Watuku v Republic (Criminal Appeal 08 of 2020)
[2022] KEHC 4 (KLR) (19 January 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL 08 OF 2020

JM MATIVO, J

JANUARY 19, 2022

BETWEEN

EDWARD KAGUATHI WATUKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against conviction and sentence in Criminal case number 426 of 2018, Voi, R v Edward Kagwathi Katuku & 3 others, delivered by Hon. D. Wangeci, PM on 7.2.2020 and sentence passed on 12th February 2020)

JUDGMENT

Introduction

1. This is an appeal against conviction and sentence in Voi CMCR case No. 426 of 2018 in which the appellant was sentenced to life imprisonment for the offence of Robbery with violence contrary to section 296 (2) of the Penal Code.[1]

Duty of a first appellate court

2. As a first appellate court, this court's duty is to determine, whether the appellant was correctly convicted/sentenced in respect of the offence. However, an appellate court will not interfere with the conviction and sentence unless it finds that the trial court misdirected itself as regards its findings of facts or the law.[2] If it finds that the trial court misdirected itself either on the facts or the law, an appellate court will be at large to interfere including substituting its own order for that of the trial court including setting aside the conviction or the altering of the sentence. The ambit for the interference on a finding

1 Cap 63, Laws of Kenya.

2 See *R vs Dhlumayo & Another 1948 (2) SA 677 (A*). The principle was also restated in *S v Mlumbi 1991 (1) SACR 235(SCA)* at 247g.

of fact and credibility is restricted to few instances such as where there is a demonstrable material misdirection by the trial court, or where the recorded evidence shows that the finding is clearly wrong.[3] Factual errors may be errors where the reasons, which the trial court provides, are unsatisfactory or where it overlooks facts or improbabilities. The appeal court is also in an equal position to the trial court.[4]

3. When evaluating or assessing evidence, it is imperative to evaluate all the evidence. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none may simply be ignored.[5]

4. The facts found to be proven and the reasons for the judgment of the trial court must appear in the judgment of the trial court. If there was evidence led during the trial, but such evidence is not referred to in any way in the judgment, it is safe for a court of appeal to assume that such evidence was either disregarded or not properly weighed or even forgotten about at the time of delivering the judgment. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.[6]

5. However, by requiring the trial court to consider and weigh all evidence is not meant that the judgment of the trial court must also include a complete embodiment of all evidence led, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led.[7]

   FOOTNOTE 7

   Mofokeng v S (A170/2013) [2015] ZAFSHC 13 (5 February 2015).

6. This court must determine, as regards the conviction in the first place, what the evidence of the state witnesses was, as understood within the totality of the evidence led, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decisions / findings or judgment.[8]

7. This court must consider whether the trial Magistrate considered all the evidence, weighed it correctly and correctly applied the law or legal principles in arriving at his judgment in respect of both the convictions and sentences. This exercise necessarily entails a scrutiny of the evidence of each witness within the context of the totality of evidence. It also entails what the trial court's findings were, in relation to such evidence.[9] In order to determine whether there is any merit in any of the submissions made by the respective parties in this appeal, this court must consider the evidence led before the trial

3 See *S v Hadebe and Others 1997 (2) SACR 641 (SCA) t 645e- f*.

4 Ibid.

5 As Nugent J (as he then was) in *S v Van der Meyden// 1999 (1) SACR 447 (W)* stated at 450.

6 As was stated in *S v Singh 1975 (1) SA 227 (N) at 228*.

7 content missing)

8 Ibid.

9 Ibid.

court, juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for interfering with the judgment.[10]

8. If an appellate court is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, that will amount to a misdirection on the part of the trial court. The appellate court must then consider whether the said misdirection, viewed either on its own, or, cumulatively together with any other misdirection(s) is so material as to affect the judgment, in the sense that it justifies interference by the appellate court.[11]

The trial at the lower court

9. The appellant was charged jointly with 3 others who were all acquitted for lack of evidence. It was alleged that on the 3rd day of April 2018 at around 22000hrs at Miasenyi area along Mombasa-Nairobi Highway within Taita Taveta County, jointly with others not before court, while armed with dangerous weapons namely knives and pangas, they robbed a one Jeremiah Sikuku Mwaniki a motor vehicle Isuzu lorry FRR registration number KBU 869, 500 bags of biryani rice, one tecno mobile phone, wallet, two National Identity cards number xxxxxxxx and xxxxxxxx and Kshs. 20,300/= all valued at Kshs. 5,222,000/=, and during the time of that robbery they used actual violence to the said Jeremiah Sikuku Mwaniki.

