REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.19 OF 2020

GIDEON MWINGA NDUNG'U..APPELLANT

-VERSUS-

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

(Being an appeal against the conviction and sentence of the Hon. J.B. Kalo Chief Magistrate dated 21st May 2020 in NAKURU CMCR NO. S/O 1398 of 2017 – Republic –vs- Gideon Mwinga Ndung'u)

JUDGMENT

1. The accused person was charged before the lower court with an offence of Robbery with Violence contrary to section 296(2) of the Penal Code.

2. The particulars of the offence were that on 28th March 2017 at Nakuru Township within Nakuru County, jointly with others not before court while armed with dangerous weapon namely AK 47 raffle robbed Purity Nyambura Njeri cash of Ksh.97, 000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Purity Nyambura Njeri and in the process shot dead one Francis Kinyanjui Mburu.

SUMMARY OF THE PROSECUTION CASE.

3. The prosecution in support of their case summoned evidence of nine (9) witnesses.

4. PW1 **Purity Njeri Nyambura** testified that she was running an MPESA shop at China Bazaar in Nakuru. On 28th March 2017 at around 8.00p.m while at her shop preparing to close, two men came into the shop. One was armed with a riffle came. He pointed the gun to her and demanded a hand over of money, while the other one warned her to co-operate. She handed over the money then shouted *huyu ameniibia pesa* i.e. 'this is the one who has stolen my money'. Just then, her friend by the name Muthoni who was coming to the shop grabbed the assailant from behind. Other members of the public came and tried to restrain him. His accomplice shot into the crowd securing their escape. The bullet hit one of her a neighbour called Kinyanjui who later died in the hospital.

5. She stated that the men did not wear masks. The lights were on in her shop. She saw the face of the one who demanded the money from her clearly. She described the one armed with the gun to be of Somali descent but did not have Somali accent, the other one as tall and of dark complexion. About three weeks later she attended an identification parade at Nakuru Central police station .There were about 6-9 men on the parade who were of almost the same height, average built and of dark complexion. She said that she positively identified the appellant by touching him. That she was able to identify the appellant from his facial appearance which was etched in her memory from the time he robbed her. She stated that accused's face did not have any unique mark. She pointed him out in the dock.

6. In cross examination she stated that the incident happened at around 8.00pm the usual time she closed her shop. The money was in the open drawer. Her shop had metal bars. That the two people who came to the shop were men and she screamed soon after handing over the money to one of them that she had been robbed. She had seen a gun before but that was the first time she was robbed. She was shocked and worried. She stated that the incident happened fast and took less than five minutes but she looked the men in the eye as they spoke to her. They were outside the shop. That she gave the money to the appellant and it is him that Muthoni grabbed. She said at the Identification parade the appellant was the only one with a swelling on the neck, but she identified him from his facial appearance. That he had red eyes. That she identified him from the picture in her mind. That she had seen him only once at the time of the robbery.

7. She could not remember the time police arrived at the scene. She confirmed that she recorded her statement the same day. She said she attended identification parade after about one month of the incident though she could not tell the exact date. She confirmed she did not count the number of men at the identification parade. That at the parade she was in company of police officers. In re-examination she testified that

she clearly saw the face of the man who robbed her, he was an African man of dark complexion and that the men at the parade were all male Africans of dark complexion. She reiterated that she identified the appellant from the picture in her mind, by his facial appearance.

8. PW2 **Rose Gathoni Wairimu** testified that on 28th March 2017 at around 8.00p.m she had closed her business and went to PW1's shop to pick her shoes. She found two male customers. One was standing at the door while the other one was at the grill. She picked the shoes and as she left heard PW1 screaming '*Mwizi! Nimeibiwa'*, Thief! I have been robbed! She turned and grabbed the man at the grill. He was too strong for her and he overpowered and pushed her to the ground. By then a crowd had gathered. The man with the gun shot twice to disperse the crowd. The two escaped but a bullet hit a man called Kinyanjui, who later died while undergoing treatment at Mediheal hospital. Police officers arrived after few minutes interrogated them.

9. It was PW2's testimony that there was light at PW1's shop and she saw one of the men whom she described to be tall and of dark complexion. She did not see his face clearly. She attended an Identification parade at Nakuru Central police station. It was made up of about 8-10 men of African descent and of dark complexion. She noted they were not of the same height, some of the men were tall while others were short, and some were of light complexion. She identified the appellant as one of the as robbers by looking at his face and touching him.

