



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 4 OF 2020

BENSON KIOKO MASAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence (Hon. M. Kasera, SPM),

delivered on 29th November, 2019 in Criminal Case No. 533 of 2015,

at the Chief Magistrate's Court, Kajiado)

JUDGMENT

1. The Appellant was charged with five counts of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. Particulars on count I were that on the 16th day of March, 2015 at Kitengela Sub-County Hospital in Kitengela Township in Isinya Sub-county of Kajiado County, with others not before court while armed with dangerous weapons, namely; pistol and crude weapons, robbed Jesca Lawoi Kshs. 93,000 and mobile phone make Nokia, valued at Kshs. 6,000, and at the time of such robbery used actual violence to Jesca Lawoi

2. Particulars in count II were that on the 16th day of March, 2015 at Kitengela Sub-County Hospital in Kitengela township in Isinya Sub-County of Kajiado County, jointly with others not before court while armed with a dangerous weapon, namely; pistol and crude weapons robbed Faith Limo her mobile make Tecno valued at Kshs. 12,000 and cash Kshs. 640.

3. Particulars with regard to count III were that on the same day, 16th day of March, 2015 at Kitengela Sub-County Hospital in Kitengela Township in Isinya Sub-County of Kajiado County, jointly with others not before court, while armed with dangerous weapon, namely pistol and crude weapons, robbed Ruth Lengale her mobile phone make Alcatel valued at Kshs. 8,000.

4. On count IV, particulars were that on the same day, 16th day of March, 2015, at Kitengela Sub-County Hospital in Kitengela Township in Isinya Sub-County of Kajiado County, jointly with others not before court, while armed with a dangerous weapon namely pistol and crude weapons, robbed Jeremiah Ngumi his mobile phone make Nokia valued at Kshs. 2000/= and cash Kshs. 550/=

5. Particulars for count V were that on the 16th day of March, 2015 at Kitengela Sub-County Hospital in Kitengela Township in Isinya Sub-County of Kajiado county jointly with others not before court while armed with a dangerous weapon, namely; pistol and crude weapons, robbed Bernard Ndilo his phone make Alter valued at Kshs. 2000 and cash Kshs. 800.

6. The appellant pleaded not guilty to all the counts and after trial in which the prosecution called 8 witnesses and the appellant's defence, he was convicted on all counts. He was sentenced to 20 years imprisonment in count I. Sentences in counts II- to V were held in abeyance.

7. Being aggrieved with both conviction and sentence, the appellant filed this appeal through his advocates raising the following grounds, namely:

1. That the learned trial magistrate erred in law and in fact by admitting evidence of an identification parade that was not conducted in accordance with the provisions of the Police Force Standing Orders.

2. That the learned trial magistrate erred in law and in fact by admitting the evidence of PW5 on the identification of the appellant by PW1 in an identification parade despite the claim by PW1 to have known the appellant very well prior to the robbery.

3. That the learned trial magistrate misdirected herself in holding that the appellant was adequately identified despite lack of any evidence to corroborate that of PW1.

4. That the learned trial magistrate misdirected herself in holding that the Appellant was adequately identified despite [the fact] that the testimonies of PW2 and PW4 contradicted that of PW1, where PW2 and PW4 confirmed that all the robbers were masked and they could not identify any of them whereas PW1 claimed that the appellant was not masked.

5. That the learned trial magistrate erred in law and in fact by finding that the appellant was adequately identified by PW1 despite the existence of doubts as to whether the appellant was actually known to PW1 and the existence of doubts as to whether it was actually the appellant who was at the scene of the crime.

6. That the learned magistrate erred in law and in fact for failing to read glaring witch-hunt in the evidence and the testimony of PW1.

7. That the learned trial magistrate erred in points of law and fact by failing to evaluate the evidence as a whole and observe that the prosecution never proved the case beyond reasonable doubt.

8. That the learned trial magistrate erred in law and in fact by ignoring the appellant's plausible defense of alibi.

8. When this appeal came up for hearing, parties relied on their written submissions in disposing of the appeal.

appellant's submissions

9. The appellant's submissions were dated 2nd November 2020. Counsel faulted the conduct of the identification parade. It was argued first, that the conduct of the parade flouted the provisions of the Police Force standing Orders. According to counsel, the Parade form produced by PW5, PW1 identified the appellant through missing teeth in his mouth. PW1 asked the appellant to open his mouth claiming that the attacker had a gap in his front teeth but did not ask all the other eight participants to open their mouths. Counsel relied on the decision in David Mwita Wanja and 2 Others v Republic (Cr. App. No. 117 of 2005) and Republic v Mwangi S/O Manaa (1936) 3 EA CA 29.