10. The prosecution case rested on the evidence of 10 Witnesses. The defence rested on the appellant's sworn evidence. He never called any witnesses. PW1, Mr. John Kiragu Ndungu, operates a cat hire business at Thika. His evidence was that on 27th February 2018, the appellant hired his motor vehicle number KBV 149 V Toyota NZE at an agreed daily rate of Kshs. 2,500/=, but, after paying for a week, he stopped paying as agreed. Using a car tracking system, he located the car parked at a place at Voi. He forwarded the link to a one John Wanjagi who was based at voi and the link led him to the Voi Police Station. On 12th April 2018 he travelled to Voi Police Station where he was told that the vehicle had been involved in a robbery and that it had 4 occupants at the material time. He produced copies of documents which included the car hire agreement and stated that the appellant was known to him since they hail from the same place.

11. PW2, Jeremiah Sikuku Mwaniki testified that he was the driver of KBM 869 M; that on 3rd April 2018 he loaded 500 bags of rice each weighing 25kgs at Mombasa which he was to transport to Nairobi. At Masienyi at around 10.00pm a probox blocked his way and he stopped. Three people dressed in police jungle came out leaving one in the vehicle. He said that one of them asked for his driver's license but as he removed it, the person opened the driver's door while another one opened the co-driver's door and they pointed knifes at them. The person stabbed him with a knife and they tied him on the conductor's bed and took his wallet which had his identity card and ATM cards. They also tied the conductor. The person drove the vehicle for a short distance and parked it off the road.

12. He testified that they untied the conductor and took him to the bushes, then, they came and untied him. Hoping to attract attention from passing motorists, he started struggling, but they stabbed him severally and overpowered him, then they dragged him into the bushes where they were tied and a person sat on each one of them. He heard the lorry and the probox drive off. He said the persons asked for their ATM pin numbers and at one point he passed out due to bleeding only to wake up at 4am and realized they had gone. He called the conductor and they untied each other but they were not able to get help from passing motorists. In the morning, a passer-by took them to Maungu AP Police Post

10 Ibid.

11 Ibid.

where he was taken to Maungu Hospital and then transferred to Moi County Referral Hospital where he was admitted. Later he was called to Voi Police Station and he was told that some persons had been arrested. He said he identified the appellant using the vehicle headlights after they stopped them and also from lights of passing vehicles. He said the appellant was the one who took control of the lorry and drove it. He identified his P3 form, photographs of the vehicle, delivery notes for the consignment and said that he lost his two ATM card and identity card.

13. PW3, Joseph Mutuku Ndavi, a transporter based at Emali Town testified that on 4th April 2018 at around 6.20am his wife received a call from a caller who identified himself as a car wash dealer at Maungu. He told her that their driver Mr. Mwaniki were attacked by thugs as they were transporting rice from Mombasa he was injured. He said as he travelled to Maungu, he found his vehicle KBY 992Y parked on the side of the road at Kiundwani Shopping centre but when he got near, he also saw his other vehicle KBU 869M also parked on the side of the road. The driver of KBY992Y and his turn boy were trying to peep into the vehicle to see whether its driver was inside. They told him they found the vehicle parked on the side of the road.

14. PW3 said that upon opening the cabin, he found the keys in the ignition hole, the drivers blood-stained jacket and in the cabinet a delivery note for rice. At the luggage compartment he saw grains of rice. He reported the incident at Makindu Police Station and he drove the vehicle to Voi Police Station accompanied by Police Officers where he found his turnboy. He recorded his statement. He said the driver was brought by officers at around 7pm accompanied by police officers, and that he had bandages all over the body. He identified photographs of the vehicle.

15. PW4, Mr. Daniel Kinyamasyo Kanini, the turnboy in the ill-fated lorry testified that on the material day they were transporting rice to Nairobi but he was unwell, so he slept in the bed in the driver's cabin only to be woken up by noise when the driver was being pushed into the bed by 2 people. At this time the vehicle was stationary. He said there were 4 people and one of them was wearing a jacket similar to those worn by the police and also there was a white probox in front of the lorry. He said three people got into the lorry and one drove the lorry while one drove the probox. They took his Kshs. 20,300/=. They stopped the vehicle and he was taken into bushes by one of them from where he heard the driver screaming. The driver was tied at a distance and two people guarded them until 4am and after they left, he went to where the driver was and found that he had stab wounds. He said the attackers had knives and that they threatened to kill them if they did not cooperate. He untied the driver and who also untied him. Later, they got help to Maungu Police post where the driver was taken to hospital from where he was taken to Moi County Hospital. He recorded a statement at Voi Police Station. He said at the identification parade he was unable to identify any of the suspects because when they were attacked, he was asleep.

