other court or tribunal as prescribed by an Act of Parliament"**

A plain reading of the text appear to indicate that whereas appeals from other courts or tribunal to the Court of Appeal are governed by specified Acts of Parliament, appeals from the High Court to the Court of Appeal appear to be unrestricted hence the argument that the Court of Appeal on second appeal can now hear appeals on issues of law and fact. The question is whether it was the intention of the legislature in drafting ***Article 164(3***) that there should be such a distinction. In addressing this question, we find it necessary to examine the position of appeals prior to promulgation of the current Constitution.

[22] As pointed out by Mr. Kimani, ***Section 64*** of the retired Constitution provided for the jurisdiction of the Court of Appeal to be circumscribed by an Act of Parliament. This is reiterated in ***Section 3*** of the Appellate Jurisdiction Act. It is pursuant to these provisions that ***Section 361*** of the Criminal Procedure Code provides limitation on the jurisdiction of the Court of Appeal in hearing second appeals such that appeals on matters of fact are excluded.

[23] In considering whether the intention in ***Article 164*** of the Constitution was to depart from the previous position indicated above, we have paid a visit to the jurisdiction of the Supreme Court in hearing appeals. ***Article 163(3)&(4)*** provides for the appellate jurisdiction of the Supreme Court as follows:

***"163***

***(3)(b) Subject to clause 4 and 5 appellate jurisdiction to hear and determine appeals from-***

***i) the Court of Appeal; and***

***ii) any other court or tribunal as prescribed by national legislation***

***4. Appeals shall lie from the Court of appeal to the Supreme Court-***

***a) As of right in any case involving the interpretation or application of this Constitution***

***b) In any other case in which the Supreme Court or the Court or Appeal certifies that a matter of general public importance is involved, subject to clause 5***

***5. A certification by the Court of Appeal under clause (4)(b) may be reviewed by the Supreme Court and either affirmed varied or overturned ".***

[24] Thus appeals from the Court of Appeal to the Supreme Court have been restricted by ***Article 163(4)*** to matters involving the interpretation of the Constitution and matters certified to involve general public importance. In our considered view, such matters can only be anchored on serious issues of law. Indeed, it would be an issue of law whether an appeal falls within ***Article 163*** such as to give the Supreme Court appellate jurisdiction. We do not therefore agree with Mr. Kimani's submissions that the jurisdiction of the Supreme Court under ***Article 163*** is unfettered.

[25] The restriction of the Court of Appeal in hearing appeals to matters of law only is not unique to

criminal matters. In **Petition No. 6 of 2014, <u>Fredrick Otieno Outa v Jared Odoyo Okello & Others,</u>** the Supreme Court had occasion to consider a similar restriction on the appellate jurisdiction of the Court of Appeal to matters of law imposed by ***Section 85A*** of the Elections Offences Act. The following observation by the Supreme Court is pertinent:

> ***"...we would observe that section 85A manifests Parliament's intention to regulate the scope of appeals to the Court of Appeal to*** "*matters of law only*". ***We decline, with respect, the 1st respondent's contention that the provision should be struck out as an undue limitation on the Court of Appeal's jurisdiction as conferred by Article 164(3)(a) of the Constitution.We reaffirm our earlier position, that the statutory provision regarding the jurisdiction of the Court of Appeal, and in relation to "****matters of law*", ***is not a limitation to, or a restriction of Court of Appeal jurisdiction under Article 164(3)(a). It is our view that the appellate jurisdiction in Electoral disputes is donated not simply by virtue of Article 164(3)(a) but also by the legislation contemplated under Article 105(3) of the Constitution".***

[26] The above statement covers the situation herein. The Appellate Jurisdiction Act Cap 9 and ***Section 361*** of the Criminal Procedure Code provides statutory provisions that give effect to the constitutional right of appeal in this Court by regulating how that right is to be applied. The restriction of the right to matters of law does not negate or defeat the essence of the appellant's right of appeal as the appellant had an opportunity to have his case fully reviewed in the High Court. Indeed, where appropriate, this Court has the right to interfere with the decision of the trial court or first appellate court if it is apparent that the decision is one which no court could reasonably come to **(Marakaru [1960] EA 484** following **Bracegirdle v Oxney [1947] 1 ALL ER 126).** After all, where it is deemed that the first appellate court failed in its duty to re-evaluate the evidence exhaustively or thoroughly as required, this court has jurisdiction to intervene as the issue of evaluation of evidence becomes an issue of law. We therefore find no substance in this ground of appeal.