10. In cross examination she testified that she found two male customers at PW1's shop. One was at the grill the other at the door. The one at the grill was facing PW1. That she had taken only two steps away from PW1's shop when she heard her scream *Mwizi!* Thief! She turned and grabbed the one at the grill. She grabbed him at the waist from the back. A struggle that lasted less than a minute ensued as he tried to free himself and it was then that she saw his face as he pushed her to the ground. She noted that his eyes were reddish, he was taller than her and wore a raincoat. When she attended the identification parade the police told her that she was going to identify the robber who had robbed PW1. The parade had about 8-10 men, some were short while others were tall, some were of dark complexion and some of lighter complexion. She said she identified the appellant who had a swollen neck, by his facial appearance.

11. In re-examination she reiterated that she saw the accused clearly when she grabbed him at the shop.

12. PW3 No. **78235 CPL Benson Tom Danaiki** testified that at the material time he was attached to DCI Flying Squad Nakuru performing patrol and general surveillance duties. One Gideon Mwinga *alias* Mcoast was on their wanted list of robbery suspects. He was also suspected to own a fire arm. On 20th May 2017, his boss IP Kahai called him and informed him that this suspect had been sighted in Mchanga area in KITI. In the company of PC Mburu, PC Bosire and PC Diver Chebor he proceeded to Mchanga area where they found the appellant at a certain hotel. They arrested him. While escorting him to the motor vehicle a scuffle ensued as he resisted. In the process he sustained slight injuries.

13. At the police station he was interrogated on the whereabouts of his firearm. First he denied having but after some time agreed to show the police where it was but instead took them on wild goose chase where none was recovered. Under cross examination he confirmed that they did not recover anything from the accused person.

14. PW5 **No. 101086 PC Rafael Bosire** was serving in the Flying Squad in Nakuru in 2017 with PW3 **CPL Benson Tom Danaiki**. He testified that on 20th May 2017 they received instructions from their officer in charge that a suspect whom they were trailing in relation to a series of robberies had been spotted at Mchanga area in KITI. His name was Gideon *alias* Mcoast. They had been told that he was in possession of an AK 47. They proceeded there and found him in Hollywood Bar. He resisted arrest but they overpowered him. On interrogation he told them that the AK 47 was hidden at his compound in a pile of wood. They proceeded there, conducted search in vain. They took him to the police station where they were instructed to place him in cells awaiting further investigation.

15. On cross examination he stated that they arrested the appellant at 8.00pm but reached the station at midnight. That they used force to get him into the motor vehicle. That they first went to his house to conduct search for the rifle, did not recover anything. From there they took him to the police station. He said that he did not know the appellant physically but they had his photos. That he only knew the appellant's *alias*; Mcoast. He denied torturing the appellant. In reexamination he testified that their commander had accused's photo and that his rights were not violated.

16. PW4 No. **234652 Chief Inspector Michael Kiruro** was Officer in Charge crime in Nakuru at the material time. He was the officer who conducted the Identification parade at the request of the investigation officer. He produced the identification parade forms as exhibits. In his testimony he confirmed that he complied with the law on the conduct of identification parades. He testified that on 25th May 2017 he convened the Identification parade at the police station. It comprised of 8 members of public who in his view were of the same size and complexion as the accused person. He had three witnesses who were to identify the suspect. He put them in the crime office room 4 to await their turns.

17. The first witness he called to the Identification parade was one Ann Wanjiru. This one did not identify the appellant.

18. The second witness was PW2. According to him she positively identified the appellant by touching him. He said she that she stated that she was able to identify him because of the height and appearance.

19. The next one was PW1. Again she positively identified the appellant based on his appearance by touching him.

20. He testified that the appellant was satisfied with identification parade and he signed the identification parade form in presence of his wife, Debora Nyambura Kitawa.

21. On cross examination PW4 stated that he was not present at the arrest of the appellant. That the appellant's appearance at the time of the ID parade and at the time of his testimony was the same.

