**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 143 OF 2019**

**KEPHA BETIA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the conviction and sentence by Hon. Boke (SPM) on 17th May 2019 in Kibera Chief Magistrate's Criminal Case No. 1107 of 2017)**

**JUDGMENT**

1. The appellant, *Kepha Betia*, was charged, tried and convicted of the offence of robbery with violence contrary to *section 295* as read with *Section 296* of the *Penal Code*.

2. The particulars of the charge alleged that on 23rd April 2017 at around 20:00 hours at Kangemi within Nairobi County, jointly with others not before the court and while armed with a dangerous weapon namely a kitchen knife, the appellant robbed *Duke Kerosi* of cash KShs.4,000, a wallet, two ATM cards from Family Bank and Co-operative Bank and a mobile phone make Techno all valued at KShs.13,900 and immediately before or after the time of such robbery used actual violence on the said *Duke Kerosi*.

3. Upon conviction, the appellant was sentenced to thirty five years imprisonment. He was dissatisfied with his conviction and sentence. He initially filed an appeal to this court through what he described as a memorandum of appeal filed on 1st July 2019 but he subsequently filed amended grounds of appeal together with his written submissions on 7th June 2021.

4. In his amended grounds of appeal, the appellant mainly complained that the learned trial magistrate erred by: denying him the right to recall PW1 for further cross examination thus violating his constitutional rights to a fair trial; convicting him on the basis of identification by a single witness; not giving due consideration to his defence; imposing of a sentence that was harsh and excessive considering that he was underage when he was charged with the offence; sentencing him without taking into account the time he had spent in custody during the trial contrary to *Section 333 (2)* of the *Criminal Procedure Code*.

5. At the hearing, the appellant relied entirely on his written submissions. The respondent through learned prosecuting counsel *Ms Ndombi* chose to give oral submissions in opposition to the appeal.

6. In his submissions, the appellant contended that the trial court violated his right to a fair trial under *Article 50 (2) (k)* of the *Constitution* by casually dismissing his application to recall PW1 for further cross examination as an afterthought; that this denied him the right to cross examine PW1 and to challenge his evidence.

7. On identification, relying on the case of ***Wamunga V Republic, [1989] KLR 424*** and ***Maitanyi V Republic, [1986] eKLR***, the appellant submitted that the circumstances surrounding his arrest proved that the complainant may have made a mistake when identifying him as one of the culprits who had robbed him.

8. In addition, the appellant submitted that the learned trial magistrate failed to consider all the evidence in its entirety and dismissed his defence without justifiable reasons; that he was wrongly convicted as the evidence adduced by the prosecution was insufficient to prove the charge facing him beyond reasonable doubt.

9. On sentence, the appellant claimed that the learned trial magistrate erred by failing to consider the time he had spent in custody during the trial and in imposing a harsh and severe sentence without considering that he was underage when he was arrested. He urged the court to find merit in the appeal and allow it in its entirety.

10. In contesting the appeal, the learned prosecuting counsel supported the appellant's conviction and denied that the trial court's refusal to recall PW1 for further cross examination amounted to a violation of this constitutional rights to a fair trial. Counsel further submitted that the prosecution adduced consistent and credible evidence which proved all the ingredients of the offence preferred against the appellant beyond any reasonable doubt; that the appellant was positively identified and he was thus properly convicted. In a nutshell, the respondent submitted that the appeal lacked merit and should be dismissed.

11. This is a first appeal to the High Court. I am thus duty bound to revisit and re-evaluate all the evidence on record and draw my own independent conclusions bearing in mind that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. See ***Okeno V Republic, [1972] EA 32***; ***Soki V Republic, [2004] 2 KLR 21***.

12. I have carefully considered all the evidence on record alongside the grounds of appeal and the submissions made by each of the parties. I find that the key issue that emerges for my determination in this appeal is whether the prosecution proved its case in the trial court beyond any reasonable doubt and if so, whether the appellant was properly sentenced.

But before addressing the above main issues, there is a preliminary issue which arose from the parties' rival submissions which I need to address first. The issue arises from the appellant's claim that the trial court's decision to deny him a chance to recall the complainant for further cross examination amounted to a violation of his constitutional right to a fair trial which claim is contested by the respondent.

13. The right to a fair trial is guaranteed under *Article 25* and *Article 50 (2)* of the *Constitution*. *Article 50 (2) (a) to (q)* enumerates rights that are supposed to be accorded to an accused person during the trial which if complied with ensures a fair trial. One of those rights is the right to adduce and to challenge evidence.

14. The court record shows that after the complainant (PW1) testified, he was subjected to cross examination by the appellant after which hearing was adjourned. When hearing resumed, the appellant applied for recalling of PW1 for further cross examination on grounds that he was not satisfied with his earlier cross examination. The appellant did not contest the prosecution's claim that he had been supplied with witness statements three months before the date scheduled for hearing.