10. Counsel further argued that during cross examination, PW1 testified that she was able to identify the appellant through his voice and walking style, however he was never asked to walk or talk during the Identification parade.

11. Secondly, counsel submitted that PW1 did not give a description of the suspect when she made her first report to the police which was necessary in this case, thus making it impossible for the court to arrive at a determination that PW1 made a positive identification of the attacker. According to counsel, PW1 kept on changing her testimony on the description of the person, she claimed to have positively identified during robbery. One account was that she saw a fat person. During trial, PW1 said she was able to identify the appellant through voice and walking style, while during the Identification parade, she claimed she identified him by the colour of his face, height, and a missing front teeth. Counsel relied on Ntelejo Lokwam v Republic [2006] eKLR.

12. Thirdly, counsel argued that since PW1 stated that the appellant was well known to her, it was not necessary to conduct an identification parade. In counsel's view, the trial court erred in relying in the evidence of the identification parade that was defective. Reliance was placed on R v Mwangi S/O Manaa (1936) 3 EACA 29 cited in George Maina Otiso & Another v Republic [2009] eKLR on the guidelines for conducting an identification parade including that a witness may ask accused(suspect) to walk, speak, see him with a hat or not, if so, then all parade members must do likewise.

13. Regarding evidence of his identification and/or recognition, counsel he relied on the decision in Wamunga v Republic (1989) KLR 424 at 426 to argue that visual identification should be carefully tested. Hethe principles on identification established in Republic v Tumbull (1971) QB 227.

14. Counsel submitted that the only evidence against the appellant was that of the identification and or recognition by PW1. That evidence contradicted that of PW3, PW4 and PW7 who stated that the all robbers, including the one with the pistol, had covered their faces and could not be identified. PW1 claimed that most of her colleagues were customers of the appellant and that the appellant was wearing a Marvin but his face was not covered, the others were not able to identify the appellant. PW7 stated it was dark and no one could clearly see and, therefore, it was not clear how PW1 was able to see each of the robbers very well considering the prevailing circumstance.

15. Counsel again argued that the manner in which the appellant was arrested by the police, the conduct of the identification parade as well as the contradictions in the testimony by PW1 showed that there was a witch-hunt. According to counsel, PW6 stated that he had arrested someone else who PW1 said was not the person she saw. There was no indication that an identification parade was conducted for PW1 to identify that suspect. This showed that the appellant's arrest was similar to the other suspect and a possibility that he was arrested, shown to PW1 before the identification parade was conducted. In counsel's view, the identification parade was conducted solely to assist in substantiating PW1's testimony against the appellant.

16. Counsel again argued that PW1 was determined to make sure the appellant was convicted by saying anything. He submitted that PW1 claimed that the appellant's face was not covered during the robbery which made it possible for her to identify him, by color and appearance of his face. The evidence of PW3, PW4 and PW7, however, contradicted that of PW1. This showed that PW1 had her own reasons for insisting that she could see the appellant's face when the other victims said it was impossible to see the faces of the robbers.

17. On whether the prosecution proved its case beyond reasonable doubt, counsel submitted in the negative. He relied on Republic V Ismail Hussein Ibrahim [2018] eKLR for the argument that in criminal cases the burden of proof is on the prosecution to prove the case beyond

reasonable doubt. He argued that the prosecution did not prove the case beyond reasonable doubt. According to the appellant, there were multiple questions raised in the testimony of PW1 which the trial court ignored. The trial court did not consider evidence by PW3, PW4 and PW7 which put doubts on the evidence by PW1 which formed the basis for the appellant's conviction. He urged this court to find and hold that the testimony of PW1 was not sufficient to establish the appellant's guilt beyond reasonable doubt.

18. Counsel submitted that the trial court relied on the evidence of identification from one witness only to convict the appellant despite it not being watertight. He also maintained that the conduct of the identification parade was irregular and flouted the Police Standing Orders. He therefore argued that the trial court erred by finding that the prosecution proved its case beyond reasonable doubt.