16. PW5, IP Peter Kyalo, of forensic crime scenes investigations, DCI, Voi photographed the vehicles and prepared a certificate of photography which he produced together with the photos.

17. PW6, a one Patrick Chege Thuita, a resident of Mazeras testified that on 5th April 2018 he went to Voi town at 3am to board a vehicle to Salama to pick his children who were closing school. While at the stage, motor Vehicle KBU 149V stopped and the driver asked if there were any passengers travelling to Nairobi. He asked the fare to Salama and after they agreed, he boarded. Also, a lady passenger entered the vehicle. There were 4 people already in the vehicle, but the lady alighted at Mtito Andei. At Masimba, 2 passengers who sat with him at the back got out and the driver asked to be excused to talk to a person.

18. He stated that the driver went and talked to a lady who was outside a closed bar and the person at the front seat also went out and they spoke to her. After they returned, the person who was seated at the

co-driver's seat took over the driving. After a few meters the 2 passengers who had earlier alighted at Masimba got into the vehicle. As they moved towards Sultan Hamud, a police vehicle ordered them to pull to the roadside. They were all ordered to alight and lie on the ground. The police asked each passenger to pick his luggage. He said he had a bag with his girls' clothes which they were to change from school. He stated that the Police asked each person to pick his luggage and a police jacket remained unclaimed. While lying down, the police were pointing a gun at the driver asking him for how long he will trouble them, but he said he stopped crime. He testified that the appellant drove the vehicle from Voi to Masimba, and that the 2nd and 3rd accused persons were the ones seated at the rear seat, who alighted at Masimba and boarded again.

19. PW7, Mr. Kiplangat Arap Korir, Ass. Spt of Police, attached Northern Corridor Patrol Unit Sector 11 as the Commanding Officer covering Konza to Voi, Emali to Loitoktok testified that on 29th March 2018, he received information that High way robbers who were on board motor vehicle KBU 149 V Toyota NZE 6 in number were armed with pistols. He stated that one of the persons as per information was a one Collins Mwathe. He testified that on 5th April 2018, they got information that the vehicle was being driven towards Sultan Hamud. He testified that they intercepted the vehicle near Sultan Hamud, that it had 6 occupants, and Collins was driving and upon searching they did not find arms but they found a military jacket. He said that Collins had a Warrant of Arrest issued by a Machakos court in a pending Robbery with violence case. The others were taken to Voi.

20. PW8, PC Michael Kokani, attached to Voi Police Division DCI, the investigating officer. He visited the scene, recorded statements and on 5th April 2018 they received reports that some suspects were arrested at Sultan Hamud, and upon investigations, two suspects who were passengers were released, and that the investigations revealed that the vehicle had been hired from PW1. He testified that PW2 was able to identify the appellant at the identification parade as the person who pushed him out of the driver's seat and drove the vehicle. He said cabin light lights on opening the door, so, he was able to see him and he is the one who drove the vehicle from the scene. He also testified that in the car he recovered the appellant's driving license and his identity card. He issued PW2 with a P3 form. He also identified the jacket recovered from the vehicle and produced it as an exhibit.

21. PW9, Dr. Kagoma Gitau of Moi Referral Hospital produced the PW2's P3 form filed by Dr. Katisya. He testified that he had a deep cut measuring 4cm in length, friction burn wound on the left measuring 8 x 3cm, 6 stab wounds on the back with the largest measuring 2cm, multiple cuts on the upper limbs, friction burn wounds on the right shoulder and both elbows, while on the lower limps there was a deep cut wound on right lower limp measuring 8cm, and multiple cut wounds on anterior right thigh and gluten region. The approximate age was 2 weeks and the type of weapon used was probably a knife.

22. PW 10, IP Rukia Ndolali, previously in charge of crime, Voi Police Station conducted the identification parade for the appellant which had 8 persons including the appellant. He said the appellant was identified by PW2, but PW3 was not able to identify him. He signed the identification parade form.

23. Upon being put on his defence, the appellant elected to give sword defence. He stated that on 27th February 2018, he hired motor vehicle KBU 149U from PW1 which he stayed with for about a month. He stated that he received a call from his brother in law's wife who resides at Mazeras and informed him that his brother-in-law was sick. He proceeded to Mazeras and took him to Mariakani Sub County Hospital. He testified that he was with him for 4 days and left on 5th April 20118 and at Mariakani he picked a passenger who was heading to Samburu and at Samburu, he picked another passenger heading to Voi and at Voi Clatex, he picked 5 passengers, among them a lady heading to Mtito Andei and another to Sultan Hamud and others were to alight at Makutano junction, Machakos, while the last one was heading to Nairobi.