Given this uncontested fact and considering that the appellant had previously been given time and opportunity to cross examine the complainant, I am not satisfied that the dismissal of his application amounted to a violation of his constitutional right to a fair trial.

15. Turning to the issue whether the prosecution proved its case against the appellant beyond any reasonable doubt, I will start by identifying the essential ingredients of the offence of robbery with violence which the prosecution needed to prove beyond doubt in order to secure a safe conviction. The prosecution was required to prove that the appellant robbed the complainant while armed with a dangerous or offensive weapon; or that he was in the company of one or more persons or that immediately before or after the time of such robbery, personal violence was inflicted on the complainant.

16. As held in ***Johana Ndungu V Republic, [1995] KLR 387***, in order to sustain a conviction for the offence of robbery with violence, it was not necessary for the prosecution to prove all the elements of the offence at the same time. Proof of any one of them was sufficient.

17. In this case, the prosecution case was supported by the evidence of five prosecution witnesses. PW1, the complainant was the chief witness. He testified that on 23rd April 2017 at around 8pm, he boarded a *matatu* at Kangemi bus stage together with five young men. The young men demanded that he pays for their bus fare which he declined. They then stopped him from alighting at Mountain View bus stop and he was forced to alight at the *matatu's* final destination.

18. PW1 recalled that after alighting from the vehicle, the five men surrounded him and started demanding money. One of them, who he allegedly identified as the appellant slapped him once and as another person who he did not identify gave him a second slap, their other accomplices ransacked him and stole from him the items listed in the charge sheet. He then heard one robber say *"leta hiyo kisu"* (bring that knife). He got scared and ran away.

19. The complainant further testified that when running away, he came across a motorcycle rider who agreed to help him look for his assailants. As they rode along the highway, he saw a group of people on Thiongo road and one of them was wearing a shirt resembling one that had been worn by one of the robbers. They rode in their direction and he confirmed that the group comprised of the same people who had attacked and robbed him earlier. He noticed a police vehicle on patrol and he reported the matter to the police officers in that vehicle. On their advice, together with the motor bike rider, they arrested three of those men and took them to the police station. He testified that one of them was the appellant in this case.

20. According to his evidence, he was able to see and identify the appellant through lights in the *matatu* and thereafter when the offence was being committed after disembarking from the vehicle. He claimed to have seen him through street lights. After reporting to the police, he was advised to go to hospital for treatment which he did although in his evidence, he did not state that he had sustained any injuries.

21. On being examined by the court, PW1 claimed that though there were some people walking along the road, he was able to identify the group of young men who had robbed him because they were walking together.

22. The other prosecution witnesses were the doctor who examined PW1 who testified as PW2, PW3 the arresting officer and PW4 who claimed to have searched the appellant after his arrest and allegedly recovered a knife which he produced as *Pexhibit1*. The last witness was the investigating officer *Cpl David Oluoch Otach* who testified as PW5.

23. In his evidence, PW5 recalled that on 24th April 2017, upon reporting for duty, he found that the case reported by PW1 had been assigned to him for investigations. The appellant was already in police custody. In the course of his investigations, he interviewed the complainant who told him that he was able to identify and have the appellant arrested from a group of people who were leaving a football match; that he

had pursued the appellant right after he escaped from the scene of crime to the point at which he joined the group. After his investigations, he charged the appellant with the offence for which he was convicted.

24. When put on his defence, the appellant gave a sworn statement but did not call an additional witness. In his evidence, he swore that on 23rd April 2017, he left his place of work at around 8pm and went to watch a football match at a video shop. After the first half, he went out of the shop and sat outside. A police vehicle then passed by and two shots were fired in the air. Police officers alighted from the vehicle and ordered him and those outside the shop to lie down. He was arrested together with two other persons who were later released after allegedly bribing their way out. He denied having committed the offence as charged or that a knife was recovered from him soon after his arrest as claimed by PW1, PW3 and PW4.

25. After my independent analysis of the evidence as summarized above, I find that the prosecution case was solely premised on the appellant's alleged identification by PW1 as one of the culprits in the alleged robbery.

26. It is settled law that for a court to base a conviction on identification evidence from a single witness, the court must examine such evidence with utmost care and must be satisfied that the conditions in which the identification was done were conducive to a reliable and positive identification of the culprits.