Respondent's submissions

19. The learned prosecution counsel relied on their written submissions dated 25th January 2021. It was argued that it proved the case against the appellant beyond reasonable doubt. Regarding identity of the offender and whether they were armed with dangerous weapon, the prosecution counsel argued that PW1 saw the appellant with a metal bar and something that looked like a pistol which he pointed at her. PW2 saw one of the assailants with a pistol and an iron bar. PW3 saw 6 armed men and was able to recognize a pistol while the rest had assortment of weapons which included pangas, rungas and metal bars. PW4 saw 7 people with rungas while one had a pistol.

20. It was further argued that PW3 was injured by the attackers which was proof of use of weapons to threaten PW1 and PW3 and use of violence on PW3. It was also argued that properties of PW1, PW2, PW3 and PW4 were forcefully taken from them which proved robbery.

21. Regarding identity of the attacker, PW1 identified the appellant in the identification parade; robbery had taken around 30 minutes and PW1 was able to interact with the appellant, minimizing the chances of mistaken identity. Reliance was placed on Maitanyi v R [1986] eKLR. Counsel urged that the appeal to be dismissed, conviction upheld and sentence affirmed.

22. I have considered this appeal, submissions and the authorities relied on. I have also perused the trial court's record and considered the impugned judgment. This being a first appeal, it is by way of a retrial and parties are entitled to this court's reevaluation and reconsideration of the evidence afresh and make its own conclusion on it. The court should however bear in mind that the trial court had the advantage of seeing the witnesses as they testified and give due allowance for that. (See Okeno v Republic [1972] EA 32)

23. In Kiilu v Republic, [2005]1 KLR 174, the Court of Appeal held that:

An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

18. In David Njuguna Wairimu v Republic [2010] eKLR, the Court of Appeal stated:

The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.

19. And in Ganpat v State Of Haryana & Others (2010) 12 SCC 59, The Supreme Court of India underscored this duty, stating:

The first appellate court and the High court while dealing with an appeal is entitled and obliged as well to scan through and if need be re-appreciate the entire evidence and arrive at a conclusion one way or the other.

20. **PW1 Jesca Lenawi Philip** a cashier at Kitengela Sub County Hospital, testified that on 15th March, 2015 she was on duty up to 1.00 a.m. The guard told her that there was a patient who had come on a motor bike. She told him to pay Kshs. 50 for an admission card which he did. The patient then went to see the clinical officer. The clinical officer told him to return the following day since he had no injuries. After one hour she heard a woman who was in labor screaming. After a few minutes, she heard a knock at the door and when she opened, she met the appellant whom she knew as a motor bike rider because she used to be his customer. She smiled at him but he grabbed her at the trouser saying it was her he was waiting for. He took her to the cash office where she found another person trying to break into the cash office. She told them not to break in because she had the keys. The appellant led her to collect the keys where she had kept them. She came and opened the cash office. One person in a red T-shirt broke the safe. Another person joined the men to make the number four. The other two who were breaking the safe stopped and started fighting over the money in the safe as the appellant kept watch over her. The appellant had a metal bar and something that resembled a pistol which he had pointed at her neck. She was taken to another room where she found other members of. When the robbers left, she got out of the room and called the police. The police came and she told them that it was the appellant and three other people who had robbed them. She also informed the police that she had known the appellant for one year and that he knew her house and her sister. She also gave them the appellant's name, as Kioko.

21. She stated that the robbers were talking in kamba. The witness told the court that appellant wore a Marvin but his face was not covered. She was familiar with his voice and walking style. The robbery took about 30 minutes and she had enough time to see everyone very well. She denied framing up the appellant.

22. **PW2 Jeremia Ngumbi**, a security guard at the hospital, testified that on 16th March, 2015, at around 2.00 p.m., they had finished cleaning the compound and went to change. Bernard Mwilu went to close the gate. He heard footsteps while at the changing room and when he went to check, he was abruptly sandwiched between three men who told him they were police officers and ordered him not to look at them. He was taken to a room where his hands were tied and his phone and Kshs. 500/= taken. Bernard Mbilu went where he was and was also tied. One of the robbers kept watch over them. They heard a bang in the clinical officer's office. Agnes, the clinical officer and Jesca were also brought to the room and the person guarding them closed the door and went away. One of the robbers had a pistol while the others had iron bars.

