



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 9, 10,11 & 12 [CONSOLIDATED] OF 2018

JOSEPH OPIYO MARENDE.....1ST APPELLANT

ISAIYA OTIENO SUMBA.....2ND APPELLANT

MOSES OMONDI OMBOKO.....3RD APPELLANT

JOHN ETYANG.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence by Hon. M. Obiero Principal Magistrate in Bondo PM's Court Criminal Case No. 729 of 2016 delivered on 24th January, 2018)

JUDGMENT

Introduction

1. The four appellants herein **JOSEPH OPIYO MARENDE, ISAIYA OTIENO SUMBA, MOSES OMONDI OMBOKO and JOHN ETYANG** were all jointly charged with three counts of robbery with violence Contrary to Section 296 (2) of the Penal Code. In count 1, the four accused persons were charged with the offence of robbery with violence Contrary to Section 296(2) of the Penal Code the particulars being that on the 21st day of June 2011 at about 8.30 p.m. at Barkowino area in Bondo Sub-County within Siaya County, jointly with others not before court while armed with dangerous weapons namely; axes, pangas and runkus, they jointly robbed Fred Mathew Epiku of Kshs.24, 000 and two mobile phones valued at Kshs.10, 000/ all valued at Kshs.34,000 and immediately before the time of such robbery fatally injured the said **Fred Mathew Epiku**.

2. In count II, the four appellants were charged with the offence of robbery with violence Contrary to Section 296 (2) of the Penal Code the particulars being that on the 21st day of June 2011 at Barkowino area in Bondo Sub-Location within Siaya County, jointly with others not before court while armed with dangerous weapons namely; axes, pangas and runkus robbed Veronica Atieno Adundu of two mobile phones make nokia 1200 and another make not know both valued at Kshs.10,000 and immediately before the time of such robbery fatally injured the aforesaid **Veronica Adundu**.

3. In count III, the four appellants were charged with the offence of robbery with violence Contrary to Section 296(2) of the Penal Code the particulars being that on the 21st day of June 2011 at about 8.30 p.m. at Barkowino area, Bondo Sub-County within Siaya County, jointly with others not before court while armed with dangerous weapons namely; axes, pangas and runkus robbed Reuben Omondi Odera of Kshs. 9,500 and immediately before or immediately after the time of said robbery assaulted the said **Reuben Omondi Odera**.

4. The trial magistrate Hon. M. Obiero after considering the evidence of the nine prosecution witnesses against the sworn statements of the appellants herein found that the prosecution had proved their case against the appellants on Counts 1 and 3 only and convicted them on the same. On Count 2, the trial magistrate found that the prosecution failed to prove their case against the appellants and proceeded to acquit them. After considering the appellants' mitigation, the trial magistrate sentenced the appellants to 50 years imprisonment on account of Count 1 and another 50 years on account of Count 3 with the sentences deemed to run concurrently.

5. Dissatisfied by the said conviction and sentences the appellants filed their grounds of appeal and supplementary grounds of appeal as below;

a) That the trial court erred in law and facts by failing to appreciate that the appellants were not properly identified or recognized at the scene by any of the prosecution witnesses as the condition favouring positive identification or recognition were NIL.

- b) That the prosecution failed to avail the MOST vital witnesses which was fatal to their own side as whenever a person name appears in an indictment such person should be treated as a witness.*
- c) That the lower court erred in law and facts in failing to note that a genuine medical report was not produced in court in support of the prosecution's evidence, especially the allegation of P.W.4, P.W.5, P.W.8 and P.W.9.*
- d) The trial court further erred in law and facts by failing to notice that the evidence adduced was full of contradictions, inconsistencies and that the whole investigations was a framed up case hence occasioned an injustice.*
- e) The trial magistrate erred in law and facts by failing to notice that charged preferred were incurably defective hence leading to the whole judgment a nullity.*
- f) That the entire D.P.P's office did conceal some of the essential documents such like the first report, recovery form and the inventory list which were favourable to the appellants case.*
- g) The trial court erred in law and facts in failing to evaluate the appellants strong alibi defences which were not demolished by the prosecution but shifted the burden of proof upon the appellant's hence prejudiced them.*
- h) That the sentence of 50 years in jail is harsh and excessive it, therefore, results psychosis problem to a normal human being.*