24. He said that at Kambu, the lady who was to alight at Mtito Andei had slept, so he took her back to Mtito Andei where he picked another passenger and another one heading to Masimba, but upon reaching Masimba, he felt sick, so he went to a chemist and bought medicine. He said he asked a passenger who was a qualified driver to drive the vehicle, but he was woken up by officers who ordered them to alight from the vehicle with hands up and lie down. He said that a search yielded nothing. He said an officer asked one of the passengers for how long he will trouble them and he said he stopped stealing. He said that at Voi Police Station an identification parade was done and he was pointed by the complainant. He said he had told the officer he was not ready for the parade because his photos had been taken.

25. In her judgment, the trial Magistrate was persuaded that the ingredients of the offence were established. On identification, she recalled the testimony of PW2 and concluded that the prevailing circumstances were conducive for positive identification and that the appellant was positively identified. She convicted him and sentenced him to serve life sentenced. However, she acquitted all the other accused persons for lack of evidence.

The Appeal

26. The appellant seeks to upset both the conviction and sentence citing the following grounds:

    a) he learned trial Magistrate erred in both law and facts when he relied on evidence of purported visual identification and failed to find that conditions and circumstances could not enable a positive identification.

    b) The learned trial Magistrate erred both in law and facts by disregarding the fact that the charge sheet was defective.

    c) The learned trial magistrate erred both in law and facts when he relied on the evidence of the identification parade yet failed to find that it was conducted in breach of chapter 46 of force standing orders being unsafe to sustain conviction.

    d) The learned trial magistrate erred both in law and facts when she convicted the appellant yet the prosecution failed to adduce crucial evidence and crucial witnesses during trial.

    e) The learned trial magistrate erred both in law and facts by convicting the appellant yet the evidence and testimonies adduced by the prosecution was contradictory and inconsistent hence unreliable to secure a safe conviction.

    f) The learned trial Magistrate erred both in law and facts when shifted the onus of proof to the defense.

    g) The learned Magistrate misdirected herself in fact and law by disregarding the appellant's constitutional rights during trial and according him a fair trial.

    h. The learned magistrate misdirected herself in fact and law by not regarding the appellants constitutional right to be heard during his mitigation hence proceeded to pass a harsh sentence on the appellant without hearing his mitigation

27. The appellant prays that the appeal be allowed, the conviction and the sentence dated 12th February, 2020 be quashed and this court issues such other order as it may seem just and expedient.

Analysis of submissions and determination

28. I will first address the question whether the ingredients of the offence of robbery with violence were proved. The appellant's counsel argued that the prosecution never provided evidence to show the items alleged to have been stolen belonged to the appellant. He argued that no evidence was tendered to

show that the motor vehicle KBU 869N was in possession of the complainant nor did the owner of the vehicle record a statement or complaint of a stolen motor vehicle. He argued that there was nothing to show that the 500 bags of rice did not reach the recipient nor was there a complaint from the sender of the rice or recipient for the alleged loss of the rice consignment.

29. He submitted that no receipt was produced to show that the complainant owned the techno phone. He argued that the Kshs. 20,300/= was in possession of a person who was not the complainant. He also argued that even though the complainant stated that his ATM cards were stolen, no evidence was tendered to show that there was any attempt to access the complainant's bank accounts. In absence of such evidence, he argued that the complainant may have lost his wallet elsewhere. He urged the court to take judicial notice of the fact that once a person loses his identification card he is issued with an abstract and a waiting replacement. He argued that the complainant did not support his claim for the loss of the said items nor was he in possession of any of the stolen items. He argued that the alleged robbery did not occur.

30. The Respondent's counsel submitted that the evidence tendered established all the three elements of the offence.

31. In addressing the issue at hand, it is necessary to examine the evidence to determine whether it establishes the ingredients of the offence of Robbery with violence. The Court of Appeal in *Johana Ndungu v Republic*[12] listed the ingredients as follows: -

    i If he offender is armed with any dangerous weapon or instrument; or

    ii. If he is in the company with one or more other person or persons, or;

    iii. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person.

32. Proof of any one of the above ingredients is enough to sustain a conviction under Section 296 (2) of the *Penal Code*.[13] The assailants were armed with knives. They violently robbed PW2 & PW3 the items listed in the charge sheet. PW2 was stabbed with a knife on various parts of his body. His mobile phone and wallet containing his identity card and ATM cards were stolen. Cash was also stollen from PW3. The identity card and ATM cards were recovered in the vehicle the appellant had hired when the police intercepted it near Sultan Hamud. The argument that the ingredients of the offence were not proved cannot stand on the face of the above evidence.

