REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 180 OF 2015

LESIIT, J.

DANIEL KIHUNGI NJERI Alias **DADY.....APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. C. Oluoch (Mrs.) SPM dated 15th September, 2015 in Milimani Chief Magistrate's Court, Criminal Case No. 539 of 2013)

JUDGMENT

1. The Appellant's **DANIEL KIHUNGU NERI ALIAS DADY**, was facing two counts of offences in the lower court. Count 1 was **Robbery with violence** contrary to **section 296(2)** of the **Penal Code**. Count 2 was **Attempted Robbery** with violence contrary to **section 297(2)** of the **Penal Code**.

2. In the 1st count the Appellant with others not in court were accused of robbing PW1 Monica Wanjiku Mbugua of a cell phone and tablet at gun point. While in the 2nd Count the Appellant with others not in court are said to have shot the deceased **DANIEL KYALO MWANZA** with a pistol causing his death as they attempted to rob him of his vehicle.

3. The Applicant was convicted in both counts and sentenced to death in both counts, with the sentence in count 2 being ordered to be held in abeyance.

4. The Appellant has filed this appeal challenging both the conviction and sentence. He raises seven grounds of appeal as follows:

> **1. That, the Learned Trial Magistrate erred in law and fact by failing to note that the Identification Parade was dubious because the complainant had already seen him beforehand and was therefore valueless.**
>
> **2. That, the Learned Trial Magistrate erred in law and fact in holding that he was in possession of a gun and ammunitions in the absence of evidence proving that he had knowledge of the existence of the said items.**
>
> **3. That, the testimonies tendered to establish his mode of arrest was riddled with doubts and was not enough to sustain a conviction.**
>
> **4. That, the learned trial Magistrate erred in law and fact by convicting him on contradicting, uncorroborated and unreliable evidence.**
>
> **5. That, the entire proceedings are incurably defective in that the court failed to comply with mandatory provisions of the Criminal procedure Code (Section 200 of the CPC).**
>
> **6. That, the Learned Trial Magistrate erred in law and fact in failing to find that the Prosecution did not prove to required standard that the conditions obtaining were conducive for positive identification.**

7. That, the Learned Trial Magistrate erred in law by rejecting his defense without assigning any good reasons for so doing.

5. The facts of the prosecution case were that on the material day, the complainant in count I had just stopped outside her gate at Golden Gate Estate, South B at 6 p.m. when she was confronted by three men one on the co-driver's side and others on the right side where she was. Her intention was to open the gate to her house. She had switched off the engine of her car when the men, who had guns which they used to bang the windows of her vehicle shouting orders to open the car windows and the doors.

6. The complainant stated that the man on her side managed to open her door and ordered her to jump to the back seat from between the front seats. She told him that she was not able to jump between the seats. She said that her safety belt was still fastened when the man tried to pull her out of the seat and when he could not get her out, he punched her on her mouth and nose. The complainant testified that the safety belt snapped and she took that opportunity to jump out of the vehicle. The one who struggled with her jumped into the driver's seat grapping her cell phone from her hand as he did so. He then tried unsuccessfully to start the vehicle. The complainant in the meantime ran towards the main gate of the Estate screaming. A neighbour whose house was next to the main gate, PW9, heard her screams and went out of his house and pulled her into his house telling her that it was not safe for her to stay outside at that time. The complainant did not stay in the house for long.

7. In the meantime, the 3 assailants gave up on her vehicle and abandoned it after taking with them the complainant's tablet device. They walked towards the main gate at around the time, the deceased drove in with one passenger, PW2. The deceased slowed down near the bumps but lowered his window as if to speak to the robbers. That is when PW2 heard two gun shots and she ducked under the seat where she sat. The assailants then walked away leaving the deceased bleeding from gun shots to his head and neck. PW2 was also hit by a bullet which scratched the surface of her abdomen.

8. In the meantime, PW10, the investigating officer of this case and two other police officers were going to South B Golden Gate Estate to bond witnesses in a criminal case when they heard gun shots. They went towards the shots and found the deceased unconscious in his vehicle. It was PW10 who pulled him out and put him in their vehicle. They drove him to Mater Hospital but he died before they could reach the hospital.

9. The Appellant was arrested by PW10 on 18th April 2013 at 7p.m. following information received by an informer. He was arrested in his house where he was with his family.

10. The Appellant in his unsworn defence denied the two charges. The Appellant gave a detailed account of his arrest by PW10 and other Police Officers saying he was not found in his house with his family preparing dinner when he was arrested. He said that he was not found in possession of any weapons or stolen property. He produced the OB of his arrest as D. exh. I to prove he was not arrested in possession of any weapons. He also gave details of how the Identifying parade was conducted saying that the members of parade were of different height and physical appearances, and that 2 of them were Nigerians. The Appellant stated that the parade was improperly conducted.