Appellant's Submissions

6. The appeal was canvassed by way of written submissions with the appellants filing joint submissions. It was submitted that there was no identification or recognition of any of the appellants by the prosecution witnesses at the scene of crime. The appellants' submitted that despite claims made by the 1st complainant and her son PW2 that they were able to see the attackers and recognize them, the same did not appear in their initial report of the incident. The appellants; submit that there should be no dispute between the report given to the police and the evidence given in court. Accordingly, it is the appellants' submission that the prosecution evidence on identification ought to be disregarded by this court as it was unsafe to act on evidence of a witness who was unable to tell how he, or she managed to identify the attackers, time taken under observation and the distance from the identification point.
7. The appellants further submitted that their case was prejudiced as the prosecution failed to avail crucial witnesses whose testimony would have led the trial court into arriving at a favourable decision to them. They cited the prosecution's failure to call **Nyakisumo** and **Mariko** who according to the appellants, were at the scene of the crime as could be deduced from the evidence of PW2, PW4, PW8 and PW9. Further, that the prosecution's failure to call **Fred Otieno Onyango** and **Fredrick Omondi** who recorded their statements at Bondo Police Station without whom the 2nd and 3rd appellants would have not been arrested, that the prosecution's failure to call one **Ouma Pabaya** whom they allege was vital because he would have narrated to the court why the 3rd accused was hidden in his house and finally the failure to call one **Amugune** who was mentioned in PW9 testimony was fatal to the prosecution's case..
8. It was the appellants' submission that there was no medical evidence adduced in support of their case and as such all evidence of such injuries as alleged by the prosecution remained null and void.
9. The appellants further submitted that they were convicted on evidence that was inconsistent, contradictory and amounted to a frame up. They cited the evidence of PW8 and PW9 who were the Police Officers who participated in the case as crucial witnesses and yet gave contradictory evidence. The appellants submitted that the prosecution failed to prove their case beyond reasonable doubt.
10. According to the appellants, they were initially arrested along with 2 other persons not before court and the charge of murder preferred against them only for the same to be withdrawn without their notice, the 2 co-accused discharged and the present charges of robbery with violence preferred which failure amounted to a miscarriage of justice against them.
11. The appellants submitted that the charges brought against them on all counts were defective as they were in variance with the evidence adduced during trial. They submitted that it was impossible for PW1, who was referred to be fatally injured under Count 1 and 2 to inform the police of his two stolen phones. They further submitted that no supportive documents were produced to prove that the victim in Count 1 actually had the alleged phones and further that failure to disclose the make of the phones allegedly stolen made the charges against them totally defective and further that the alleged phones were never produced as exhibits under Count 1 or 2.
12. The appellants relied on Section 214 of the Criminal Procedure Code which talks about the variance between charge and evidence being adduced at any stage of the trial, before the close of their case, and further that provides for the amendment of charges where it appears that the charge is defective either in substance, or in form, failure of which the benefit of doubt should be to the accused persons.
13. Further, regarding the defective nature of the charges brought against them, the appellants submitted that the charge sheet brought against them did not have or did not show the O.B. number, Police file number, the D.P.P's stamp and further the stamp of the police station did not illustrate when it was stamped.
14. It was the appellants' submission that the prosecution office concealed some of the documents which were essential thus violating and infringing on the appellants' rights as contained in Articles 49(1) (a) (i) and article 50 (2), (c), (e), (f) and (k) of the Constitution.
15. The appellants further claim that when they were arrested, they were not informed promptly of the reason for their arrest and even after being charged, they were not supplied with adequate facilities to get prepared for their defence.

16. They further submitted that the duration the case had taken since its inception in June 2011 to date to conclusion occasioned an injustice to them and as such this violation rendered the entire process unfair and prejudicial which amounted to mental torture. It was their submission that the delay was occasioned by the prosecution through the investigating officer who did not have sufficient ingredients linking them to the commission of the alleged offence.

