REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 299 OF 2011

DONALD ATEMIA SIPENDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Judgement, sentence and conviction in Criminal case number 4984 of 2010,

R vs Donald Atema Sipendi & Kennedy V. Endeki at Nakuru,

delivered by Hon. W. Kagendo, P.M., delivered on 7.12.2011).

JUDGMENT

Introduction.

1. The principles to be kept in mind by a first appellate court while dealing with appeals are that there is no limitation on the part of the appellate court to review the evidence upon which the order appealed against is founded and to come to its own conclusion. The first appellate court can also review the trial court's conclusion with respect to both facts and law. It is the duty of a first appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.

2. When the trial court has breached provisions of the constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.[1]

3. As the Supreme Court of India aptly put "The appellate Court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,...The appellate Court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – **sans passion and sans prejudice**. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."[2]

Background to the appeal.

4. **Donald Atema Sipendi** (hereinafter referred to as the appellant) was charged and tried jointly with a one **Kennedy V. Endeki** with the offence Robbery with violence contrary to section **296 (2)** of the Penal Code[3] at the Chief Magistrates Court at Nakuru. He was sentenced to suffer death while his co-accused was acquitted of the charges. He now seeks to overturn both the conviction and sentence.

5. The facts were that on the **6th** September 2010, at Kiamunyi area in Nakuru District of the Rift Valley Province, jointly with others not before the court, he robbed a one **Maureen Jepkorir Kebenei** one mobile phone make Nokia E 86 valued at Ksh. 4,000/=, spectacles valued at Ksh. 6,000/=, a passport valued at Ksh. 1,230/=, one pen valued at Ksh. 200/=, one handbag valued at Ksh. 1,500, assorted documents valued at Ksh. 300/= and cash Ksh. 8,500/= all totalling to Ksh. 21,830/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said **Maureen Jepkorir Kebenei**.

6. The appellants faced an alternative count of handling stolen property. The facts were that on the **15th** Day of October 2010 at Rongai, in Nakuru District of the Rift Valley province, otherwise than in the cause of stealing, dishonestly retained one pen valued at Ksh. 200/= knowing or having reason to believe it to be stolen property of **Maureen Jepkorir Kebenei**.

7. The complainant's evidence was that on **6th** September 2010 at 7pm, she boarded a motor vehicle at Kamunyi Estate and at Olive Inn , the matatu stopped, and, some passengers alighted while others entered, among them a dark male person carrying a cement package who sat behind him. She stated that at the last stage the two men alighted before her, (i.e. the one with a cement bag and the other wearing a blue jacket) and both stood outside the vehicle as she alighted.

8. She stated that she entered her gate and locked it, and walked in but as she progressed she saw a tall man in a black T-shirt, blue jacket and a black trouser and talked to him confusing him with her brother but the voice was different. She testified that he went for her neck and they struggled towards her door, where the security light is. She stated that he pinned her down and took her purse and she raised an alarm. She stated that she lost the items listed in the charge sheet. Further, she stated that she was later informed that her documents had been recovered and some suspects had been arrested, and, that she later identified both accused persons at identification parades at the police station. She also stated that the appellant was found with her biro which she identified in court.

9. She was recalled for further cross-examination on **26th** May 2011. Upon cross-examination by the appellant, she stated that the appellant had no special marks on the face but she knew him by appearance. She stated that she had seen him before, and, on that day, headlights from a vehicle assisted in helping her see him. She also stated that he had the cement bag in the vehicle and he wore the same jacket. She stated that she did not see any weapon during the attack and that she had no visible injuries. She also stated that she was later informed by administration police officers that her items were recovered and she identified her biro. She also stated that she was able to identify the appellant at the identification parade.

