**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CRIMINAL APPEAL NO. 34 OF 2019**

**CHARLES MWANGI NJERI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant was convicted of the offence of robbery with violence contrary to **Section 296(2) of the Penal Code** and sentenced to forty years imprisonment. It was alleged that on the 21st September 2017 at Kianjai Trading Centre within Kirinyaga County the Appellant with others not before court while armed with offensive and dangerous weapons namely an axe, robbed Elly Irungu Ngure, one Keg Pump valued at Kshs.10,000/-. Empty Keg Cylinder with beer valued at Kshs.4000/-, 2 mobile phones valued at Kshs.18,500 and Kshs.18,000/- thousand and valued at Kshs.75,000/- and at the time of such robbery wounded the said Elly Irungu Ngure.

2. The Appellant was dissatisfied with both conviction and sentence and filed this appeal which raises the following grounds:-

***(a) The trial magistrate erred in law and facts by convicting the Appellant despite questionable evidence on identification.***

***(b) The trial magistrate erred in law and facts by not considering ownership of the alleged item stolen was not proved.***

***(c) The trial magistrate erred in law and facts by failing o consider contradictions and inconsistences inherent in prosecution case.***

***(d) The trial magistrate erred in law and facts by not considering that existed a grudge between the Appellant and PW4 the investigating officer which resulted to the fabrication of the present case.***

***(e) The trial magistrate erred in law and facts by convicting the Appellant using single evidence and without independent witness.***

***(f) The trial magistrate erred in law and facts by not considering my defence and mitigation.***

***(g) The trial magistrate erred in law and facts by serving me a harsh and excessive sentence.***

The Appellant prays that the appeal be allowed, the conviction be quashed and he be set at liberty.

3. The State has opposed the appeal and prays that it be dismissed. The facts of this case are that the complainant Elly Irungu Ngari is a resident of Kangai within Kirinyaga County where he operates a business of a bar. On 20th September 2017 he closes the bar at 11.00 pm and retired to his room to sleep. Later while asleep he heard the alarm of the padlock and went outside to check. He saw one Macharia near him and also saw the Appellant, Mwangi who was armed with a machete. He returned to the house but Mwangi caught up with him and cut him several times on the head. The complainant lost consciousness. He had Kshs.18,500/- in his pocket which was stolen. The Appellant demanded the Keg pump. They broke into the club and took away empty Keg Cylinder and pump. The attackers also stole two mobile phones. The complainant identified the Appellant as he was a person he knew before and there was security light which enabled him to recognize him. The Appellant according to PW1 is the one who injured him on the head.

4. The complainant was escorted to hospital where he was admitted for three days. He was treated and later a P3 form was filled showing that the complainant had sustained an injury which was bodily harm. Later the Appellant was arrested and charged with this offence.

5. The Appellant gave his defence on oath and denied that he committed the offence.

6. When the matter came up for directions, the Appellant opted to file written submissions. The State also filed submissions through F.S Ashmagi Assistant Director of Public Prosecutions.

7. In his submissions the Appellant states that the evidence of certification was questionable. His contention is that when the complainant and his wife made the initial report they did not give his name to the police. He faults the prosecution for not conducting an identification parade. He submits that the complainants did not recognize the assailants as they did not give his name when they gave their first report to the police. The Appellant relies on ***Moutanyi (sic) -vs- Republic (1986) KLR 198*** and ***RC Turubo;; (1967)3 All E.R 549 amd Wanjeri and two others -V- Republic (1089) KLR 415*** where the Court of Appeal held that, recognition is stronger than identification but an honest recognition may yet be mistaken.

8. The Appellant further submits that the Appellant did jot proof the ownership of the stolen items. He further submits that there were glaring contradiction in the evidence. He further states that he had a grudge with PW4 who acknowledged that he had charged him with several cases. The Appellant further submits that the prosecution case was not proved beyond any reasonable doubts. He further submits that his defence was not considered. Finally, he submits that the prosecution failed to call a crucial witness.

9. For the respondent it is submitted that the court is supposed to satisfy itself that the ingredients of the offence of robbery with violence were proved beyond any reasonable doubt. He relies on the case of ***Johanan Ndungu -v Republic Criminal Appeal No. 116/1995*** where the court held:

> ***" In order to appreciate properly as to what an offence under Section 296(2) of the Penal Code, one must consider the subsection in conjunction with Section 295 of the Penal Code. The essential ingredients or Robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing.***
>
> ***Thereafter, the existence of the afore described ingredients constituting Robbery are pre supposed in three sets of circumstances prescribed in Section 29(2) which we give below. Any one of which if proved will constitute the offence under the subsect on."***
>
> (a) If the offender is armed with any dangerous or offensive weapon or instruments.
>
> (b) If he is in the company of one or more other person or persons
>
> (c) At or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or use any other violence to any person.