17. The appellants submitted that case law provided for the remedy of acquittal where the accused's persons' constitutional rights were infringed. They relied on the Court of Appeal cases of **Albanus Mwasia Mutua v Republic (2006) KLR**, **Gerald Macharia Githuku v. Republic (2007) KLR** and that of **Paul Mwangai Murungi v Republic Criminal Appeal Number 35 of 2006 UNREPORTED**.

Submissions by the Respondent

18. Opposing the appeal, the Respondent represented by Mr. Okachi Senior Principal Prosecution Counsel filed written submissions contending that the appellants were positively identified as the robbers on the material night and reiterated the evidence adduced by the prosecution witness, urging the court to uphold the judgment of the lower court and dismiss the appeal herein. On sentence the respondent's counsel submitted that the offence was serious as it involved death hence the sentence imposed should be deterrent.

Analysis & Determination

19. This being a first appeal, the court is required to re-evaluate the evidence and reach its own conclusion. In doing so, it should bear in mind that it has neither seen nor heard the witnesses, which the trial court had the advantage of doing- see **Okeno v R (1972) EA 32** and **Joseph Njuguna Mwaura & 2 Others v Republic [2013] eKLR**.

20. The prosecution called 9 witnesses in support of their case which is summarised below. PW1, **Veronica Achieng Odundo** testified that on the 21st day of June, 2011 at about 8.30 p.m. she was in the house together with her husband and their children and their neighbours who had visited them. They were preparing to take supper and she went to call her husband that is the deceased who was in the bedroom. When she was in the bedroom, she heard one of the visitors by the name Nyakisumo screaming. When she went back to the sitting room, she saw four (4) people. She stated that she was able to identify two of them as Joseph Opiyo Marende and John Etyang that is the 1st and the 4th appellants respectively. She explained that she was able to identify the two because she knew them prior to the date of the incident as the 1st appellant was their neighbor while the 4th appellant had worked for her as a herdsman.

21. She further explained that the four people were armed with crude weapons which included pangas and rungun. She explained that when she further checked, she realized that Nyakisumo, Reuben and Mariko were all bleeding on the head.

22. She stated that she went back to the bedroom and locked the door which prompted the attackers to start cutting the door and they managed to break the door. She stated that one of the people who was armed with a panga entered into the bedroom and cut her husband. In the process, her husband also picked a panga and cut the person on the hand and the person retreated. She explained that another person again entered into the bedroom and cut her husband and her husband cut the person on the hand and the person retreated. She explained that the other people entered into the bedroom and attacked her husband and cut him and he died on the spot.

23. It was her further testimony that after that, the robbers ordered her to give them money and she cooperated and gave the Kshs 24,000 which she had in the house. She explained that they demanded for more money but she told them that she did not have money. After that, the people pulled her back to the sitting room and when they reached there, one of them was shocked when they realized that the lantern lamp was on. In the process, one of the robbers asked whether they should kill her but she pleaded with them and one of them hit the lamp with a rungun and it went off.

24. She further explained that after the incident, the robbers went out and locked the door from outside. She stated that Reuben told her that he had a phone in his socks and she took the phone and she called somebody who happened to be a police officer. She stated that after a short time, police officers came and rescued them but found when the robbers had gone away.

25. It was her further testimony that on the following day, she went to the police station where she recorded her statement and that as she was recording the statement at the police station, she saw some of the people who were among the robbers and the people she saw were Omboko, the 3rd appellant and another person and that the people had injuries on the head. She further explained that the 4th appellant was arrested on the 23rd day of June 2011 at her home.

26. She further stated that the robbers stole her phones and the phones were recovered from the appellants when they were arrested. She further explained that the robbers took away their panga which was also recovered when the appellants were arrested.

27. It was her further testimony that she was able to identify the robbers in the house because in the sitting room, there was a lantern lamp while in the bedroom there was a spot-light and a solar lamp. She explained that the 1st appellant wore a pair of trousers with high waist and a pair of gumboots. The 3rd appellant wore a brown pair of trousers while the 4th appellant wore a green t-shirt with a yellow band on the hands.