23. **PW3 Ruth Langete** a clinical officer at Kitengela Sub County, testified that on 16th March, 2015, she saw her last patient at 1.30 a.m. and went to the rest room. She heard a commotion at the parking lot but did not see anyone. She heard a knock at the door and on opening, she was pushed to the floor by 6 armed men. One of them had a pistol. The others had panga, metal bars and rungun. They all had their faces covered. She was hit on the hand, wrist and knee. One of the robbers took her Alcatel phone and car keys. Two men led her to her car and took her laptop bag. She was taken to a room where Jeremiah and Ben were. Faith, a nurse was also lying down and was ordered to lie down. She was given back her sim card, car keys and laptop bag. Only her phone was taken. She did not recognize any of the robbers. She was treated but was not issued with a P3 form.

24. **PW4 Bernard Mathi Ndilu** also a security guard at the hospital, testified that he was on duty on 16th March, 2015 at around 2.00 a.m., when he saw 7 men armed with rungun and one had a pistol. He was held together with Jeremiah and they were tied in the consultation room. His phone was taken away. Faith a clinical officer was brought into the room. Later Jesca Laloi went and untied them. They called the police. The robbers had covered their faces so he could not identify them.

25 **PW5 No. 234715 IP Antony Ikunda**, then in charge of crime at Kitengela police station, testified that he conducted an identification parade for the appellant. He informed the appellant who said he was ready. The appellant agreed to have his brother present during the parade. There were 8 member of the parade of same complexion and height. The appellant had no objection to the arrangement of the parade. At the time PW1 was in isolation room and did not see the appellant before the parade. At the parade, PW1 asked appellant to open his mouth and said the suspect had a gap in his front teeth. The witness identified the appellant through height and his colour by touching him. The appellant said he was not happy because he was the only one with a gap in his front teeth.

26. **PW6 No. 55495 P.C Charles Mwai** of Kitengela Police Station, testified that on 16th March, 2015 at 2.00 a.m., he and CPL Wahome were on night patrol. The Medical Officer of Health, Kitengela went to the station with members of staff to report a robbery that had taken place at the hospital. They reported that the robbers had metal bars and a pistol. They had robbed members of staff cash and phones. They visited the scene where PW1 told them that she could identify one of the robbers who was a boda boda operator and used to carry her. CID officers took over investigations of the case and on 16th April, 2015, they were informed that the suspect had been seen at the hospital. They went and arrested the appellant at Tosha area and took him to the police station and handed the matter to the investigating officer.

27. **PW7 Faith Jemutai Limo**, a nurse at the hospital, testified that on 16th March, 2015 at 1.45 a.m., she was with PW3. Someone knocked the door and when PW3 opened the door, she raised an alarm and many people entered the room. They placed a metal on her head and pushed them to another room. She laid down and only woke up after the men had gone. The watchmen were also herded into the room. She did not identify any of the robbers since there were no lights in the room. She was with PW1, PW2, PW3, PW4 and Jeremiah. She lost her phone and Kshs. 600.

28. **PW8 232033 C.I Said Otieno Onyanyo**, Deputy D.C.I.O Kajiado Central, testified on behalf of CI Osman, O C Kitengela DCIO Office, that on 16th March, 2015 at 2.00am, a report of robbery with violence was made at Kitengela police station by the MOH in the company of his members of staff. Mobile phones and cash were stolen. Officers from the station visited the scene and confirmed the robbery. Witness statements were recorded and PW1 stated that she had recognized one of the robbers. On 16th April, 2015, the appellant was arrested around Tosha area. An identification parade was conducted by PW5 and the appellant was identified by the PW1. He was charged with five counts of robbery with violence.

29. The appellant gave a sworn testimony but did not call a witness. He testified that he is a boda boda rider and that they also operate a church in Kitengela. On 16th March, 2015 he was in his house with his family and mother in law. He was surprised when he was arrested at Tosha stage. He denied committing the offence.

30. The trial court considered the evidence and was satisfied that the prosecution had proved its case beyond reasonable doubt, convicted and sentenced the appellant prompting this appeal. The trial court stated:

I have considered the evidence on record by the prosecution witnesses and the defence. PW1 who is the cashier lost Kshs. 93,000 to the robbers. It is in her statement that the accused went to her and told her he was looking for her. She had known the accused as a motorcycle rider in Kitengela. She had used his services and her own sister is also known to the accused. The accused had once taken her to the bank to withdraw money. He knew her house. She gave the accused's description in her statement to the police and identified him at the identification parade. She lamented that accused presents himself as a pastor. The same came out in accused's defence....PW1 said the lights were on at the hospital. It was about 2am. She was able to recognize the accused person whom she smiled at the first time he approached her. She had known him for some time. They were together with accused who also knew her because he said 'I was looking for you.'