10. **PW2 Isaiah Kiptoon** testified while home on the material day at around 8pm, he heard screams and switched on the security light and opened the door. He stated that he saw the complainant running after somebody towards the main gate. He stated that the person jumped over the fence, but he did not recognize him. He stated that the person was tall, and wore a jacket and t-shirt. He also testified that outside the gate they saw a cement bag which had an axe, piece of timber and beside the bag there was a pair of shoes.

11. **Mr. Kiptoon** also testified that a police officer called him and told him that the complainant's serial number had been traced and her phone was in use by the appellant who was identified by his co-accused. He stated that the appellant was traced at Salgaa and upon searching his bag, a biro answering the description provided by the complain was recovered. He also stated that a print out from Safaricom confirmed that the appellant had used the complainant's phone.

12. **PW3 Joshua Shika** a police officer from Nakuru Police station testified that he was requested to conduct parade at Mengai Police Station, and, that, both suspects informed him that they had no friend or representative to be with them during the parade, and, that, both accepted the parade. He stated that the complainant went to the parade and touched the appellant at the shoulder. Further, he stated that the appellant was satisfied with the parade, and, he signed the form, which he also signed. He testified that he disbanded the parade and conducted a second identification parade in which the second accused was identified by the complainant. He also signed the form and the also signed.

13. **PW4 William Chepotibit**, an Administration Police Officer from the Chiefs Office at Rongai at Kiamunyi testified that on **5th** October 2010 while at the station at **8.00** am some people informed him of papers scattered at the place and upon going to find out, he saw Some laminated documents, a national identification in the complainant's name and certificates which had been rained on and a lady's hand bag. He also saw a note book with a mobile number, but upon calling the number, a male person who turned out to be the complainants cousin answered. He identified the bag and the documents in court.

14. **Joseph Wekesa,** a police officer from Nakuru Police Station testified that he proceeded to Safaricom customer care, Nakuru and an officer traced the appellant who was arrested. Also, his co-accused who had mentioned him was also arrested. He stated that he recovered a pen from the appellant's bag.

15. **PC Allan Mboche** from Mengai Police Station testified that on **7th** September 2010 he was assigned to investigate this case. He confirmed that he instructed Safaricom to track a stolen phone serial number **35513086925182** and that he obtained a printout showing incoming and outgoing calls. He produced the print out in court.

16. At the close of the prosecution case, the learned Magistrate evaluated the evidence and placed both accused persons on his defence. The appellant elected to give sworn evidence, but called no witnesses.

17. The appellant testified that he befriended the complainant and she visited him every Sunday. He stated that one day a caller asked for the complainant and he warned him prompting him to suspect her of having another man. Also, he stated that the complainant henceforth refused to pick her calls or talk to her. He further stated that the same caller called asking him to get a quotation at Kiamunyi, but he declined. He stated that the same night the caller called asking for the complainant and he texted her about the incidence and she told her that the caller was her hash brother and he suggested to her that they remain apart.

18. The appellant further stated that one day the complainant's colleague quarrelled him for leaving the complainant and he called her but she warned him. He stated that he was arrested on **15th** October 2010 he was arrested and among those who arrested him was the harsh caller and a Mr. Mureithi. He stated that among the items taken from him was a pen which he was given at Fair deal after purchasing some items. He also stated that he was taken to the police station where he was beaten as the complainant's brother watched and he accepted never to see the complaint again. He stated that the pen was his, and, that, the complainant's brother never recorded a statement. The court allowed him to take the witness stand on **21st** October 2011 and he produced his pen as an exhibit.

19. After evaluating the evidence, the trial Magistrate found that the prosecution has established its case against the appellant but acquitted his co-accused. He was sentenced to death.

The appeal.

20. In my view, the appellants grounds can be reduced to, namely, **(a)** whether the prosecution proved the offence of Robbery with violence to the required standard; **(b)** whether the evidence of identification irresistibly pointed to appellant.

(a) whether the prosecution proved the offence of Robbery with violence to the required standard.