22. PW6 **DR. Tutus Ngulungu** a pathologist at Provincial General Hospital Nakuru produced the postmortem report for Francis Kinyanjui Ndungu, the victim of the shooting at the scene of the robbery. He conducted the post mortem on 31.3.2017 upon request from Nakuru Police Station. He stated that he was told the deceased who was a business man was shot during a robbery incident and died while being taken to the Hospital. He confirmed that the body had a gunshot wound on the left chest measuring 1cm across. He also found a fracture of the 7th, 8th, and 9th ribs on the right as a result of the gun shot. The digestive system had laceration of liver and one litre of blood in the abdominal cavity. Other systems were normal. He opined that the cause of death was severe abdominal organ injuries, injury to the liver and massive blood loss which was as a result of a single gunshot.

23. PW7 no. **53387 CPL Peter Ndiritu** was the investigating officer. He testified that on 28th March 2017 a report of robbery was made through police communication to the station. He rushed to the scene in company of the OCS and DCI. They found that the robbery had taken place in an MPESA Shop where by PW1 was robbed of Ksh.97, 000/=. He reiterated what PW1 and PW2 told the stated in their witness statements.

24. Regarding the culprits who committed the offence he testified that while at the scene people whispered that the robber was one by the name Mcoast. He enquired as to who this Mcoast was and proceeded to enlist the assistance of the Flying Squad who traced and arrested him on the 20th May 2017. Thereafter Identification parade was conducted where the person arrested was positively identified by the witnesses. It is then that he learnt that the names of the appellant were Gideon Mwinga alias Mcoast.

25. During cross examination he stated that that the robbery took place at Nakuru Retail Market, that it is the people who arrested the appellant who showed him to him. He said that the appellant was arrested at Mchanga. He also testified that he did not know any other person by the name Mcoast.

26. After the testimony of PW7 Prosecution closed its case. On the 15th August 2019 the court found that a prima facie case had been established and appellant was put on his defence.

THE DEFENCE CASE

27. In his defence the appellant elected to give unsworn testimony. He denied the offence. He denied ever owning a firearm. He stated that he was arrested while roasting meat. Upon his arrest he was tortured. His house was searched but nothing was recovered. It was his position that this case was a result of jealousy from some quarters because his father was constructing for him a permanent house.

28. The learned trial magistrate in a judgment delivered on 21st May 2020 found the appellant guilty and convicted him accordingly. On 29th May 2020 the appellant was sentenced to 25 years imprisonment.

29. Aggrieved by these findings the appellant filed the petition of appeal on the 15th of June 2020 on the following grounds:

> *i) THAT his conviction on identification evidence by PW1 and PW2 was manifestly unsafe as the learned trial magistrate prior to his conviction failed to rule out altogether the existence of mistaken identification on the part of two witnesses in view of the prevailing circumstances at the scene of crime by the time of attack.*
>
> *ii) THAT the learned magistrate erred in law and in fact in failing to warn himself as to the dangers of convicting in reliance on such identification evidence made under difficult circumstances.*
>
> *iii) THAT the learned trial magistrate erred in law and in fact in failing to appreciate that the prosecution had failed to prove its case to the standard required in law that is, prove beyond reasonable doubt.*
>
> *iv) THAT the learned trial magistrate misapprehended the facts, applied wrong principles, and drew erroneous conclusion to the prejudice of the Appellant.*
>
> *v) THAT the learned trial magistrate misdirected himself in law in that, he shifted the onus of proof from the prosecution to the Appellant contrary to the law.*
>
> *vi) THAT the learned trial magistrate erred in law and fact in convicting the Appellant whereas the Appellant's constitutional right to a fair hearing had not been afforded.*
>
> *vii) THAT the learned trial magistrate erred in law and facts in failing to take into account ,and failed to consider and or failed to give reasons why he disregarded the Appellant's defence.*

APPELLANT'S SUBMISSIONS

30. The Appellant's submissions were dated 24th November 2020 and filed on 30th November 2020 by the firm of Nyawira and Company Advocates. The appeal was argued by Mr. Mongeri.

31. It was submitted that the conviction was unsafe due to the paucity of identification evidence. That there were only two identifying witnesses neither of whom had ever met the appellant neither of whom gave any description of the robbers to the police. That PW1 testified that the incident happened fast, took less than 5 minutes, PW2 that she grabbed the robber from the back and the struggle between them took less than a minute before he threw her to the ground. It was also argued that the circumstances of the offence did not augur well for a positive

identification. PW1 was shocked and worried. PW2 grabbed the robber from the back.