28. On cross-examination, she stated that she recorded her statement at the police station, she disclosed that one of the people was her neighbor who is the 1st appellant, although the same was not captured in her statement. She further stated that the 2nd appellant wore a jungle green jacket during the incident and that she saw the 2nd appellant at the police station on the following day and that the 2nd appellant had visible cut wounds.

29. PW2, James Ochieng testified that on the 21st day of June, 2011 at about 8.30 pm, he was in the house together with his parents, siblings

and the visitors. They were preparing to take supper and his mother, PW1 went to call his father that is the deceased, who was in the bedroom. In the process, four people who were armed with pangas and rungas entered into the house and started attacking the visitors. He stated that the people cut the visitors on the head and ordered them to lie down. He stated that his mother closed the door to prevent the robbers from entering into the bedroom but the robbers pushed the door and it was opened. He explained that one of the robbers entered into the bedroom and emerged while bleeding on the hand. In the process, the other robbers entered into the bedroom. When they emerged from the bedroom, they hit the lamp with a rungu and it went off. After that, they went outside and locked the door from outside.

30. It was his further testimony that during the incident, he was able to identify two people who were known to him. The two people were the 1st and the 4th appellants respectively. He stated that the 1st appellant used to buy eggs at their shop while the 4th appellant used to work for them as a herdsman. He explained that the light in the house was very bright and that the people did not switch off the lamp when they entered into the house.

31. The testimony of **PW3, Japheth Oduor** was that he is a clinical officer based at Bondo Sub-County hospital. He stated that he examined **Reuben Omondi Odera** and filled for him a P3 form on the 27th day of June 2011. He stated that on examination, he noted that the patient had a stitched wound on the forehead with multiple bruises on the right ear flap. He also noted bruises on the left fingers and the thumb. He produced the P3 form as exhibit 5 herein.

32. PW4, **Reuben Omondi Odera** testified that on the 21st day of June 2011 at about 8.00 pm, he went to his land-lord's house that is the deceased's house. In the process, people entered into the house and ordered them to lie down. They complied and all of them laid down. In the process he was beaten and he could not see the person who was beating him. He stated that the people searched his pocket and took Kshs 1,500 and the motor cycle keys. He further explained that the other people who were in the house were also injured during the incident. He stated that the people did not take his phone and he used the phone and called police officer who went and rescued them. He explained that when the police officer arrived, the robbers had gone away. He stated that he later went to the hospital where he was treated and examined and a P3 form was filled for him.

33. The testimony of **PW5 Raphael Oduor Naaper** was that he was the Assistant Chief of Bar Osimbo sub-location at the time material to this case. He stated that on the 26th day of June 2011, he received information through a phone call that a robbery had taken place in Bondo on the 21st day of June 2011 and that one of the suspects was hiding in the house of one Ouma Pabaya in Pap Oriang' sub-location.

34. It was his further testimony that he proceeded to the house in the company of his two youths. When they reached there, they found the door locked. They knocked but there was no response. They pushed the door and it opened. They entered into the house and they found **Moses Omondi Omboko**, the 3rd appellant sleeping on the floor on a carton. He stated that the 3rd appellant had a fractured left hand which had been tied using a piece of cloth and also had cut wounds on the head and both hands and that the wounds had been stitched. He stated that they arrested him and escorted him to Bar Ogong'o chief's camp.

35. He further stated that the officer in charge of the camp called the OCS Bondo police station and the OCS went and collected the 3rd appellant. He explained that the OCS was in the company of the 2nd appellant who also had cut wounds on the head.

36. He further stated that on the following day, he received a phone make Nokia 1100 from the 2nd appellant's wife and also one Fredrick Otieno gave him a phone make Nokia 1650 and the said Fredrick Otieno told him that Fredrick Omondi had given him the phone to take to the 2nd appellant. He stated that he handed over the two phones to the DCIO.

37. He further explained that he assisted DCIO in the investigations and that they went to the house of the 2nd appellant where they recovered clothes which were stained with blood. The clothes included; a pair of trousers and a jacket. He further stated that the 3rd appellant later led them to his house which was in Bondo behind the hospital and when they conducted a search, they recovered items which were stained with blood and the items include; two clubs, a panga and a greenish jacket.