11. As a first appellate court, I am aware of my duty not merely to scrutinize the evidence on record to see if there was some evidence to support the lower courts' findings and conclusion; but to analyze and evaluate afresh the entire evidence adduced by both sides and draw my own conclusions. In the cause of **Kiilu and Anor. Vs. Republic [2005] 1KLR** the learned Justices of Appeal **TUNOI, WAKI** and **ONYANGO OTIENO** held, *inter alia* 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."**

12. This position is also pronounced in another land mark case of **OKENO VS. REPUBLIC 1972 EA 32** where the Court of Appeal set out the duties of the first appellant court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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."**

13. I have analyzed and evaluated afresh the entire evidence adduced by the prosecution and defence, and have drawn my own conclusion, having given an allowance for the limitation of not seeing or hearing the witnesses. I have also considered the written and oral submissions by the Appellant, and the oral submissions by the learned Prosecution Counsel, who opposed this appeal.

14. The Appellant's first ground of appeal is that the identification parade was conducted by PW5 in a dubious manner because the complainant had already seen him before the parade. The Appellant has cited an Author whose name was not given, of a Report of a Committee titled **Scientific Approaches to Understanding and Maximizing the Validity and Credibility of Eyewitnesses Identification in Law Enforcement and the Courts**. The only thing I wish to say about the Report by this Committee is that I agree with their conclusion that caution must be exercised when relying on eye witness identification. We have many celebrated cases dealing with the issue of identification. I will get back to this later.

15. On the issue of identification, the Appellant submitted that the complainant did not identify or give the name of the Appellant or describe the Appellant in her first report. He cited **Maitanyi vs. Republic [1986] KLR 198** for the proposition that an inquiry should be made whether the complainant was able to give a description or to identify her assailants to those who had first contact with her. He also cited

Jaribu Abdalla Vs. Republic Tanzania CA No. 220 of 1994 for the proposition that the credibility of a witness, not just factors favouring accurate identification are important.

16. The Appellant urged that no descriptions were given by the Appellant and therefore urged the court to find that the evidence of identification was insufficient to base a conviction. He relied on the case of **James Tinega Omwenga vs. Republic [2014] eKLR** for the proposition that identification of a suspect in an identification parade, who was a total stranger at the time of the offence renders the evidence of identification to be that of dock identification. The Appellant also relied on the case of **Peter Gatiku Kariuki vs. Republic [2014] eKLR; John Njagi Kadogo & Others vs. Republic [2006] eKLR;** and **Joseph Ngumba & Anor. Vs. Republic [1991] vol.2 KAR 212** for the proposition that identification of suspects in an identification parade without a prior description to police by witnesses in their first report cannot be said to be fool proof.

17. The Appellant has also challenged the fact that the identification parade was conducted 28 days after the incident, and urged that by then the complainant could not have been able to re-call the features of her assailants. He relied on the case of **Victor Mwendwa Mulinge vs. Republic CA 357 of 2012** where the Court of Appeal found that *"it was doubtful whether the witness could vividly remember his assailants eleven days after the robbery given the short period he had interacted with him and the prevailing circumstances."*

18. The learned Prosecution Counsel, Ms. Ndombi, on the issue of identification supported the findings of the learned trial Magistrate. Counsel urged that the identification parade was properly conducted and that the complainant, PW1 was able to confirm to court that she was able to identify the Appellant. Counsel urged that it was the complainant's evidence that the Appellant ordered her to jump to the back seat during the incident. Counsel also urged that PW5 conducted the identification parade properly.

19. The Appellant was identified by PW1, however PW2 and 9 who were at the scene during the incident were not able to identify the Appellant or anyone else involved on the two offences. From her evidence, PW1 was able to identify the Appellant as one of her assailants because he was the person who stood on the right side of the vehicle, at the driver's door where she was. PW1 in her testimony stated that the Appellant also opened the driver's door and had a conversation with her. The first being a command to jump between the front seats to the back seat. When she told him that she was not able to do so, he tried pulling her out of the vehicle which was not successful as her safety belt was fastened.

20. PW1 describes how the Appellant hit her on her nose and mouth before she managed to jump out of the vehicle and run. The description given by PW1 of the events around her vehicle during the robbery gives a clear view of the circumstances and sequence of events during the incident.