32. It was also argued that the Identification parade evidence could not be relied on. How would PW2 testify that she identified the appellant at the identification parade yet in her evidence in chief she said she did not see him clearly? It was also clear that in the whole Identification parade only the appellant had a visible injury on his neck making him stand out and easy to pick out. That the Identification parade took place in May while the offence was committed in March.

33. Counsel also pointed out that the arresting officers' testimony did not link the appellant with this offence at all. In fact that the appellant was only charged because the DCI believed that he was involved in some robberies. The INVESTIGATING OFFICERS evidence did not connect him with the offence at all. The police did not even know the person they were looking for. There was no investigation. No recovery of firearm. To support the arguments on identification the appellant cited the following cases.

(a) **MICHAEL NG'ANG'A KINYANJUI VS R [2014] eKLR** where the court stated that *" witnesses may be deliberately untruthful, but there may be other causes of inaccuracy in a witness's testimony like inaccurate observation, faulty memory of self-interest .It is for this reason that the courts approach the question of identification with caution in situations of disputed identification evidence…"*

(b) **CLEOPHAS OTIENO WAMUNGA VS. R [1989] eKLR** where the court while relying on the case of **R VS. TURNBULL [1976] 3 ALLER 549**, stated *"Evidence of visual identification in criminal cases can bring about the miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification…"*

(c) **STEPHEN MATU KARIUKI & 2 OTHERS VS REPUBLIC [1996] eKLR** where the court, citing ***Turnbull*** above set the tests to be used in the examination of the identification evidence. The court ought to ask itself certain questions in order to verify the evidence. *"How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, e.g. by passing traffic or press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and the accused's actual appearance?"*

(d) **DONALD ATEMIA SIPENDI VS**. **REPUBLIC [2019] eKLR** where the court restated the importance of the testing questions in Stephen ***Matu Kariuki*** in evaluating the accuracy of identification testimony.: what were the lighting conditions under which the witness made his or her observation, what kind of light, how close was the perpetrator to the light; how far was the witness from the perpetrator; did the witness have an unobstructed view of the perpetrator? ; did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color and clothing of the perpetrator?; for how long did the witness actually observe the perpetrator?;, what direction where the witness and the perpetrator were facing?; was there a particular reason to look at and remember the perpetrator?; Did the perpetrator have any distinctive features that a witness would likely notice and remember?; did the witness have an opportunity to give a description of the perpetrator?; if he/she did give a description to what extent to did the description match the perpetrator?; what was the mental ,physical and emotional state of the witness before, during and after the encounter/ observation?; to what extent did the condition if any affect the witness's ability to observe and accurately remember the perpetrator?.

34. Appellant submitted that the testimony of PW1 contradicted that of PW2 on the issue of the identification parade. PW1 stated that the parade consisted of persons of the same height, build and complexion whereas PW2 was categorical that the parade included persons of different height and complexion. PW4 testified that the same set of people were used for all the witnesses and the only thing the Appellant did was to change the position. That this raised questions whether the identification parade was safe, and hence whether it was reliable.

35. It was submitted that there was no direct or circumstantial evidence to incriminate the appellant. No evidence was placed before the trial court on the nature of the lights at the shop considering PW1 only stated that there were lights at the shop. That the circumstances at the time of the attack were difficult, the witnesses had never seen the assailants, the incidence took a very short time, PW1 was in shock.

36. That since the accused person had a swollen neck then it could have been easier to identify him.

37. That the trial court shifted the burden of proof to the accused person to prove that he was not the one at the scene and that he did not commit the offence that he had been charged with. Counsel relied on the case of **PETER WAFULA JUMA & 2OTHERS VS. REPUBLIC (2014) eKLR** the court stated that *"the legal burden of proof in criminal cases is only one and rests upon the shoulders of the prosecution ,it remains constant throughout the trial and does not shift"*

38. It was therefore their submissions that the prosecution did not discharge the burden of proof that the learned trial Magistrate erred in putting the accused on his defence, and also shifting the burden of proof onto the appellant. That the learned trial magistrate relied on the inconsistent identification evidence of the witness. That the court in ***PETER WAFULA JUMA*** further explained that *'except ,it must be understood that judgement or conviction will not be entered because the defendant or the accused person did not call for evidence in rebuttal; but because the plaintiff or the prosecution ,as the case may be, has proved its case to the required standard.*

39. The appellant prayed that the appeal be allowed and the judgement by the learned trial magistrate be set aside.

SUBMISSIONS BY THE PROSECUTION.