33. I now address the question whether the appellant was sufficiently identified as the offender. The appellant's counsel submitted that identification of the offender is paramount in every offence, and that he must be positively identify. He submitted that visual identification in criminal cases can cause miscarriage of justice and should be carefully tested to confirm positive identification of the accused. He cited *Wamunga v Republic*[14] which held that 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 favorable and free from possibility of error before it can safely make it the basis of a conviction. Counsel argued that PW4 who was with PW2 were unable to identify the perpetuators under similar circumstances. He argued that it is likely that PW2's injuries could have a clouded his vision.

12 Criminal Appeal No. 116 of 2005 (UR).

13 See *Olouch vs Republic {1985} KLR 549.*

14 {1989} KLR 424 at 426.

34. The Respondent's counsel combined the question whether the appellant was identified at the scene with the identification parade. As for the identification at the scene, he recalled PW1's testimony which confirms that the appellant hired a car from him. He also argued that PW2 was able to identify the appellant. He submitted that the evidence of identification was water tight.

35. I have severally in previous decisions addressed the question of what constitutes sufficient identification in criminal cases. Among my decisions is *Donald Atemia Sipendi v Republic*[15] which was relied upon by the trial court. The same decision was cited by the Respondent' counsel. Inevitably, I will reiterate what I said in the said decision. For starters, identification evidence is evidence that a defendant was or resembles a person who was present at or near a place where an offence was committed, or an act connected with the offence was committed. Decisional law is in agreement that there is a special need for caution before accepting identification evidence.

36. Evidence from eyewitnesses plays an important role in all contested cases. However, the memory is a fragile and malleable instrument, which can produce unreliable yet convincing evidence. Because mistaken witnesses can be both honest and compelling, the risk of wrongful conviction in eyewitness identification cases is high, and can result in injustices. Our system of justice is deeply concerned that no person who is innocent of a crime should be convicted of it. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. However, the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate.

37. As was held in *Charles O. Maitanyi v Republic*,[16] it is necessary to test the evidence of a single witness respecting to identification, and, absence of collaboration should be treated with great care. In *Kariuki Njiru & 7 others v Republic*[17] the court held that evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

38. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.

39. The positive identification of an accused is an essential element of any offence. It is a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution. While testing identification evidence of a single witness, great care and caution should be taken to ascertain whether the surrounding circumstances were favourable to facilitate proper

15 {2019} e KLR.

16 {1988-92} 2 KAR 75.

17 Criminal Appeal no. 6 of 2001 (Unreported).

identification. Authorities are in agreement that these include light, time spent with the assailant, clothes or any item that the witness may positively identify and whether the complainant knew the accused. Such evidence may be reinforced by sufficient collaboration. In absence of collaboration, the court needs to treat it with caution. In evaluating the accuracy of identification testimony, the court should also consider such factors as: -

a) What were the lighting conditions under which the witness made his/her observation?

b) What was the distance between the witness and the perpetrator?

c) Did the witness have an unobstructed view of the perpetrator?

d) Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

e) For what period of time did the witness actually observe the perpetrator?

f) During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

g) Did the witness have a particular reason to look at and remember the perpetrator?

h) Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

i) Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?

j) What was the mental, physical, and emotional state of the witness before, during, and after the observation?

k) To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

40. The trial court in assessing the demeanour of a witness is expected to make a finding as to the integrity, honesty and truthfulness of such witnesses not his or her boldness or firmness. The Court of Appeal in *Toroke v Republic*[18] had this to say: -

> " It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So, the error or mistake is still there whether it be a case of recognition or identification."

41. PW2's testimony is that he saw the appellant when the lorry was blocked by the car. He said the headlights were on. The attackers forced them into the lorry, tied them and drove the lorry. He was emphatic that it was the appellant who drove the lorry. They stopped the lorry off road. They were ordered to get out. He struggled with the attackers for a while. Again, he said light from passing vehicles enabled him to see the appellant. This evidence is not to be viewed in isolation. There is on record the evidence of PW1 who testified that the appellant hired the car from him, a fact the appellant confirmed. PW2's wallet containing his driving wallet and identity card were found in the same car when it was intercepted by police near Sultan Hamud. There is both direct and circumstantial evidence which the appellant did not dislodge with his defence. I am satisfied that the identification evidence was free from error and that it was sufficiently corroborated.

[18] {1987} KLR 204.

42. I will now address the arguments regarding the identification parade. The appellant's counsel submitted that the prosecution relied on identification parade to identify the appellant. He submitted that identification parades are meant to test the correctness of a witness's identification of a suspect and relied on *Njihia v Republic*[19] which held: -

> "It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course, if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

43. He submitted that the identification parade was unfair because the appellant was not allowed to have a witness present to ensure fairness his protection. He argued that as shown by exhibit 13 at page 14 to 17 of the supplementary record of appeal, the officer in charge indicated that there was no witness present. He submitted that the officer in-charge did not indicate the time he conducted any of the 3 parades which omission is very essential considering the officer in charge was conducting parades for 3 suspects.