That the use of the word ***"or"*** implies that proof of any of the three ingredients is sufficient to establish the offence of robbery with violence. He relies on ***Dima Denge Dima & Others -V- Republic Appeal No. 300/2007 UR*** where it was stated that:

> ***" The elements of the offence under Section 296(2) are three in number and they are to be read not conjunctively but disjunctively. One element is sufficient to find an offence of robbery with violence."***

Reliance was also had on the case of ***Mueni Ngombau Maingi -V- Republic (2006) eKLR*** where it was stated-

> ***" The word robbed in terms of art and connotes not simply a theft but a theft preceded by use of threat or use of actual violence to any person or property, accompanied or followed by use of threat or use of actual violence to any person or property or another to obtain or retain the stolen property,"***

10. The respondent submits that PW1 and PW2 saw the appellant who entered their house while armed with a Machete/Axe robbed them and injured them. The PW5 the clinical officer testified that PW1 sustained soft tissue injury. He submits that;

On identification in the case of ***Waruinge -vs- Republic Criminal Appeal No.20 of 1998***. It was held:

> ***" It is trite law that where the only evidence against a defendant is evidence or 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 conviction."***

The court of Appeal was also of the same view in the case of ***Munda-v- Republic Criminal Appeal No.51 of 1989;***

> ***" Whenever the case against an accused person depends wholly or substantially on correctness of one or more identification of the accused, special need of caution before conviction in reliance of correctness of identification is necessary. The court should warn itself of the possibility that mistaken witness could be convincing one and that a number of such witnesses could be mistaken. The court should further examine closely the circumstance in which the identification by each witness can be made. How long did the witness have the accused under observation."***

He submits that the conviction was based on proper analysis of the evidence and application of the law. He submits that the Appellant was properly identified.

11. On sentencing, the prosecution relies on ***Ogolla S.o Ouwor -vs- Republic (1954) EA CA 270*** where the principles upon which an

Appellate court will exercise discretion to review or alter the sentence. In the case it was stated:-

> ***" This court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors. To this, we could add a third criterion namely, " That the sentence is manifestly excessive in view of the circumstances of the case "CR -vs- Sily Simshowsky (1912) CCA 28 TLR 263" see also Shadrack Kipkoech Kogo – V- Kogo -v- Republic Eldoret Criminal Appel No. 253/2003 held:***

> ***" Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irregular factor or fact or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered."***

Regarding re-sentencing, this court is guided by the case of ***Francis Karioko Muruatetu & Others -v- Republic Petition 15 &16 of 2015*** where the supreme Court set out guidelines with regard to mitigating factors that are applicable in a re-hearing sentence for conviction of a murder charge. They are:

(a) Age of the offender

(b) Being first offender

(c) Whether the offender pleaded guilty

(d) Character and record of the offender

(e) Commission of an offence in reference to gender based violence

(f) Remorsefulness of the offender

(g) The possibility of reform and social re-adaptation of the offender

(h) Any other factor that the court may consider relevant.

That the Appellant was allowed to mitigate and submit on the sentence. He submits that in view of the jurisprudence in Muruatetu, he suggests that the sentence be reduced to 15 years.

12. The Appellant filed a reply to the prosecutions submissions which I have duly considered.

**13. Analysis and determination**

To start with, this is a first appeal which is normally in the nature of a retrial as the court is expected to analyse and re-evaluate the evidence adduced before the trial court a fresh and come up with its own finding. The only reservation is that the court is supposed to leave room for the fact that it had no opportunity to serve the witness and assess their demeanor and the leading authority in the case of ***Okeno -V- Republic (1972) E.A 32*** where the Court of Appeal stated-

> ***" An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted and fresh and exhaustive examination (Pandya -vs- Republic (1957) EA (336) the Appellate Court own decision on the evidence. The first Appellate Court must itself weigh conflicting evidence and draw its own conclusion; (Shantilal M. Ruwala -vs- Republic 1957) E.A 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 courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate's findings should be support be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses, see Peter's vs Sunday Post (1958) E.A.424."***

I have considered the evidence. The Appellant faults the identification by the witnesses PW1 & PW2. The consideration here is evidence identification and recognition.

In case of ***John Mwangi Kamau v Republic [2014] eKLR*** the Court of Appeal in reference to ***R –vs- Turnbull and others (1976) 3 All ER 549***, an English case, where **Lord Widgery C.J.** highlighted circumstantial factors a jury should consider when it comes to identification of the accused by the witness he held that:

> ***"...Secondly, 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 the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a 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 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 the actual appearance?"***