31. The court then referred to the decision in *Maitianyi v Republic* [1986] eKLR that a fact may be proved by a single witness though the rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification.

32. This appeal raises two main points for determination. First, whether the prosecution proved its case beyond reasonable doubt and, second; whether the appellant was properly identified in the identification parade.

33. The appellant was charged with robbery with violence under section 296(2) of the Penal Code. The prosecution was required to prove that there was robbery with violence. Section 296(2) states that if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, the offence is complete.

34. There is no doubt from the evidence by the prosecution that there were several attackers; they were armed with dangerous weapons when the offence was committed and threatened to use violence on some of the victims while actual violence was used on PW3. The attackers having been more than one, armed and used or threatened to use personal violence on the victims, the requirements under section 296(2) were met. The prosecution proves the offence even where only one of the ingredients of the offence is met. (See *David Njuguna Wairimu v Republic* [2010] eKLR)

35. The other issue is whether the appellant was properly identified as one of the attackers. The appellant argued that the prosecution did not prove that he was one of the attackers. According to him, there was no evidence that he participated in the robbery incident and that the identification parade was not properly conducted. The appellant maintained argued that witnesses stated that the attackers had covered their faces and therefore they could not identify them. This, he argued, would also not allow PW1 to identify him.

36. I have considered submissions from both sides on this issue. The robbery was committed between 1.30 and 2am. The evidence of PW1 which was material to the prosecution case was at about 1.00 a.m. a patient came on a motor bike. She told the patient to pay Kshs. 50 for the treatment card which he did. When the patient went to see the clinical officer, the clinical officer did not find anything wrong with him and asked the man to return the following day. After some time, PW1 heard a knock at the door and when went to check, she met the appellant, a person she knew as a boda boda operator and whose services she had often used. She smiled at him but he grabbed her saying he was waiting for her. He led her to the cash office where she found another person trying to break into the cash office. She pleaded with them not to break in. She went for the key under the appellant's escort, opened the cash office for them and they stole some money. The appellant was armed with a metal bar and something that looked like a pistol which he pointed at her. She was later taken to a room where other members of staff had been herded. She later described the appellant to the police and gave his name as "Kioko" a person she had known for one year and he also knew her house and her sister.

37. The other witnesses testified that had been robbed testified that they were robbed by several people who had covered their faces and they could not recognize them. They lost money and cell phones.

38. PW6 testified that on that morning he and CPL Wahome were on night duty when the robbery report was made. They visited the scene and PW1 informed them that she identified one of the robbers who was a boda boda operator and used to carry her regularly. On 16th April, 2015, they were informed that the suspect had been seen at the hospital. They went and arrested the appellant at Tosha area, took him to the police station and handed over the matter to the investigating officer.

39. PW5 conducted the identification parade after he explained to the appellant his rights and the purpose of the parade. The appellant said he was ready and he had his brother present during the parade. 8 members of the same complexion and height to the appellant participated in the parade. According to PW5, PW1 was in an isolation room at the time and she did not see the appellant before the parade. In the parade, PW1 asked appellant to open his mouth because the suspect had a gap in his front teeth. The witness identified the appellant by touching him. The appellant raised an objection that he was not happy because he was the only one with a gap in his front teeth which objection PW5 recorded in the identification parade form.

40. It is clear from the evidence that all other witnesses who were victims of the robbery except PW1, could not identify the attackers. This was, therefore, a case of evidence of a single identifying witness.

41. The law is settled that where the only evidence against an accused is that of identification/recognition the court must scrutinize that evidence with great care and be satisfied that there was no possibility of error. In *Wamunga v Republic* [1989] KLR 426, the Court of Appeal stated:

It is trite law 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 favourable and free from possibility of error before it can safely make it the basis of conviction.

42. Similarly, the same court held in *Nzaro v Republic* [1991] KAR 212 that evidence of identification or recognition at night must be absolutely watertight to justify a conviction. (See also *Kiarie v Republic* [1984] KLR 739)

43. The above principles were established in *R v Turnbull & Others* (1976) 3 ALL ER 549, where the court laid down the factors that ought to be considered when the only evidence turns on identification by a single witness, thus:

... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? 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 them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

44. There can be a safe recognition even at night and the Court of Appeal stated as much in *Douglas Muthanwa Ntoribi v Republic* [2014] eKLR while upholding evidence of recognition at night that:

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error.

45. In Peter Okee Omukaga & Another v Republic [2011] eKLR the Court of Appeal stated on the evidence of recognition at night:

We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours’ from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.