44. Additionally, counsel faulted the manner the parade was conducted arguing that the officer in-charge of the parade did not observe the police standing orders, particularly standing order (d) and (n). He argued that the officer did not tell the court how he arranged the parade and how he obtained the other 7 members of the parade and if their features were similar to the appellant's. He argued that having used the same persons in the three parades, it goes without saying that the physical features of the persons in the parades were not similar in anyway. He submitted that the use of the same persons in the 3 identification parades led to unfairness because it was possible to figure out the inconsistent person in the parade. He relied on *Oscar Muliro & Anor v Republic*[20] in which the court held that it was unsafe to base a conviction on identification parades which were not conducted with scrupulous fairness.

45. The Respondent's counsel submitted that the identification parade was conducted fairly and in observance with the laid down procedures. He submitted that the trial court was guided by the principles laid down in *Cleophas Otieno Wamunga v Republic*,[21] *Kiilu & another v Republic*,[22] *Nzaro v Republic*,[23] and *R v Mwango S/O Monaa*.[24] He submitted that the identification parade was properly conducted.

19 {1986} KLR 422.

20 {2016} e KLR.

21 Court of Appeal Criminal Appeal No. 20 of 1989, Kisumu.

22 {2005} 1 KLR 174.

23 {1991} KAR 212.

24 {1936} EA CA 29.

46. I find it useful to recall *Njihia v Republic*[25] which held that if an identification is properly conducted, the resulting evidence is of great value, but if it is badly conducted, the complainant will hardly be able to give reliable evidence apart from the parade. For an identification parade to be fruitful and of evidential value, the identification rules must be complied with. Failure to adhere to the identification parade guidelines affects the evidential value of a resulting identification. The Court of Appeal in *Samuel Kilonzo Musau v Republic*[26] stated: -

> " The purpose of an identification parade, as explained in *Kinyanjui & 2 Others v Republic (1989) KLR 60*, "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion." It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification."

47. The procedures governing police identification parades are provided for in the Police Force Standing Orders pursuant to the National Police Service Act.[27]These procedures were explained in R v Mwango s/o Manaa[28] and *Ssentale v Uganda*.[29] The rules include: -

a) The accused has the right to have an advocate or friend present at the parade;

b) The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;

c) Witnesses should be shown the parade separately and should not discuss the parade among themselves;

d) The number of suspects in the parade should be eight (or 10 in the case of two suspects);

e) All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;

f) Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and

g) As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

48. Identification of a suspect in any criminal offence is always a pivotal question and whenever it arises, the trial court has to satisfy itself, before convicting. The evidence must be such that threshold set by

25 {1966} KLR 422.

26 {2014} e KLR.

27 Act No. 11A of 2011.

28 {1936} 3 EACA 29.

29 {1968} E.A.L.R 365.

the rules and decided case law has been met. The evidence must leave no doubt that the suspect was positively identified. If the police force standing orders in respect of conduct of identification parades are flouted, the value of the evidence of identification depreciates considerably. In *Ajode v Republic*[30] the Court of Appeal held that before an identification parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade. In *John Mwangi Kamau v Republic*[31] the Court of Appeal held: -

> " 15. Identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68& 69 of 2008. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them..."

49. A cautionary rule with particular application to identification evidence was formulated by Dowling, J. in the much-cited case *R v Shekele*.[32] It is worth repeating:-

> " Questions of identification are always difficult. That is why such extreme care is always exercised in the holding of identification parades - to prevent the slightest hint reaching the witness of the identity of the suspect. An acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identifications. People often resemble each other. Strangers are sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence. Witnesses should be asked by what features, marks, or indications they identify the person whom they claim to recognise. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement, unexplored, untested and uninvestigated, leaves the door wide open for the possibility of mistake. Where the accused is an ignorant native who is unrepresented by counsel or attorney and who is therefore unable himself to probe the evidence of identification and where the prosecutor has not done so, the court should undertake this task, as otherwise grave injustice may be done."

50. The central element of the cautionary approach recommended in the above case is that identification evidence by an 'eyewitness should not be accepted unless it has been rigorously tested. The greatest care should be taken to test identification evidence, and a witness may be tested in cross-examination by requiring him to describe again the appearance of the person(s) he purports to identify. Where such identification rests upon the testimony of a single witness and the accused was identified at a parade which was conducted in a manner which did not guarantee the standard of fairness observed in the recognised procedure, but was calculated to prejudice the accused, such evidence standing alone can have little weight.