The adduced by PW1 and PW2 is that the scene was well lit with security lights. PW1 testified that he knew the appellant before. The Appellant in cross-examination admitted that he used to see the complainant at Kagio Primary School where there is a football pitch. The

fact that there was light at the scene is not in dispute. PW1 maintained that the appellant was somebody who was known to him. Where the evidence against an accused person is dependant on identification, the court has to warn itself on the dangers of relying on identification in circumstances which do not favour positive identification. It is trite that recognition is better than identification although even in recognition a mistake may be made. In my evaluation of the evidence, I am convinced that PW1 knew the Appellant before and was able to identify the appellant in circumstances which favoured a positive identification and recognition. Failure to conduct an identification parade was not fatal since PW1- knew the appellant before. With regard to PW2 she was emphatic that she had seen the Appellant before. She could not have failed to identify him since there was light and circumstances favoured a positive identification. The Appellant has faulted the prosecution for failing to conduct an identification parade. In ***David Arum Okullo & Another -v- Republic (2017) eKLR,*** the Judge relied on the Court of Appeal decision in ***Samuel Kilonzo Musau -v- Republic (2014) eKLR*** where the court stated-

> ***" The purpose of an identification parade as explained in Kinyanjui and 2 Others -v- Republic (1989) KLR "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify and for a proper record to be made of that event to remove possible later confusion. It is precisely for that reason that that courts have insisted that identification parade must be fair and be seen to be fair……"***

In this case PW1 knew the appellant by name. PW2- had seen the appellant before. The evidence by PW1 & PW2 proves that the Appellant was among the people who robbed PW1 and wounded him. I find that that the Appellant was properly identified. The PW1- when he recorded a statement with the police stated that he identified the appellant. He recorded statement long before the appellant was arrested. It is therefore not possible that PW1 & PW2 were told to implicate him by PW4. The fact that PW1 and PW2 did not give the name of the Appellant when they reported is not fatal. In ***Republic -V- Turnbull (1976) 3 All ER*** (supra) the court stated that the quality of identification is crucial. In this case the prosecution proved that circumstances favoured a positive identification and the appellant was known to PW1 and PW2. The possibility of mistake is ruled out.

14. The prosecution proved that the complainant was robbed on the material night and was wounded. The prosecution had the onus to prove the charge against the appellant beyond any reasonable doubts. Under **Section 296(2)of the Penal Code,** the elements of the offence of robbery with violence are –

(a) Where the offender is armed with an offensive or dangerous weapon or instrument

(b) The offender is in company of one or more other person(s)

(c) The offender, immediately before or immediately after the trace of robbery strikes, wounds, beat or uses any form of violence;

See **Johanan Ndungu- v- Republic (supra)**

The Prosecution tendered evidence which proves that PW1 and PW2 were assaulted during the incident. PW5 the clinical officer had sustained cut wounds on the head which were bodily harm. He did produce the P3 form for PW1. The witnesses PW1 and PW2 testified that the intruders were armed with an axe and a panga. PW5 confirmed that the injuries which PW1 sustained were caused by a sharp object.

15. The PW1 – stated that he was robbed off the items listed on the charge sheet. Though they did not produce receipts and licences to prove ownership, I find no reason o doubt that owned the items and that they were robbed on the material night. The report made to the police shows that they listed the items. PW4 visited the scene and confirmed that the appellant was operating a bar or club. The evidence to prove that the complainant was robbed was sufficient.

16. The Appellant has alleged that there were contradictions in the evidence. There were no contradictions in material particulars. Grave contradictions which case doubts on the credibility of witnesses lead to finding that the charge is not proved beyond any reasonable doubts. On the other hand, minor contradictions will be ignored.

In the case of ***Richard Munene -vs- Republic (2018) eKLR*** the Court of Appeal stated-

> ***" It is a settled principle of law however, that it is not every trifling contradictions or inconsistency in the evidence of the prosecution witnesses that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and that necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."***

In this case the inconsistencies are minor and do not case doubts in the testimony of PW1 & PW2.

The Appellant has submitted that his defence was not considered. This is not so as the Judgment of the trial magistrate shows that the defence was considered at length. The allegation that the Appellant was framed by PW4- and possibly be due in the right of evidence by PW1 and PW2. I find that the prosecution tendered sufficient evidence which proved the ingredients of robbery with violence beyond any reasonable doubts.

17. On sentencing, the Appellant was given an opportunity to mitigate. Sentencing is at the discretion of the trial magistrate or Judge. This court will not normally interfere with the exercise of that discretion unless it is proved that the trial magistrate acted on wrong principle or failed do consider source relevant matters **See Ogolla S/O Owour- vs- Republic** (supra). The sentence of **40 years** was excessive and calls on this court to intervene. The State has conceded that the sentence is excessive and urged the court to reduce it to 15 years.

For the reasons stated and upon evaluation of the evidence and the Submissions, I come to the conclusion that the charge of robbery with

violence against the Appellant was proved to the required standards. The Appellant appeal on conviction is without merits and is dismissed.

The appeal on the sentence is allowed. The sentence of forty (40) years is set aside.

The Appellant to serve **18 years** imprisonment.

**Signed By HON .LADY JUSTICE LUCY GITARI**

**Dated, signed and delivered at Kerugoya by HON. LADY JUSTICE J.N. MULWA.**

**This 29TH Day of OCTOBER, 2020.**