21. I note that both parties did not address the pertinent question of whether the ingredients of the offence of Robbery with violence were proved. It is common ground that the burden of the prosecution in criminal cases is to proof its case beyond reasonable doubt. [4]The legal burden of proof in criminal cases never leaves the prosecution's backyard. **Viscount Sankey L.C.** in the celebrated case of *Woolmington vs. DPP*[5] in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that:-

> *'Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception…No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

22. The question that follows is whether the prosecution established its case beyond reasonable doubt. This calls for close scrutiny of the evidence on record and the ingredients of the offence of Robbery with violence pursuant to Section **296(2)** of the Penal Code.[6] These ingredients were set out by the Court of Appeal in the case of *Johana Ndungu vs Republic*[7] as follows:-

> *i. If he offender is armed with any dangerous weapon or instrument; or*
>
> *ii. If he is in the company with one or more other person or persons, or;*
>
> *iii. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person.*

23. It is also trite law that proof of any one of the above ingredients of robbery with violence is enough to sustain a conviction under Section **296 (2)** of the Penal Code.[8] I have carefully studied the complainant's evidence. There is no mention that the offender was armed at the time of the alleged robbery. He is said to have jumped over the stone wall. The complainant testified that *"we struggled towards my door where the security light is. The person was holding me facing him. He pinned me down, then took my purse. I raise the alarm."* There is no evidence that during this struggle the robber was armed. The only mention of an axe and piece of timber comes later. These were alleged to have been recovered in a cement bag which was allegedly found outside the gate. The robbery was inside the compound. It is my finding that there was no evidence that the robber was armed with a dangerous weapon during the struggle described by the complainant or at the time of the alleged robbery or inside the compound. If any robbery took place, then it was simple robbery but not robbery with violence.

24. Ordinary robbery (simple robbery) is committed when someone uses violence or the threat of violence to take property from another person. Robbery with violence applies if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person. It's important to note that the dangerous weapon doesn't necessarily have to be used – if it's present, then it can be considered robbery with violence.

25. The second ingredient is that the robber must be in the company of one or more persons. True, the complaint stated that she saw two people after alighting from the matatu. She stated that she entered her gate and closed, but one person jumped over the wall or over the gate. This is the person who robbed her. There is no mention of the second person in the compound or during the robbery. She raised the alarm and PW2 switched on the light and came out and found the complainant chasing one person who jumped over the gate. Again there is no mention of a second person by **PW2**. It is my finding that this ingredient was not proved also.

26. The third ingredient is that at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person. First, there is no mention that at or immediately after the time of the robbery the complainant was wounded or beaten. There is no mention that he she was struck or he used violence. She said they struggled and he took her handbag. At page **16** she stated that he over powered her then she released her handbag. She also stated that she had no visible injuries.

27. The evidence tendered in this case did not establish the ingredients of Robbery with violence. In my view it could only be useful if the appellant was charged under section **296(1)** of the Penal Code[9] which provides a maximum sentence of 14 years. The appellant has served 8 years now.

b. Whether the appellant was sufficiently identified.

28. The appellant faulted the trial magistrate for convicting him on the basis of evidence of identification of a single witness which was not corroborated. He pointed out that she even mistook him with her brother. He submitted that the court has to warn itself of the dangers of corroboration. Further, he argued that that the parade was conducted contrary to the parade rules.

29. **Mr. Omutelema** argued that the appellant was known to the complainant who had seen him in the neighbourhood and in the matatu. He also submitted that the complainant was called to identify the assailant at the identification parade, hence, the evidence of identification was

sufficient.

30. *Identification evidence* is defined as evidence that a defendant was or resembles a person who was present at or near a place where the offence was committed, or an act connected with the offence. It is an established principle that there is a special need for caution before accepting identification evidence. In *Charles O. Maitanyi vs Republic*,[10] it was held *inter alia* that it is necessary to test the evidence of a single witness respecting to identification, and that great care should be exercised and absence of collaboration should be treated with great care.