51. The appellant is shown in the identification parade form as having signed to signify that he was satisfied with the manner in which the process was conducted. He did not dispute this signature. In any event, this evidence is to be considered together with the rest of the prosecution evidence. In this regard, on

30 {2004} 2 KLR 81.

31 {2014} e KLR.

32 R. v. Shekele and another 1953 (1) (SA) 636 (T). Although judgement was delivered in this case in 1947, it was not reported until 1953. In the period between 1947 and 1953 it was frequently referred to, in its unpublished form.

record is the testimony of PW2 who identified him at the parade. This was a victim of the robbery and he explained that he saw the appellant with the help of his vehicle headlights when they blocked the lorry. He saw him when he entered the lorry and they tied and forced him into cabin bed. He also saw him take over the lorry and drive. He stopped and they were forced out of the lorry, and here he struggled with the attackers and with the help of lights from passing vehicles, he also saw him. His identity card and driving license were recovered in the vehicle the appellant had hired. These coincidences are just too many to be ignored unless they are rebutted with cogent evidence.

52. The other ground urged by the appellant's counsel is that the prosecution failed to call crucial witnesses. He argued that the complainant said that the complaint was filed by a good Samaritan who took him to the Police Station. He submitted that the investigating officer also indicated that they were taken to the crime scene by a car wash attendant. He argued that the evidence of these two persons was essential as they were the first persons to interact with the victims. He submitted that the registered owner of the motor vehicle was not called, and PW3 ought to be disregarded for reasons that he was not the registered owner of the motor vehicle. He also argued that the prosecution failed to call the owner of the purported rice.

53. Closely tied to the above argument, is the appellant's advocates submission that the prosecution did not adduce crucial evidence which linked the appellant to the charge. He argued that the complainant had no evidence to show he sustained the injuries on the 3rd April,2018. He argued that since he claimed that on 4th April 2018 he was taken to Maungu Health center and later taken to Moi Hospital Voi, he did not have treatment notes from any of the said hospitals to support his claim nor did he carry the clothes he wore on the material day.

54. He submitted that the investigating officer who alleged that he went to the scene did not have supporting evidence and despite alleging there was blood at the scene and even ropes, he did not present the crime scene photos or the ropes during trial citing lack of forensic analysis. He submitted that the only way to proof a fact exists is through evidence. He questioned the quality of the investigations and wondered by the car tracking record capturing the date of the offence was not produced. He also pointed out at the inconsistency that one witness talked of a Pro-box while the appellant was driving a Toyota NZE.

55. He argued that PW3 should have been a suspect because he was driving a Toyota probox which similar to the one that was used in the robbery, so he was a person of interest. He argued that the prosecution failed to interrogate and investigate the said witness.

56. In his rejoinder, the Respondent's counsel submitted cited section 143 of the *Evidence Act*[33] and submitted that the evidence adduced was sufficient.

57. The starting point in addressing the argument propounded by the appellant's counsel is section 143 of the Evidence Act[34] which provides that "No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact." The question of failure by the

33 Cap 80, Laws of Kenya.

34 Cap 80, Laws of Kenya.

prosecution to call witnesses has been the subject of numerous determinations by this court and also our superior courts. The Court of Appeal in *Julius Kalewa Mutunga vs Republic*[35] stated: -

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

58. The leading authority on this issue is *Bukenya & Others v Uganda*[36] in which the East African Court of Appeal held: -

    i. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

    ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

    iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

59. In the above case, the court was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. The significance to be attributed to the fact that a witness did not give evidence depends in the end upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. There are circumstances in which it has been recognized that such an inference is not available or, if available, is of little significance.[37] This position was cited with approval by Miler JA in *Hewett v Medical Board of Western Australia*.[38]

60. The rule only applies where a party is required to explain or contradict something. What a party is required to explain or contradict depends on the issues in the case as thrown in the pleadings or by the course of the evidence in the case. No inference can be drawn unless evidence is given of facts requiring an answer. This position was upheld in the following cases, namely; *Schellenberg v Tunnel Holdings*,[39] *Ronchi v Portland Smelter Services Ltd*[40] and *Hesse Blind Roller Company Pty Ltd v Hamitovski*[41] and its reiterated in Cross on Evidence.[42]

35 Criminal Appeal No. 31 of 2005

36 {1972}E.A.549.

37 See Mahoney J. in Fabre v Arenales {1992} 27 NSWLR 437, 449-450,Priestly and Sheller JJA agreeing).

38 {2004} WASCA 170.