40. The prosecution opposed the appeal. Ms. Murunga submitted that though the offence took place at 8.00pm PW1 stated clearly the lights in the shop were on. That the robbers were not wearing masks and since the lights were on at the time of the offence it was easy for the PW1 to see them. It was the prosecution's position that the identification parade was properly conducted by the Parade Identification officer, that the PW1 and PW2 positively identified the appellant at the Identification parade and the trial court did not err.

41. On the argument that the witnesses had not given any description of the perpetrators to the police before the arrest, it was submitted that it was not mandatory and was not fatal to the case for the prosecution. Reliance was made of the case of **MAURICE AMULIESE MUTAMBI V REPUBLIC [2019] eKLR**

42. Regarding the appellant's defence, the prosecution submitted that the same was simply a denial.

43. The prosecution urged this court to uphold the decision of the lower court.

ANALYSIS AND DETERMINATION.

44. The role of this court as a first court of appeal is to review and reconsider the evidence and draw its own conclusions. The Court of Appeal in **NJOROGE VS REPUBLIC (1987) KLR 19 AT P.22** put it this way:

> ***"as this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled as well as on questions of facts as on questions of law, to demand a decision of the first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect"***

45. The issues for determination **are whether the appellant was properly identified as the person who committed this offence, and whether the court shifted the onus of proof to the accused person**.

46. The issue of identification is the main issue in this Appeal. It is clear from the evidence that the appellant was not arrested in connection with this case. He was arrested because the Flying Squad considered him a suspect in an alleged series of robberies. The arresting officers said that the person they were looking for was not known to them The INVESTIGATING OFFICER also added that when he visited the scene some members of the public ***whispered*** that the person who committed the offence was known as Mcoast.

47. The initial question is how did the Investigating Officer connect the arrested person to Mcoast? He said he stated that he inquired as to who this Mcoast was. Who did he talk to? What did they tell him? He did not tell the court the outcome of that inquiry, but simply sought assistant from the DCI, whose officers were looking for a person who had an AK 47. It is noteworthy that it is the other robber who had the firearm, who was said to have the appearance of a Somali descent without the Somali accent, how would the Investigation officer tell that it was not the other perpetrator was being referred to as Mcoast? There is no evidence at all that the Investigating Officer conducted any investigation on the alleged whisper that led to the arrest of the appellant. No evidence was brought by the Investigating Officer to say who exactly this person referred to as Mcoast was. Was he identified as this appellant? The Investigating Officer did not produce evidence of his investigations as there was any connection between this name and the appellant before this court.

48. In addition the Flying Squad officers did not produce any evidence to support their reason for arresting the appellant. No evidence of any reports regarding the alleged spate of robberies was produced from any police station that the appellant was a suspect in any reported matter, no single OB report, nothing. Hence even the basis for the arrest of the appellant falls off from the bottom of the case for the prosecution.

49. PW1 was the sole identifying witness. This is because despite PW2's testimony that she identified the appellant at the Identification parade, it is clear from the record that that evidence is not credible. She testified in examination in chief that she did not see the robber's face clearly. So how would she, about two months after the incident be able to identify him in an Identification parade? That testimony is not credible. It only goes to negate the validity of the Identification parade evidence. Both PW1 and PW2 identified the person who had a swollen neck and reddish eyes as the person who had committed the robbery. The witness who did not identify the appellant was not called. Why was she called to the Identification parade if the prosecution did not think she had some idea as to how the perpetrator looked like? Failure to call her after taking her through the Identification parade raises more questions regarding the validity of the Identification parade.

50. PW1 and PW2 could not agree as to the number and appearance of the members of the parade. One said they were between 6 and 9 persons of similar height, complexion, the other 8 and 10 persons of varying heights and complexions. These inconsistencies are not idle. This can be seen from the court of appeal's edict in **WAMUNGA VS. REPUBLIC [1989] eKLR** that " *It is trite law that where the only evidence against the 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 fair from possibility of error before it can safely make it the basis of a conviction"*

51. Further the same court in **KARANJA & ANOTHER VS. REPUBLIC (2004) 2KLR 140** pointed out the need for caution in such instances and the need for a trial court to warn itself of the danger attendant on visual identification, in a proper case *"evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger…whenever a case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification"*

52. The learned trial magistrate did not put the evidence of identification on the weighing crucible of scrutiny set out in precedent.