31. Evidence from eyewitnesses is often the starting point for police investigations and it is estimated that it plays an important role in all contested cases. However, the memory is a fragile and malleable instrument which can produce unreliable yet convincing evidence. Because mistaken witnesses can be both honest and compelling, the risk of wrongful conviction in eyewitness identification cases is high, and can result in miscarriages of justice.

32. In *Kariuki Njiru & 7 others vs Republic*,[11] the court held *inter alia* that the *"law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."*

33. Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted of it. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does permit a guilty verdict on the testimony of one witness identifying the accused as the person who committed the crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate.

34. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.

35. I am also alive to the fact that it is necessary to test the evidence of a single witness respecting to identification, and take great care and caution to ascertain whether the surrounding circumstances were favourable to facilitate proper identification. These in my view include light, time spent with the assailant, clothes or any item that the witness may positively identify and whether the accused was known to the complainant. Such evidence may be reinforced by sufficient collaboration and where there is no collaboration the court needs to treat it with caution. Thus, in evaluating the accuracy of identification testimony, the court should also consider such factors as:-

a) What were the lighting conditions under which the witness made his/her observation?

b) What was the distance between the witness and the perpetrator?

c) Did the witness have an unobstructed view of the perpetrator?

d) Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

e) For what period of time did the witness actually observe the perpetrator?

f) During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

g) Did the witness have a particular reason to look at and remember the perpetrator?

h) Did the perpetrator have distinctive features that a witness would be likely to notice

and remember?

i) Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?

j) What was the mental, physical, and emotional state of the witness before, during, and after the observation?

k) To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

36. The positive identification of an accused is an essential element of any offence. It is a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution.The complainant stated that two men entered into a matatu and sat behind her. They alighted at the last destination and they were walking in the same direction. She walked fast since she was scared. She stated that light from an oncoming vehicle helped her see them. She added that she entered her gate and closed, but someone whom she confused with her brother jumped over

the gate and followed her. This was followed by a struggle and she raised the alarm and **PW2** switched on the light and the assailant snatched her handbag and ran. She tried to run after him but he jumped over the wall. **PW2** did not recognize the assailant at the scene.

37. The trial court in assessing the demeanour of a witness is expected to make a finding as to the integrity, honesty and truthfulness of such witnesses not his or her boldness or firmness. I am not in a position to comment on the demeanour of **PW1** since I did not have the opportunity of seeing her, but, I identify myself with the Court of Appeal's observation in the case of *Toroke vs. Republic**[12]*** and adopt them as relevant to the instant case.

> *"It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So the error or mistake is still there whether it be a case of recognition or identification."*

38. In *Oluoch vs. Republic**[13]*** the Court of Appeal **Chesoni**, **Nyarangi** and **Platt Ag, JJA** held: -

> *"In an identification parade, it is dangerous to suggest to an identifying witness that the person to be identified is believed to be present in the parade. The value of the parade as evidence in this case was considerably depreciated."*

39. **PW3** testimony was that *" I briefed her not to be afraid, look and see if any of the person who robbed her might be in the parade."* To me, this was a suggestion that her assailant may have been in the parade. My conclusion is consistent with the court of appeal finding in *Simon Kihanya Kairu & another v Republic*.[14] It is notable that failure to adhere to the identification parade guidelines will affect the evidential value of a resulting identification, as explained by the Court of Appeal in *Samuel Kilonzo Musau vs Republic**[15]*** thus:

> *"The purpose of an identification parade, as explained in KINYANJUI & 2 OTHERS VS REPUBLIC (1989) KLR 60, "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 courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification."*

40. Identification parade procedures are regulated by Police Force Standing Orders now under the National Police Service Act 2011, and previously under the Police Act (repealed). The procedure for identification parades were also laid out in the cases of *R V. Mwango s/o Manaa**[16]*** and *Ssentale v Uganda.**[17]*** The rules include the following:-