46. PW1 gave concise account of the events of the robbery. She also talked to the appellant who was known to her and told her that he was waiting for her. This was a person she had known for over a year and had used his motor cycle on several occasions. He also knew her home and her sister. PW1 even told the police that she knew the appellant by the name “Kioko”. According to the police, the appellant was arrested at Tosha area after it had been reported that he had been seen at the hospital. The appellant was arrested because of the description given to the police by PW1. During the robbery, there were lights; the appellant talked to PW1 and escorted her to collect keys and back and, therefore, she was able to recognise him appellant. Although it was at night, I am satisfied that PW1 was able to recognize the appellant and there was no likelihood of error. I am unable to fault the trial court on this finding of fact.

47. The appellant again complained that the identification parade was not properly conducted. According to him, whereas PW1 asked him to open his mouth, she did not do so to any other member of the parade and he was the only one with a gap in his mouth. The prosecution counsel argued that PW1 identified the appellant at the scene; that she mentioned him to the police in the first instance and gave his name. Learned prosecution counsel maintained that the appellant was known to PW1 and she was his customer. In counsel’s view, the identification parade was properly conducted.

48. I have perused the identification report form produced as exhibit 1. PW5 explained to the appellant his rights and he was satisfied with the arrangements before he agreed to take part in the parade. He even had his brother present and he chose where to stand. PW5 testified that PW1 did not see the appellant before the parade. When PW1 was called to the parade, she identified him. She even asked him to open his mouth thus confirming that she even knew that he had a gap in his mouth. The appellant faulted the conduct of the parade because he was the only one who was asked to open his mouth.

49. Regarding identification parades, the Court of Appeal stated in John Mwangi Kamau [2014] eKLR that *Identification parades are meant to test the correctness of a witness’s identification of a suspect. And in Nathan Kamau Mugwe v Republic [2009] eKLR the Court of Appeal stated:*

As to the compliant 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...

50. I do not think the appellant’s complaint could discredit the conduct of the parade to the extent of rejecting the results of the parade. Although it would have been appropriate to have some members of the parade with missing teeth, there was no indication that PW1 had informed the police that the suspect(appellant) had a gap in his mouth to enable the police in the preparation of the parade.

51. Furthermore, the appellant was not identified by missing teeth only but it was in addition to other factors. As already stated, the appellant had been known to PW1 for over a year. She was the appellant’s customer and he even knew her home. As the trial court correctly observed, and this court does too, the appellant would even take PW1 to the bank. The appellant was well known to PW1 and was identified not only because of the missing teeth, but also because PW1 knew him and that was why she smiled at him when she first found him at the door.

52. The appellant argued that it would not have been necessary to conduct an identification parade if he was known to PW1. I do not think this would in any way diminish the evidence of the identification parade. I am, therefore, unable to agree with the appellant that the identification parade was not properly conducted. I do not find any prejudice he may have suffered.

53. Furthermore, even in his sworn defence, the appellant admitted that he was a boda boda operator which was consistent with what PW1 had told the police. Although the appellant stated that on 16th March, 2015 he was at home with his family and mother in law, this was only mentioned during his defence. He did not raise that issue in good time if he intended it to be an alibi. Although it is not an accused’s duty to prove his alibi I do not think this would disprove PW1’s evidence. The appellant’s defence was not plausible.

54. Flowing from what I have stated above, I find no merit in this appeal and I hereby dismiss it.

55. Regarding sentence, the appellant was convicted on all the five counts and was sentenced to twenty (2) years imprisonment in all the five counts. However, sentences for counts 2,3,4 and 5 were held in abeyance since the robbery was in one / same incidence.

56. The trial court convicted sentenced the appellant for each of the counts he had been charged with under section 296(2) of the Penal Code. Had the trial court sentenced the appellant to death, it would have been perfectly in order to suspend the other sentences because a person can only suffer death once. However, having sentenced the appellant to a term of 20 years imprisonment for each of the counts, the proper order for the trial court to make would have been for the sentences to run concurrently.

57. Consequently, the order to hold sentences in counts 2, 3, 4 and 5 in abeyance is hereby set aside. The sentence of twenty (20) years imprisonment in each of the five counts shall run concurrently from the date of conviction, that is 29th November 2019.

DATED SIGNED AND DELIVERED AT KAJIADO THIS 25TH DAY OF JUNE, 2021

E C MWITA

JUDGE