53. It is the evidence of the prosecution that complainant's shop had grills at the front. The conversation between the PW1 and the perpetrators is said to have taken with the complainant on one side of the grills and the perpetrators on the other side. There was no effort on

the part of the prosecution to establish what kind of grills these were and whether they were obstructive, what effect the grills had on the lighting, and whether there was light both outside and inside the shop.

54. It is disheartening that these standards of proof have been in existence for years and courts have pronounced themselves about them ad nauseam yet investigating officers continue to act as though they do not exist, and the prosecution to allow such charges to be registered when the evidence on record does not meet muster. It is time that the ODPP took it upon itself to raise the standards of investigations by deferring charges where witness statements do not meet the requisite standards. Police Officers who engage in investigations ought to be well versed in these standards. This is because the identity of a perpetrator is central to any crime. Mere suspicion can never amount to proof.

55. It goes without saying that the prosecution have the onus to establish a water tight case of identification especially the case for the prosecution solely depends on it. This is what the Court of Appeal said in **KIARIE VS REPUBLIC (1984) KLR 739** at page 740 " ***where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction***"

56. The identification parade clearly flouted the procedures set out in the Police Force Standing Orders under the National Service Act in particular that '*All the 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';* in this case other than fulfilling the requirement for race and sex, the rest of the requirements were disparate.

57. In **NJIHIA V REPUBLIC [1986] eKLR** The court discussed identification parades; the court stated;

Police Force Orders require a ratio of one to eight as the minimum; and indeed in many parades the ratio is between one to ten, and one to twelve. 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.

58. I need not say more on that except that the parade in this case was improperly conducted parade. The parade did not comply with the rules, the appellant stood out, the evidence of PW1 and PW2 did on the whole process was contradictory.

59. As to whether the appellant witnesses ought to have given a description to the police before the police could arrest the appellant, as was held in **AJODE V REPUBLIC [2004] eKLR** the court of appeal held *It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. It is also trite law that before such a 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 (see case of Gabriel Kamau Njoroge v Republic (1982-88) 1 KAR 1134)*

60. The prosecution citing **MAURICE AMULIESE MUTAMBI V REPUBLIC [2019] eKLR** argued that that was not mandatory that there ought to be a description of the perpetrators before an Identification parade could be conducted. In that case the court of appeal cited with approval its own decision in **NATHAN KAMAU MUGURE V REPUBLIC CRA.63/08** where it stated:

> ***"As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.***
>
> ***In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."***

61. I understand the court to say that it is not a mandatory for a witness to give a description. The ideal situation is where the witness gives a description before an Identification parade. However it is possible for a witness not to give a description and to still identify the perpetrator. It is also possible for the police to find the perpetrator using their own means. While these two scenarios are tenable the onus will still remain on the prosecution to ensure that the evidence meets the evidentiary threshold of a water tight case. In other cases the evidence must be analysed and weighed against the standard of proof beyond a reasonable doubt.

62. In the instant case it is evident the witnesses did not give a description. The police tried their other means but clearly both did not tie up to prove that it was the appellant who was at the scene that fateful night.

63. It is not in dispute that the complainant was robbed and that a person lost his life in the process of the robbery. However, the prosecution

failed to establish to the required standard that it was the appellant who did it.

Whether the trial court shifted the onus of proof to the accused person.

64. While considering his defence the learned trial magistrate noted that the appellant did not name PW1 and PW2 as the persons who were jealous of the house his father was constructing for him. He proceeded to hold that because of that, the appellant had not challenged the case against him and hence it had been proved beyond a reasonable doubt. The burden of proof is upon the prosecution to prove their case beyond a reasonable doubt. That burden never shifts.

65. Having considered the evidence, the submissions by the defence and the prosecution, it is my considered view that the evidence of identification was not sufficient to support the conviction.

66. The conviction is quashed, the sentence is set aside and the appellant is to be set at liberty unless otherwise legally held.

Dated and delivered via zoom this 23rd April 2021

Mumbua T Matheka

Judge

In the presence of

Edna CA

Ms. Murunga for state

Mr. Mong'eri for appellant

Appellant present

Mumbua T Matheka

Judge