38. The testimony of **PW6, Emily Adhiambo**, was that on the 21st day of June 2011 at about 8.00 pm, she was in the house of PW1 where she had gone to visit them. She stated that in the process, four (4) people entered into the house and ordered them to lie down. She stated that the people were armed with pangas and rungas and the people attacked them and she was injured on the head and the other people who were in the house were also injured. She stated that the people demanded money from them and PW1 gave them money. She explained that she could not identify any of the robbers. She later went to the hospital where she was treated.

39. **PW7, Dr. Willys Ochieng** was that the postmortem report in respect of the deceased that is Fred Mathew Epiku was filed by Dr. Oigiro Peter on the 22nd day of June 2011. He produced the postmortem report as exhibit 9.

40. The testimony of **PW8, CIP Javao Onzere** was that he investigated this case. He stated that on the 21st day of June 2011 at about 11.45 pm, he received a report of a murder incident at Barkowino. He stated that they proceeded to the home and when they reached there, they found PW1 who was in the company of other people. They also discovered that the deceased had been killed and other people had also been injured. He stated that PW1 explained to them what had happened and he commenced investigations.

41. It was his further testimony that while at the scene, PW1 identified the 4th appellant as one of the suspects and they arrested the 4th appellant. He further explained that during the investigations, he received information that some suspects had been arrested in Alego and when he went there, he found the 2nd appellant at the chief's camp where he was being detained. After that, they went to the house of the 3rd appellant. He stated that at the time of arrest, the 2nd appellant had a cut on the forehead while the 3rd appellant had a cut on the arm. He further explained that they took the 2nd and the 3rd appellants to the police station and while at the police station, he discovered that the 1st appellant had been involved in the incident and he made arrangements and the 1st appellant was arrested.

42. It was his further testimony that IP Kashmir conducted an identification parade for the 1st and the 4th appellants and they were positively identified by PW1. He further explained that the appellants recorded confessions that they were involved in the incident. He produced the statements which he recorded under inquiry as exhibits herein. The same are in respect of the 1st, 2nd and 3rd appellants. He further stated that during the investigations he recovered a panga and three runkus and that the three runkus were recovered from the house of the 2nd appellant.

43. The testimony of **PW9, PC SHADRACK MELLY** was that he took part in the investigations of this case. He stated that on the 21st day of June, 2011 at about 9.30 pm, he was on patrol with his colleagues when he received a report that a house had been broken into within Barkowino area. He stated that they were given directions and they proceeded to the home which was near the highway. He stated that when they reached there, they found PW1 together with other people. He stated that PW1 explained to them what had happened. He stated that they found the deceased lying down in a pool of blood and they also discovered that the other people had also been injured. He further explained that they were later joined by the OCS that is PW8 and other police officers. They took the body of the deceased to the mortuary while the people who had been injured were taken to Bondo District Hospital for treatment.

44. It was his further testimony that during the investigations, he interviewed PW1 who explained to him that the robbers stole money and phones which belonged to the deceased. He further stated that PW1 explained to him that the deceased cut some of the robbers during the incident.

45. It was his further testimony that on the following day, he received information that the 4th appellant was suspected to have been involved in the incident and that he was at the gate of the home of the deceased. He proceeded there in the company of his colleague and they arrested him. He stated that when he interrogated the 4th appellant the said 4th appellant disclosed to him that he knew the people who might have been involved in the incident and that the people were from Alego.

46. He further explained that on the 26th day of June 2011, the OCS told him that he had received a report that some suspects had been arrested in Alego. He accompanied the OCS and they went to Bar-Ogongo AP Camp and on arrival, they found two suspects namely the 2nd and 3rd appellants. He stated that each of the appellants had injuries and had been treated. He stated that the chief explained to them that he found the 3rd appellant sleeping in an isolated house and he recovered a phone and blood stained clothes from him and that the clothes belonged to the 2nd appellant. He stated that they also found a rungu and a panga. After that, they escorted the appellants to the police station. He stated that the OCS conducted identification parades and also kept the exhibits. He produced the items recovered as exhibits. He explained that the phones were misplaced at the police station and could not be traced.