21. The learned trial Magistrate addressed the issue of identification at length in her well-considered judgment. She started by considering the complainant's evidence. She then considered the law applicable and properly directed herself as to the position of the law. The learned trial Magistrate considered the circumstances of identification and found that the identification was in broad daylight, and that the complainant had formed a good impression of her assailants despite the short time she had with them. She found that the complainant described the assailants in her report to police and singled out the Appellant as being a *'dark tall guy with shaggy hair'*, who went to her side of the door and gave her commands, including ordering her to jump to the back seat.

22. The learned trial Magistrate considered the manner in which the identification parade was conducted and concluded that it was regularly conducted. The basis for the conclusion is sound in law. The complainant was housed in an office from where she could not see the parade. The parade was itself conducted in an enclosed place, as required under the National Police Service Forces Standing Order. The complainant had no prior contact with the Appellant.

23. I have perused the judgment of the learned trial Magistrate and the manner in which she applied the law and analyzed and evaluated the facts of the case.

24. Regarding the law, the learned trial Magistrate quoted quite a number of cases. She quoted the case of **Gabriel Kamau Njoroge vs. Republic [1982-88] 1KAR 1134** on the value of dock identification. She quoted **Cleophas Otieno Wamunga vs. Republic [1989] KLR 424** on the need for the court to warn itself of the special need for caution whenever the case against the defendant depends wholly on the evidence of visual identification. She also quoted **Maitanyi vs. Republic {1986} KLR 198** and **Nathan Kamau Mugwe vs. Republic CA No. 63 of 2008** on the need for the witness to give a description of a suspect before the identification parade is conducted.

25. I have considered these cases and those cited by the Appellant. The law is clear that identification of a single witness must be taken with a lot of caution especially where, as in this case, the defendant contests that evidence. The approach to be taken when considering such evidence is also well settled.

26. One of the key considerations is the conditions under which the identification is alleged to have taken place. This includes the conditions of lighting at the time of the incidence. In this case it was in broad daylight. The time was put at 6pm or soon thereafter by PW1, PW2, PW9 and PW10.

27. The other consideration is the distance at which the witness saw the assailant and the time it took for the witness to see the assailant. The complainant's testimony is clear that apart from it being in broad daylight, the Appellant was the man who stood at her door. Not only was he issuing command to her but came so close to her as he tried to forcefully pull her out of the car. He also punched her nose and mouth. He also grabbed her cell phone from her hands as she left the car and as he took over her seat (driver's seat).

28. From this testimony, it is very clear that the complainant had a good opportunity and time to see her assailant, particularly the Appellant who she singled out as having spoken to her at close quarters, and having punched her in frustration, and also having tried to pull her out of the car. I agree with the learned trial Magistrate that in the circumstances of this case the complainant had an opportunity to clearly see her assailant and to form a permanent impression of him. The fact that the assailants did not leave the scene immediately, but attacked their second victim within full view of the complainant, gave her added advantage to see her assailants once again soon after the attack on her.

Hers was not a fleeting glance at the assailants especially the Appellant, but a close view of him with a confrontation, and an encounter that left a lasting impression of her assailant in her mind. The fact the assailants were armed with guns, and were banging the windows of her car with the weapons issuing commands was sufficient to create a lasting impression of the assailants, and in particular the Appellant who she testified came very close to her, conversed with her, pulled her, punched her and grabbed her cell phone from her hands. The conditions of light in this case were good. I agree with the learned trial Magistrate that the complainant had a clear and unobstructed view of the Appellant.

29. Concern was raised by the Appellant about the manner in which the identification parade was mounted before a prior description of the assailant by the complainant; and secondly the long lapse of time between the date of the robbery and the date the identification parade was conducted. The parade was conducted 28 days after the incident. PW5 who conducted it said that he did not require a description of the assailant from the complainant before mounting the parade.

30. The learned trial Magistrate found that the complainant had given a description of her assailant to the police. That was proven even in court from the statement the complainant made to the Police and in her evidence. The parade officer neither required a description of the assailants nor was any given to him before he mounted the ID parade.

31. Does the law require descriptions of suspects to the ID parade Officer before conduct of ID parades? In the case of **John Njagi Kadogo**, supra, which the Appellant relied upon is clear that what is required is a description of the assailant by the witnesses in their first report to the police. It is not necessarily a description to the parade officer before mounting the parade. There is nothing wrong with the latter. However, where the witness described their assailant in their first Report or in their Statement to police, that is sufficient to give an assurance that the witness could identify the assailant. It is also good enough if the witness described her assailant to persons who were first to arrive at the scene soon after the incident even if they are not police officers. There is no such legal requirement for descriptions before the conduct of the ID parade, neither can be done in a mechanical manner. The idea is not to make hard and fast rules of the conduct or process of identification. The idea is to net widen the factors a court can consider in a case to satisfy itself whether the complainant or witness was in a position to make a credible identification in the case.