[27] The facts leading to the arrest of the appellants as established by the two lower courts were as follows. Linet Minayo Lumumba (PW1) hereinafter referred to as the complainant had alighted from an upcountry bus on 31st June 2003 at 6a.m. She had two bags one containing clothing and another foodstuffs and was also carrying a radio of Sony make. She was walking to her house at Kalahari within Changamwe Estate when she was accosted by three young men. They grabbed the luggage that the complainant was carrying, threatening the complainant with a knife and an iron bar. She screamed but the young men fled with her things. The three young men were known to the complainant, one as Karanja and the other two only by face. The complainant reported the matter at Changamwe Police Station. In the cause of the day, she was accompanied by the police to a mnazi selling den where they found the 1st appellant whom she knew by name as "Karanja" and the 2nd appellant whom she identified by face. The two were arrested by the police and upon interrogation led the police to a house where the complainant's bag and clothing were recovered. On further investigations, the police went to a house where they found the 3rd appellant and from his house the radio cassette belonging to the complainant was recovered. The complainant identified the 3rd appellant as her second assailant whom she knew by appearance only.

[28] In their defence, the appellants all denied having committed the offence. The 1st appellant maintaining that he had a grudge with the complainant's husband as they had quarreled over a debt while the 2nd and 3rd appellant claimed the complainant was a stranger to them and that they were innocent of the charge. Both the trial magistrate and the learned Judges of the High Court rejected the appellants' defences.

[29} In considering the case against the appellants, the main issue was that of identification. It is apparent that the complainant was the only witness who identified the three appellants as having participated in the robbery. Both the trial magistrate and the High Court were alive to this issue. Before evaluating the evidence, the trial magistrate noted in her judgment as follows:

> ***"the prosecution case rests heavily on the evidence of identification. That evidence comes only from the testimony of the complainant because there was no witness when she was***

***robbed.The Court therefore assessed that evidence keenly to establish the circumstances under which she purported to have identified them".***

She then proceeded to evaluate the evidence and found that the complainant's three attackers were known to her and that she identified one by name and two by appearance. The trial magistrate also found the complainant's evidence corroborated by the evidence of recovery of the stolen items. In reviewing the evidence, the High Court Judges noted that the complainant identified the 3rd appellant by name and that this was therefore evidence of recognition.

[30] In **Wamunga v Republic [1989] KLR 424**, this Court applying **R v Turnbull & Others [1976] 3 ALL ER 509;** & **Abdalla Bin Wendo & Another v Reginam (1953) 20 EACA 166** held as follows:

***"1. Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.***

***2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made."***

[31] The record of appeal clearly reflects that the trial magistrate cautiously considered and analyzed the evidence of identification before coming to the conclusion that the three appellants were the people who attacked and robbed the complainant. The robbery happened at 6 a.m. when there was sufficient light and therefore the circumstances were favourable for an accurate identification. In addition, there was corroborative evidence of recovery of the complainant's bag and clothing on the same day of the robbery from a house to which the police were led by the 1st and 2nd appellant. Although there was no clear evidence of the ownership of the room which appeared unoccupied, it is evident that the 1st and 2nd appellants knew where the items were and were therefore in constructive possession of the items. The complainant's radio was also recovered from a room where the 3rd appellant was arrested. We are satisfied that he was in possession of the radio. All these items were identified and established to have been stolen from the complainant.

[32] The learned Judges similarly addressed the evidence and came to the same conclusion that each of the three appellants were properly identified by recognition and that the appellants were found in possession of the complainant's goods which the complainant had been recently robbed of. We find no reason to fault the concurrent findings of the two lower courts that the appellants were properly identified as the complainant's assailants in addition to being found in possession of goods recently stolen from the complainant during the robbery. The conviction of each of the appellants was therefore proper. The sentence was also lawful and in accordance with the law.

[33] As regards the alleged delay in hearing the appellants' appeal, the appellants' appeal to the High Court was dismissed on 24th October 2008. The appellants each filed memorandum of appeal in person and these memoranda have been severally amended. The final amendment being done just shortly before the appeal proceeded before us on 20th January 2014. There was therefore no substantial delay in hearing the appeal that can be tantamount to inhuman or degrading treatment.

[34] As regards the charge sheet, it is apparent that the complainant was attacked and robbed by three people and that she was threatened with violence during the robbery. The ingredients of the offence of robbery with violence contrary to ***Section 296(2)*** of the Penal Code were therefore established and nothing turns on the appellant's submissions that the charge sheet was defective. Like the High Court we are unable to find any defect on the charge sheet as the omission of the time of the offence is not material to the charge.

The upshot of the above is that we find no substance in these appeals and do therefore dismiss each of the appellants' appeal and confirm the appellant's conviction and sentence.

**Dated and delivered at Malindi this 22nd day of September, 2014.**

**H.OKWENGU**

**…………………………….**

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

**…………………………………**

**JUDGE OF APPEAL**

**F. SICHALE**

**………………………………..**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**