47. At the close of the prosecution's case, each of the appellants adduced sworn evidence. The 1st appellant that is Joseph Opiyo Marende testified as DW1. In his sworn testimony, he denied the allegations that he was involved in the robbery. He stated that on the 21st day of November 2011 at about 8.30pm, he was at his place of work and that he went to his home at about 9.30pm. He further stated that on the 24th day of June 2011, he was arrested when he was within the court premises together with one Arimba. He stated that he was later charged with the offence before court together with the other accused persons who were all strangers to him.

48. The 2nd appellant that is Isaiya Otieno Osumba testified as DW2. He stated that on the 23rd day of June 2011 at about 8.00pm, he was at a funeral in Barding in Alego. He stated that he was arrested on the 23rd day of June 2011, after a disagreement with one Richard. He further explained that the injuries which he sustained on his head were caused by the said Richard who hit him with a piece of wood. He denied the allegation that he was one of the robbers who went to the complainant's home on the 21st day of June 2011.

49. On cross-examination, he admitted that some of the clothes which were produced as exhibits herein belonged to him. However, he denied the allegations that the clothes were stained with blood.

50. The testimony of DW3 that is Moses Omondi Omboko, the 3rd appellant was that on the 21st day of June 2011, at about 8.30pm, he was in his hotel at Migingo market within Bondo. He stated that on the 25th day of June 2011, he received information that one of his employees that is the 2nd appellant had been arrested and was being detained at Siaya police station. He explained that on the 26th day of June 2011, he went to Siaya police station. When he reached there, he was told that the second appellant had been taken to Bar Ogong'o Chief's Office.

51. He went to Bar Ogong'o Chief's Camp and when he reached there, he was told that the 2nd appellant had been taken to Bondo Police Station. He stated that he went to Bondo Police Station where he found many people including the complainant that is PW1. He further explained that while at the police station, PW5 alleged that he was one of the people who were involved in the incident. After that, he was arrested and later charged with the offence before court.

52. On cross-examination, he denied the allegations that he was arrested in Alego. He also denied the allegations that he had fresh injuries as at the time of his arrest. He also denied the allegations that the panga which was recovered from his house had blood stains. He also denied the allegations that the police officers recovered clothes which had blood stains from his house.

53. The 4th appellant that is John Etyang Ogweri, testified that on the 21st day of June 2011 at 8.30pm, he was at his home where he was selling chang'aa. He explained that on the 22nd day of June 2011, he received information that somebody had been killed the previous night. When he went to find out, he discovered that it was the deceased who had been killed. He explained that he stayed at the home of PW1 till the 30th day of June 2011 when he was arrested. He denied the allegations that he went to the complainant's home on the 21st day of June 2011.

DETERMINATION

54. I have considered the prosecution evidence on record, the judgment of the trial court, the grounds of appeal; and submissions for and against this. The following issues arise for determination:

- i. **Whether the appellants' constitutional rights were infringed;**
- ii. **Whether the charge sheet was defective;**
- iii. **Whether the prosecution evidence was inconsistent and contradictory;**
- iv. **Whether the prosecution failed to call crucial witnesses to prove their case;**
- v. **Whether the appellants were properly identified by recognition;**
- vi. **Whether the sentence meted out on the appellants was harsh and illegal.**

55. The appellants submitted that their constitutional rights were infringed as they were not provided with essential documents by the prosecution during their trial and this prejudiced them and as a result they should be acquitted. Article 50 (2) (j) provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence while sub-article (c) provides for the right of the accused to have adequate time and facilities to prepare his defence.

56. The right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence is expressly provided for in our constitution. In **Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR** (decided before the promulgation of the 2010 constitution) the Court of Appeal stated categorically that:-

“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under..... our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.” In arriving at this holding, the court cited common law duty as well as comparative decisions from various jurisdictions including the UK, Canada and Uganda: respectively R. V. Ward [1993] 2 ALL ER 557; R. V. Stinchcombe [1992] LRC (Cri) 68; Olum & Another V Attorney General [2002] 2 E.A. 508; and, the Kenyan Case of George Ngodhe Juma & two others Vs. The Attorney General Nairobi High Court, (Misc. Criminal Application No. 345 of 2001).”

57. Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. In the instant case the appellants have not disclosed what essential documents the prosecution failed to provide them and further it is not evident whether the appellants failed to raise this with the trial magistrate. The appellants had the opportunity, which they took to cross-examine the witnesses called by the prosecution without raising any complaint that they did not have the documents which the prosecution were relying on or producing in evidence as exhibits. Accordingly, this ground is found to be devoid of merit and is hereby dismissed.

58. The appellants further submitted that they were convicted on the basis of a defective charge sheet, which was never amended. The specific defect cited by the appellants was that the charge of robbery with violence brought against them was not substantiated by the evidence brought forth by the prosecution.

59. The principle of the law governing charge sheets is that an accused person should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

60. The test for a defective charge sheet is a substantive one, not a formalistic one and when it is used here it establishes that the charges gave fair notice to the appellants to the charges they were facing, and the trial was fair in a substantive sense.

61. From the evidence on record, I do note that PW1, PW2, PW5 and PW6 were at the scene of the incident and explained to the trial court the breakdown of events when they were attacked and robbed them by 4 people. Their evidence lays out the items which were stolen during the incident and also explains the injuries they suffered. I reasonably believe that they gave the same information to the police and the police used the information to charge the appellants herein. Further to these, I do note that the evidence in the testimonies given by PW1,2,5 & 6 flesh out the particulars of the charges brought against the appellants in Counts 1 and 3 of the charges.

62. The appellants also cited the charges brought against them as defective as the prosecution failed to provide supportive documents or exhibits to back up their case. The appellants submitted that the alleged phones stolen from the deceased as well as the other victims were not fully described. On this point I am in agreement with the trial magistrate that failure to disclose the make of the phone is not an omission which renders the charge fatally defective. Further, the phones were not produced as exhibits in this case after the investigating officer testified that the phones as recovered were misplaced at the Police Station and therefore I do not think that their description would have been of any importance in this case, considering the overwhelming evidence adduced of recognition of the robbers on the material night.

63. This court is unable to detect any prejudice which the appellant suffered. The record shows that the appellants suffered no confusion when the charges, as framed, were read to them and when the witnesses testified, they fully cross-examined them. The appellants raised no complaint before the trial court.

64. Section 382 of the Criminal Procedure Code provides, in material part that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

65. The proviso to Section 382 stipulates that in determining whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. Accordingly, it is my considered opinion that the appellants' complaint of a defective charge sheet are without merit and are hereby dismissed.

66. The appellants further impugned the trial court judgement on the grounds that it was based on inconsistent and contradictory evidence. They cited the evidence of PW8 and PW9 who were the investigating officers and submitted that they gave contradictory evidence.

67. I have already expressed my satisfaction with the evidence of PW1, 2, 5 and 6 who were victims of the attack by the appellants were and who recorded their statements with the police on how things unfolded on the material night. PW8 and PW9 testified that on the 21st day of June 2011 they both received report of a murder incident at Barkowino and proceeded to the scene where they found the deceased had been killed. They further stated that they undertook their investigations after which they brought charges against the appellants.

68. I am persuaded that there was no material contradictions in the evidence of PW8 and PW9 and if at all there was any, the same was not substantive as to lead this court to the conclusion that the prosecution witnesses deliberately intended to lie and as such the substance of the case against the appellants was not affected. In **Twehangane Alfred vs. Uganda (2003) UG CA 6** it was held:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

69. The appellants also submitted that the prosecution failed to call crucial witnesses such as Nyakisumo to testify and that this failure prejudiced them. In criminal cases the prosecution is required to avail to the court all relevant evidence to enable the court make an informed decision based on evidence available.

70. In **Bukenya & Others V Uganda [1972] EA 549** the court addressed itself thus:-

“(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.”