39 Cubillo (No. 2) 355

40 {2005} VSCA 83

41 {2006} VSCA 121 28

42 Supra at page 1215

61. When no challenge is made to the evidence of witnesses who are called, the principle in Jones v Dunkel cannot be applied to make an inference in respect of other witnesses who could have been called to give the same evidence.[43] A look at the record shows that the prosecution testimony on the involvement of the appellant has not been dislodged. There is the direct evidence of PW2 which puts the appellant at the scene. As explained in Cross on Evidence[44] and the authorities cited above, the rule does not require a party to give merely cumulative evidence. In order for the principle to apply, the evidence of the missing witness must be such as would have elucidated a matter.[45] The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the case. The circumstances of this case do not show the alleged uncalled witnesses could have added value to the case.

62. In any event, it is established law that a conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.[46] The Court of Appeal of Uganda in *Okwang Peter v Uganda*[47] held:-

> "Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error."

63. It is always competent to convict on evidence of a single witness if that evidence is clear and satisfactory in every respect. The law is also clear that there is no particular number of witnesses required for proof of any fact.[48] Further, it has not been shown that the evidence tendered had gaps which required to be filled. I find no reason to make adverse inference in the circumstances of this case.

64. The appellant's counsel submitted that the prosecution failed to proof the case beyond reasonable doubt. He cited Article 50 (2) (a) of the *Constitution* and *United States v Smith*[49] in support of the proposition that the burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. He also argued that the prosecution failed to prove that the robbery occurred because it was not proved that the property was in possession or control of the complainant. He argued that it was not proved that the appellant was the offender. He argued that the prosecution relied on circumstantial evidence. Also, he argued that the prosecution did not demonstrate the owner of the police jacket. He submitted that the prosecution case is founded on suspicion and cited

43 See Cross on Evidence, Supra.

44 Supra.

45 See Payne vs Parker, 202 Cubillo)No. 2) 360.

46 See *Anil Phukan vs State of Assam {1993} AIR 1462.*

47 Criminal Appeal No. 104 of 1999.

48 See Section ..... Evidence Act, Cap 80, Laws of Kenya.

49 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Citing In re Winship, 397 U. S. 358, 370, 90 S. Ct. 1068, 1076 (1970) (Harlan, J., concurring).

Joan Chebichii Sawe v Republic[50] in support of the proposition that suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.

65. The above argument is attractive. However, I have already concluded that the evidence of PW2 places the appellant at the scene and the same witness was able to identify him as one of the assailants.

66. The appellant's counsel also submitted that the appellant was not accorded a fair trial because on several occasions the appellant requested for documents that were in the custody of the prosecution but from time to time the prosecution did not present the accused with such evidence in time. On his part the Respondent's counsel submitted that the prosecution proved its case and the trial did not infringe the appellants Article 50 (2) (a) of the Constitution. A careful evaluation of the entire trial records leaves no doubt that the trial was conducted properly in accordance with the law and all the legal and procedural safeguards were observed.

67. Also, the appellant's counsel submitted that section 296 (2) of the Penal Code provides for the ingredients of the offence and argued that the statement on offence in the charge sheet does not define what robbery itself is. He argued that for a charge of robbery with violence, it is paramount for the prosecution to prove the occurrence of the robbery before proceeding with the ingredients set out in section 296(2).

68. In reply, the Respondent's counsel submitted that the charge sheet was not defective and cited a passage from *Katana Njuguna v Republic*[51] in which the Court of Appeal cited *Joseph Onyango Owuor & another v Republic*[52] in which the court rejected a similar argument. I associate my self with the reasoning in the said decision. I say no more.

69. Lastly, the appellant's counsel submitted that the sentence imposed is harsh, that the mitigation or previous records were not considered and that the sentencing guidelines were not considered. On his part, the Respondent's counsel submitted that the sentence meted is not excessive.

Conclusion

70. Flowing from my analysis and conclusions on all the issues discussed above, it is my finding that the trial court did not misdirect itself in returning a finding of guilty. I find that the conviction is supported by evidence, so, I find no reason to disturb it.

71. As for the sentence, I note that the appellant was sentenced to life imprisonment as opposed to the death penalty provided by the law. This is in line with the Supreme Court Guidelines in the Muruatetu case. However, considering the sentencing policy and guidelines, it is my view that the life sentence is harsh. I substitute it with a prison term of 10 years. In computing the said period, the period the appellant was in police custody pending arraignment in court and the period he was held pending trial shall be considered. The upshot is that I uphold the conviction, but I reduce the sentence to 10 years prison term.

Right of appeal 14days

SIGNED, DATED AND DELIVERED VIRTUALLY AT VOI THIS 19TH DAY JANUARY 2022

JOHN M. MATIVO

50 Crim. App. No. 2 of 2002.

51 {2016} e KLR.

52 Criminal Appeal No. 353 of 2008.

JUDGE