32. As regards the 28 days' lapse before the identification parade was conducted, that would not render the identification parade a nullity. The issue would be a matter of fact not of law whether the witness could remember the assailant. In the case cited by the Appellant **Victor Mwendwa**, supra, citing another case, **Ajode vs. Republic [2004] 2KLR 81** the Court of Appeal found that it was doubtful whether the complainant could remember his assailants eleven days after the robbery. It gave a reason for that as being the fact he had interacted with the assailant for a short period of time and further the unique circumstances of that case.

33. I have already found that the complainant had sufficient time to see the Appellant, and due to the circumstances involved in this case, to wit one; the close contact she had of him, two, the confrontation where he tried to pull her out of the vehicle while still strapped to the safety belt; three, the frustration which led him to quarrel or scold the complainant before punching her on the face; and, four, all this happening in broad day light removes any doubts about the complainant's ability to focus on the Appellant and establishes that she had a good opportunity and time to see her assailant as to recall him at a later state. Added to the experience she had with him, threats with a gun and being punched, all went towards creating a lasting impression of the assailant's features in her mind. I find that the quality of her evidence of identification was very good.

34. Could she recall the assailant 28 days later? First of all, I must mention, as stated earlier, that the learned trial Magistrate's conclusion that the identification parade was properly conducted cannot be faulted. I find that the complainant had such good and conducive conditions in which to see and have a lasting impression of the assailants as to be able to identify him subsequently. I find that the circumstances of this case were different from those of the cited case (**Ajode vs. Republic**) and I therefore distinguish the two. The complainant saw the assailant whom she singled out as the Appellant. I have no doubt that 28 days is not such an inordinate time as to make the complainant forget her assailant.

35. The Appellant raised issue of numbers of the members of the parade being 7 instead of a minimum of 8. He cited the case of **Njihia V. Republic (1986) eKLR** where the Court of Appeal, Nyarangi, Platt and Gichuhi JJA 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 ….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 ……."**

36. The **NPS Service Standing Orders**, at **Regulation 7 (5) (d)** provides:

> **"(d) the accused or suspected person shall be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as him or her;"**

37. The idea behind the numbers of the members of the parade are to ensure the accused or suspect gets fair play during the parade. In this case the parade officer used one person less the recommended number. I do not find this difference significant. If the difference in numbers was below by more than two, it would raise eye brows. Or if the persons were so few, it would be outrageous. In all the circumstances of the case, one man less is not a good reason to nullify the parade.

38. Moving on to the second ground of appeal, the Appellant contended that the learned trial Magistrate found that he was arrested while in

possession of a gun. On this issue the learned trial Magistrate in her judgment stated thus:

> **"I agree with the contention that the accused person had gun – short wounds as confirmed by the P3 form produced by Dr. Kamau (PW6). However, I cannot say with certainty that he suffered the injuries when shot at by a team comprising the investigating officer. There was also evidence that the accused was arrested and placed in custody at Tassia Police Station after he sought treatment for gunshot wounds. But again I cannot conclude that he was most certainly a casualty in the shootings of 28th March, 2013. This is a mere suspicion and cannot be relied on to sustain a conviction."**

39. The excerpt from the judgment is clear that the learned trial Magistrate did not find that the Appellant was arrested while in possession of any weapon. She also found that the evidence adduced by PW10 that he shot the Appellant in a shootout on 28th March 2013 was not proved but was mere suspicion.

40. The third ground of appeal raises issues with the mode of the Appellant's arrest. In his written submissions the Appellant contends that he was arrested on the basis of identification by a person found in possession of the complainant's cell phone. He argues that his arrest was based on recent possession of stolen property without which he would not have been arrested. He challenges the prosecution for failure to produce the person who led to his arrest and urged the court to find that the case against him was for that reason not proved.

41. Ms. Ndombi for the State, in her submissions urged that the prosecution proved all the ingredients of the offence of **robbery with violence** contrary to **section 296(2)** of **Penal Code** and that of **attempted robbery with violence** contrary to **section 297(2)** of the **Penal Code**. Counsel urged that the prosecution proved that the Appellant was accompanied by 3 other persons and that they were armed with three guns, and that they violently robbed the complainant (PW1) of a cell phone and tablet after assaulting her; and shot dead the deceased complainant in an attempt to rob him of his vehicle.

42. The Appellant is mixing up issues in his submissions on this point but I do understand where he is coming from. The learned trial Magistrate laid no emphasis on the recovery of the complainant's stolen cell phone or of the identification of the Appellant by the person found in possession of the cell phone. In fact, she did not rely on either of the two. The conviction was therefore not based on possession of the cell phone or the identification of the Appellant by the person found with the cell phone.