71. This court is however alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of Evidence Act (Cap 80) Laws of Kenya provides:-

“143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact”

72. In **Keter V Republic [2007] 1 EA 135** the court held inter alia:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

73. Accordingly, it is my humble view that the witnesses availed by the prosecution were enough to prove their case and that it has not been shown that failure to call some other persons who are named by the prosecution witnesses is not fatal to the prosecution's case. Accordingly, I find no substance in this ground of appeal. I dismiss it.

74. The appellants further submitted that that there was no identification or recognition of any of the appellants by the prosecution witnesses at the scene of crime as the same was not contained in the complainant's initial report. It is correct that a court has to be careful in considering evidence of recognition. In **Hassan Abdallah Mohammed vs Republic [2017] eKLR** it was stated that:

“Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in Wamunga vs Republic (1989) KLR 424 at 426 had this to say:

“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 a conviction.”

75. In **Nzaro vs Republic (1991) KAR 212**, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction. The factors to be considered with respect to recognition as set out in **R vs Turnbull & Others (1976) 3 ALL ER 549** must always be borne in mind when a court is dealing with the question of identification. The court in that case stated as follows:

“... 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.”

76. In this case, the complainant PW1 testified that the incident took place at around 8.30 p.m. when they were preparing to have supper with her son, PW2 as well as their two neighbours, PW4 & his wife PW6. She testified that she was able to identify the robbers in the house because in the sitting room, there was a lantern lamp while in the bedroom there was a spot-light and a solar lamp. She explained that the 1st appellant wore a pair of trousers with high waist and a pair of gumboots. That the 3rd appellant wore a brown pair of trousers while the 4th appellant wore a green t-shirt with a yellow band on the hands. She further explained that in the course of the attack by the appellants, one of them was shocked when they realized that the lantern lamp was on. In the process, one of the robbers asked whether they should kill her but she pleaded with them and one of them hit the lamp with a rungu and it went off. PW1 testified that the 1st appellant was known to her as he was her neighbour.

77. This evidence was corroborated by the testimony of PW2 who testified that the appellants failed to switch off the lights when they entered the house to commence the attack. PW2 further identified the 1st and the 4th appellants respectively as one who used to buy eggs at their shop while the 4th appellant used to work for them as a herdsman respectively.

78. The 1st appellant was arrested on suspicion that he had participated in the robbery. That suspicion was corroborated by the evidence of PW1 and PW2 who were firm that they identified him at the scene. As for the 2nd and 3rd appellants, they were arrested for reasons that PW5 received information that an incident of robbery had occurred in Bondo and the 3rd appellant was suspected to have participated in the incident and at the time of arrest, they had injuries. As for the 4th appellant, he was arrested when PW1 informed the police that he was one of the people who were at the scene at the time of the incident and PW1 was actually firm that he was among the robbers.

79. Subsequently, I am satisfied that in this case, the appellants were recognized by prosecution witnesses who knew them well. The house where the incident took place was well lit and the victims had enough time to recognize the appellants before the appellants broke the lamp. I am therefore unable to find any mystery in the manner in which the appellants were identified, and I find that the identification by recognition was safe. This ground of appeal also fails and is hereby dismissed.

80. Finally, as to whether the sentence meted out on the appellants was harsh and excessive, the trial court acquitted the appellants on Count 2 of the charge of robbery with violence but sentenced them to 50 years imprisonment on Count 1 and another 50 years imprisonment on account of Count 3.

81. In **James Kariuki Wagana vs Republic [2018] eKLR**, Prof. Ngugi J observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder.

82. In the case before me, all the ingredients of robbery with violence have been met. The appellants, robbed the complainant and her guests and further fatally wounded the complainants husband, and in the course of the robbery, the appellant not only used force, but were armed with dangerous weapons.

83. The Court of Appeal, on its part, in **Bernard Kimani Gacheru v Republic [2002] eKLR** restated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

84. Consequently, no reason has been presented or has emerged out of the record to warrant this court’s interference with the trial court’s sentence. Accordingly, this appeal against conviction and sentence is devoid of any merit and the same is hereby dismissed.

85. File closed.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 30th Day of November, 2020

R.E. ABURILI

JUDGE