27. In **Wamunga V Republic, [supra]** which was referenced by the appellant, the Court of Appeal held as follows:

> **"It is trite law that where the only evidence against a defendant is 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 the possibility of error before it can safely make it the basis of a conviction."**

28. In **Republic V Turnbull & Others, [1976] 3 All ER 549**, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. Further, in ***Kiarie V Republic, [1984] KLR 379***, the Court of Appeal pronounced itself as follows:

> **"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely on identification; that evidence should be watertight to justify a conviction."**

29. In this case, it is not disputed that the appellant was robbed after 8pm at night after he had alighted from the *matatu*. He claimed that he was able to identify the appellant as one of the robbers through streetlights and the fact that he had seen him earlier through lights in the *matatu*. The complainant did not however tell the court how far he had gone from the road or the *matatu* terminus when he was confronted by the robbers inorder for the court to make a fair assessment whether given the distance, the scene of crime was well illuminated by streetlights. He did not also describe the intensity of the streetlights, their brightness or otherwise.

30. In addition, PW1 claimed that his alleged identification led him to the arrest of the appellant and two others since after pursuing the robbers through the help of a motorcycle rider, he found them still together walking as a group.

31. His evidence regarding how the appellant was arrested was sharply and materially contradicted by the evidence of PW3. Whereas PW1 claimed that he is the one who arrested the appellant and two others while walking along Thiongo road, PW3 maintained that he is the one who arrested the appellant outside a video shop at Kangemi Gichagi area. He recalled that the appellant was among a group of people who were outside a video shop and started running away on seeing the police officers; that the appellant was arrested after he fell down in the course of running away.

32. This evidence by PW3 aligned very well with the appellant's testimony in his defence regarding how he was arrested. The question that then emerges from the contradictions in PW1 and PW3's evidence is whether the accused was arrested because he was identified as a robbery suspect or because he was found among other young men who were found crowding outside a video shop as claimed by PW3.

33. The other major discrepancy in the prosecution case related to the alleged recovery of a knife on the appellant after he was searched by PW4 at the police station later that night. PW1 recalled that he witnessed the search and that the appellant was found with a kitchen knife that had a blue handle. PW3 and PW4 who also witnessed the search claimed that the knife recovered from the appellant did not have any handle. This is the knife which was eventually produced in evidence by PW5.

34. The above contradictions are hard to reconcile given that they arose from alleged eye witness accounts of how and why the appellant was arrested and what was thereafter allegedly recovered from his person. They give rise to an inference that either one or all of the witnesses were not reliable or truthful. In my view, the unexplained contradictions seriously dented their credibility.

35. The learned trial magistrate in his judgment did not address his mind to these contradictions and placed high premium on the alleged recovery of the knife from the appellant without carefully evaluating the evidence regarding how the said recovery was made and whether it had any connection to the commission of the offence preferred against the appellant. This is so because even if the appellant was found in possession of a knife, this in itself did not amount to evidence that he had participated in the robbery. The complainant only claimed that he heard one of the robbers call for a knife but he did not actually see any of them in possession of a knife. The evidence of recovery of the knife would only have been material if the appellant was positively identified as one of the perpetrators of the offence charged.

36. The complainant confirmed in his evidence that he did not know the appellant before and therefore his purported identification was that of a mere stranger at night and not recognition which is always more reliable.

37. Given the contradictions in the prosecution case as enumerated above and the circumstances surrounding the complainant's identification of the appellant, I am satisfied that the appellant's identification was not free from any possibility of error.

38. I make this finding because the said identification was done at night in circumstances which were not demonstrated to have been conducive for a proper and positive identification of the complainant's assailants. PW1 did not point out any special physical features that made him pick out the appellant from the group of young men who were in his company when he was arrested. It is also curious that PW1 claimed that he did not identify any of the other four men who were the appellant's alleged accomplices yet in his evidence, he claimed to have seen all of them in the same circumstances. I am persuaded to find that PW1's evidence on the appellant's identification was not watertight to justify a safe conviction.

39. Taking all the evidence into account, I have come to the conclusion that the appellant was not correctly and positively identified as one of the robbers who stole from PW1 the items listed in the charge sheet. It may be important to point out at this juncture that even though the appellant was arrested shortly after the robbery, none of the properties stolen from PW1 were recovered in his possession.

40. Had the learned trial magistrate carefully interrogated the evidence regarding the alleged identification of the appellant and appreciated the material contradictions in the prosecution case, he may have reached a different conclusion.

41. It must be remembered that the onus is always on the prosecution to prove its case against an accused person beyond any reasonable doubt. The accused does not have any duty to prove his innocence. In this case, it is my finding that the appellant's defence which was supported by the evidence of PW3 created a doubt in the prosecution's case which should have been resolved in his favour.

42. For the foregoing reasons, I have come to the conclusion that the appellant's conviction was unsafe and cannot be sustained. It is thus my finding that this appeal is merited and it is hereby allowed. The appellant's conviction is consequently quashed and the sentence set aside. The appellant is to be released forthwith unless otherwise lawfully held.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2021**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Appellant present

Mr. Chebii for the respondent

Ms Karwitha: Court Assistant