43. That said, I must add that the prosecution should have called as a witness the person(s) found in possession of the complainant's recovered cell phone. I agree with the Appellant that these were material witnesses, and could have shed more light on the chain of possession of the said cell phone. I however find that having failed to call them did not weaken the prosecution case. The learned trial Magistrate was right when she placed no reliance on the recovery of the phone or identification by the person found in its possession.

44. The other ground is that the Appellant was convicted on contradictory uncorroborated and unreliable evidence. The issue of contradiction was raised in the form of a complaint that the value of the property as per the complainant's evidence was different from the amount quoted in the charge. The learned trial Magistrate ruled correctly that as prescribed under **Section 137 (c) (1)** of the **Criminal Procedure Code**, as long as the charge has indicated with reasonable clarity the property referred to, it was not necessary to state its value. The learned trial Magistrate found that the disparity in the value, being a difference of Kshs. 30000/= **"was not grave and could not render a charge sheet fatally defective."** I agree with that analysis and conclusion by the learned trial Magistrate.

45. The sixth ground raised the issue of identification and has already been dealt with hereinabove quite extensively.

46. The last issue is rejection of the defense without assigning any good reasons for doing so. I have considered the learned trial Magistrate's judgment and find that there were reasons given why the Appellant was convicted. In the evaluation and analysis of evidence in the case, the learned trial Magistrate was alive to the Appellant's defense and issues he had raised challenging the prosecution case, which she dealt with exhaustively quoting both case and statute law. I find that the reasons why the Appellant's defense did not stand are clearly demonstrated in the judgment of the trial Magistrate.

47. Before I end this judgment, I must comment on an issue raised by the Appellant in his submissions. He stated that the prosecution blundered by failing to dust the victim's vehicles in order to lift fingerprints. He even cited a case, **Yusuf Ali Said V. Republic Mombasa C.A. NO. 316 of 1995,** in which the court observed that **"the task of Police ought to have been to dust the scene of crime for any suspects' fingerprints in order to compare with the accused…"**

48. I agree with the observation by my two sister and brother judges in the cited case. In this case the complainant, PW1's vehicle was moved by her neighbour from the road, after the incident but before police came to the scene of the incident. That was tampering with the exhibit and lifting the fingerprints from that vehicle may not have served a useful purpose or may have been a failure. In the circumstances, failure to dust PW1's vehicle was not fatal.

49. The deceased complainant's vehicle was never touched by the assailants. All they did was to spray him with bullets as he sat behind the wheel. Carrying out fingerprint lifting was not going to serve any useful purpose.

50. I have carefully and exhaustively considered all grounds of appeal raised in this case, together with other issues which arose therein. Having examined and analyzed the evidence by both sides, and having considered all the issues raised, I find no merit in this appeal. The learned trial Magistrate correctly directed herself on the facts and the law and drew the correct conclusions. I find no reasons to fault her judgment. Consequently, the Appellant's appeal against conviction is rejected in its entirety.

51. Regarding sentence, the Appellant was sentenced to suffer death in both counts, with the second count being ordered to stay in abeyance. In **Francis Karioko Muruatetu & another v Republic (2017) eKLR**, the court declared unconstitutional the mandatory nature of capital sentence in murder trials. The Court of Appeal in its interpretation of the Supreme Court case extended this doctrine further, finding that following the principle of *Stare Decisis* all mandatory sentences, including those under the Sexual Offences Act, are unconditional. This was

in the case of ***Dismas* Wafula Kilwake v R [2018] eKLR**, the Court of Appeal sitting in Kisumu I am bound by that finding of the Court of Appeal.

52. Adopting the wisdom of the Court of Appeal and those numerous ones of my sister and brother judges of the High Court, I set aside the sentences of death in both counts.

53. As for the appropriate sentence to impose, I have considered the violent nature in which the robbery against PW1 and the attempted robbery against the deceased complainant were executed. The use of firearms and the firing of shots against victims who neither provoked nor uttered a word. There were aggravated acts which I take into account. And as the trial Magistrate observed, it matters not who fired the fatal shot between the Appellant and his accomplices. That was killing in cold blood. I have considered Appellant is a young man and a first offender.

54. Having considered the factors relevant to sentence, including the two and a half years he spent in custody during the pendency of his case, I will order a sentence of 20 years' imprisonment, which should run from the date of sentence in the Lower Court, which is September 15th, 2015.

DELIVERED THROUGH TEAMS THIS 29TH DAY OF JUNE 2020.

LESIIT, J.

JUDGE