> *i. The accused has the right to have an advocate or friend present at the parade;*
>
> *ii. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;*
>
> *iii. Witnesses should be shown the parade separately and should not discuss the parade among themselves;*
>
> *iv. The number of suspects in the parade should be eight (or 10 in the case of two suspects);*
>
> *v. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;*
>
> *vi. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and*
>
> *vii. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.*

41. There is no evidence that the identification complied with the last three guidelines set out above. Identification of a suspect in any criminal offence is always a pivotal question and whenever it arises the trial court has to satisfy itself, before convicting him, that the question has been disposed of to such threshold as to leave no doubt that the suspect was positively identified. Where an identification parade, as part of the evidence of identification is in issue, it has been held that if the police force standing orders in respect of conduct of identification parades are flouted, the value of evidence of identification depreciates considerably. In ***David Mwita Wanja & Others versus Republic**[18]*** the Court of Appeal noted thus:-

> ***"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor to this Court emphasised that the value of identification as evidence would depreciate considerably unless an identification parade was held within the scrupulous fairness and in accordance with instructions contained in Police Force Standing Orders."***

42. The court proceeded to cite its own decision on this question in ***Njihia versus Republic**[19]*** where it held at page 424:-

"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. Whether that is possible, depends upon clear evidence of identification apart from the parade. 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 would be difficult, if not impossible, for the witness to dissociate himself from his identification of the man in the parade, and reach back to his impression of the person who perpetrated the alleged crime."

43. In such matters, the importance of the first statement to the police cannot be downplayed. If the description of the attackers is not given to the police then the evidential value of the identification parade from which the attackers were purportedly picked would be substantially diminished though the parade itself may not, merely for that reason, have been rendered invalid.[20] In ***Ajode v Republic[21]*** the Court of Appeal held that it is trite law that before an identification parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade. On the validity or otherwise of an identification parade, I rehash the pronouncement in ***John Mwangi Kamau v. Republic[22]*** where the Court of Appeal held as follows:-

"15. Identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68& 69 of 2008. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DW1, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB. No. 45 of 24/6/2003; the assailants' were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, this Court observed:-

"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."

16. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure" In Nathan Kamau Mugwe –vs- Republic- Criminal Appeal No. 63 of 2008 this Court faced with a similar situation expressed itself as follows:-

"As to the compliant in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade…"

17. Based on the foregoing, we are of the considered view that the failure to give the description did not invalidate the identification parade. We find the issue that falls for our consideration is the weight to be attached to the said identification evidence. On the issue of whether the identification parade was properly conducted we can do no better than to reproduce this Court's observations in David Mwita Wanja& 2 others –vs- Republic- Criminal Appeal No. 117 of 2005:-

"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -

"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. Whether that is possible, depends upon clear evidence of identification apart from the parade. 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."

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

> ***"6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -***
>
> **……**
>
> ***(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;***
>
> **……**
>
> ***(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"***

44. The Court of Appeal for East Africa discussed the danger of relying on such evidence without warning in ***Roria vs Republic[23]***. It stated:

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness…That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."***

45. The only corroboration was data from Safaricom which was used to allegedly trace the appellant. The document was produced by a police officer. Electronic record is documentary evidence under Part **111** of the Evidence Act.[24] Any information contained in an electronic record is deemed to be a document. An electronic record may be like computer print out, Compact Disc (CD), Video Compact Disc (VCD), Pen drive, Chip etc.,. In other words, it may be printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer. Admissibility of electronic evidence is wholly governed by sections **78A** of the Evidence Act which provides that:-

> *78A. Admissibility of electronic and digital evidence*
>
> *(1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.*
>
> *(2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.*
>
> *(3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—*
>
> > *(a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;*
> >
> > *(b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;*
> >
> > *(c) the manner in which the originator of the electronic and digital evidence was identified; and*
> >
> > *(d) any other relevant factor.*
>
> *(4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.*

46. The Supreme Court of India in *Anvar P.V. v. P.K. Basheer & Others**[25]*** observed, *inter alia*, that in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate obtained at the time of taking evidence, without which, the secondary evidence pertaining to that electronic record, is not admissible.

47. Where the probative value of the information in a data message depends upon the credibility of a (natural) person other than the person giving the evidence, there is no reason to suppose that section **78A** seeks to override the normal rules applying to hearsay evidence. On the other hand, where the probative value of the evidence depends upon the "credibility" of the computer (because information was processed by the computer), the Prosecution is obliged to adduce evidence to satisfy the court as to the evidence is credible.

48. Such evidence depends solely on the reliability and accuracy of the computer itself and its operating systems or programs. It is admissible as evidence in terms of section **78A** of the Evidence Act.[26] However, the court's discretion simply relates to an assessment of the evidential weight to be give thereto. The first port of call is to 'closely examine the evidence in issue and to determine what kind of evidence

it is and what the requirements for admissibility are.

49. In addition, documentary evidence from a computer may involve hearsay, and it is necessary to determine whether the value of the statements depend on the credibility of anyone other than the person giving the evidence. The truth of the contents of such statements must be tested against the author.

50. Once the evidence is admitted, a court must decide what weight to attach when evaluating the evidence. The evidential weight of a data message must similarly be determined, once admitted into evidence. In assessing the evidential weight of a data message, regard must be had to- (a) The reliability of the manner in which the data message was generated, stored or communicated; (b) The reliability of the manner in which the integrity of the data message was maintained; (c) The manner in which its originator was identified; (d) Any other relevant factors.

51. The accuracy of the computer is an important consideration when evaluating data evidence from a computer.[27] The computer experts are likely to be cross-examined explaining the required standards of accuracy, and whether that computer met the standards at the time the data was generated, stored or communicated.[28] Any doubts as to the accuracy of the operating system may affect the reliability of the evidence and the evidential weight given thereto.[29] This is the reason why the computer expert should be called as a witness to produce the data and satisfy the court on the reliability test. The court will need an expert to help it understand the technical procedures in regard to the accuracy and reliability of a computer.

52. As stated above, the Safaricom data records were produced by a Police Officer. He is not the maker of the document nor does he work for Safaricom. He could not give evidence on how the records were generated, stored or printed or vouch on their accuracy. In short, he was not competent to produce the same. The said evidence was not properly received. The learned Magistrate erred in law by allowing the said records to be produced by a person who was not competent to produce them.

53. In any event, the data showing that he used the complainants did not place the appellant at the scene. It was relevant (if proved) to establish the offence of handling stole property.

54. Also relied upon was a pen which the appellant claimed was hers. It is alleged to have been recovered from the appellants bag at the time of arrest. No inventory was prepared to support the alleged recovery. This weakened the prosecution evidence. In fact the appellant produced a similar pen in his defence which he said was his. The complainant said her pen had a mark. But the basics must be established first. Why was an inventory prepared. In any event, the most the pen could do is to establish an offence of handling stolen property. In my view, the evidence was weak to place the appellant at the scene.

55. The law is clear that there is no particular number of witnesses required for proof of any fact[30] and that subject to well known exceptions, a fact may be proved by the testimony of a single witness. On the other hand, the burden weighs heavily on any court considering the solitary evidence of a witness in respect of identification. The caution is that such evidence must be treated with greater care.

56. Evidence based on identification in criminal cases can bring about miscarriage of justice and t it is of vital importance that such evidence is examined carefully to minimize this danger. The court must warn itself of the special need for caution before convicting the defendant. Differently stated, the court must satisfy itself that the evidence if free from error. I do not think that the evidence relied upon by the court in arriving at the appellant's conviction meets this test.

Conclusion.

57. The best indication that a Court has applied its mind in the proper manner is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.***[31]***As Nugent J (as he then was) in *S vs Van der Meyden****[32]***stated:-

> *"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."*

58. This Court must determine, as regards the conviction in the first place, what the evidence of the state witnesses was, as understood within the totality of the evidence led, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial Court applied the law or applicable legal principles correctly to the said facts in coming to its decisions / findings or judgment. In other words, this court must consider whether the Magistrate considered all the evidence, weighed it correctly and correctly applied the law or legal principles to it in arriving at his judgment in respect of both the conviction and sentence. This exercise necessarily entails a close scrutiny of the evidence of each witness within the context of the totality of evidence, and what the trial court's findings were in relation to such evidence.

59. The rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the Court to find the defendant not guilty.

60. In view of my analysis of the issues discussed above, it is my conclusion that the appellant was convicted on totally unsafe evidence. *First*, the ingredients of the offence of Robbery with violence were not proved. *Second*, identification evidence was unsafe. *Third*, the Safaricom data records were produced by a Police Officer who was not competent in law to produce the same, hence, the said evidence was not properly received. *Fourth*, the mobile data did not place the appellant at the scene of crime. It was useful if the court pursued the offence of possession of the complainant's phone. *Fifth*, the police officers who allegedly recovered the pen omitted to prepare an inventory. This pits their evidence against that of the appellant. The possession of the pen could not by itself place the appellant at the scene but could survive in establishing handling or possession of stolen property.

61. I find that the conviction and sentence cannot be allowed to stand. Accordingly, this appeal succeeds. I hereby quash the conviction and set aside the sentence imposed upon the appellant in *Criminal case number **4984** of 2010, R v Donald Atema Sipendi at Nakuru, delivered by Hon. W. Kagendo, P.M. on 7.12.2011 on behalf of Mikoyan SRM.*

62. Accordingly, I order that the appellant ***Donald Atema Sipendi*** be released forthwith unless otherwise lawfully held.

Signed and Dated at **Nakuru** this **24th** day **January** 2019

John M. Mativo

Judge

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[1] See *Ganpat vs. State of Haryana* {2010} 12 SCC 59.

[2] In the case of *K. Anbazhagan vs. State of Karnataka and Others*, Criminal Appeal No. 637 of 2015.

[3] Cap 63, Laws of Kenya

[4] See Repblicvs Derrick WaswaKuloba {2005} eKLR

[5] {1935} A.C 462 at page 481

[6] Supra

[7] Criminal Appeal No. 116 of 2005 (UR)

[8] See Olouch vs Republic {1985} KLR 549

[9] Cap 63, Laws of Kenya.

[10] {1988-92} 2 KAR 75.

[11] Criminal Appeal no. 6 of 2001 (Unreported).

[12] {1987} KLR 204.

[13] {1985} KLR 549.

[14] {2006} eKLR.

[15] {2014} e KLR.

[16] {1936} 3 EACA 29.

[17] {1968} E.A.L.R 365.

[18] **{2007} eKLR.**

[19] **{1986} KLR 422**

[20] See the Court of Appeal decision in **Nairobi Criminal Appeal No. 176 of 2006, *Nathan Kamau Mugwe versus Republic* (2009) eKLR).**

[21] **{2004} 2 KLR 81.**

[22] **{2014} eKLR.**

[23] **{1967} EA 583 at page 584.**

[24] Cap 80, Laws of Kenya.

[25]Civil Appeal no. 4226 of 2012.

[26] Cap 80, Laws of Kenya.

[27] S v Ndiki and Others [2007] 2 All SA 185 (Ck) 196.

[28] Van der Merwe D et al (2008) 123.

[29] [2007] 2 All SA 185 (Ck) para 32.

[30] See Section ....Evidence Act, Cap 80, Laws of Kenya

[31] S vs Singh {1975} (1) SA 227 (N) at 228.

[32] {1999} (1) SACR 447 (W) stated at 450.