REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 65 OF 2016

CHARLES KIMANI MURAYA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence by the Chief Magistrate's Court at Eldoret (Hon. C. Obulutsa, SPM) delivered on 20 May 2016 in Criminal Case No. 547 of 2012)

JUDGMENT

[1] This is an appeal that was filed herein on **31 May 2016** by the Appellant, **Charles Kimani Muraya**, from the conviction and sentence passed against him on **20 May 2016** in **Eldoret Chief Magistrate's Criminal Case No. 547 of 2012: Republic vs. Charles Kimani Muraya**. He had been charged before the lower court with the offence of robbery with violence, contrary to **Section 296(2)** of the **Penal Code, Chapter 63** of the **Laws of Kenya.** The particulars of the charge were that on the **1st day of February 2012** at Islamic Centre in Kaptagat Area within the Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely two pistols, they robbed **Paddy Githuku Kamau** of his motor vehicle **Registration Number KBN 275M** Toyota Fielder, Mobile Phone make Samsung, a Seiko 5 wrist watch, a golden bracelet and money in cash, **Kshs. 6,800/=,** all valued at **Kshs. 723,000/=** and at the time of such robbery wounded the said **Paddy Githuku Kamau.**

[2] The Appellant denied that Charge and its Particulars and was taken through the trial process in which the Prosecution called 4 witnesses. In his defence, the Appellant gave a sworn testimony denying the allegations against him. The Learned Trial Magistrate then rendered his Judgment herein on **20 May 2016** in which he considered the evidence presented before him. On the basis thereof, he found the Appellant guilty of the offence of robbery with violence as charged, convicted him thereof and sentenced him to suffer the death penalty which he felt obligated by law to pass.

[3] Being aggrieved by that decision, the Appellant lodged this appeal on **31 May 2016** on the following Grounds of Appeal:

[a] That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him to death;

[b] That the Learned Trial Magistrate erred in law by failing to analyze the essential ingredients of robbery with violence as provided for in **Section 296(2)** of the **Penal Code;**

[c] That the Learned Trial Magistrate erred in law and fact by convicting and sentencing him to death on flawed procedures more especially on the issue of identification and the doctrine of recent possession of stolen property;

[d] That the Learned Trial Magistrate erred both on points of law and fact by putting reliance on identification parade which was not in compliance with the law;

[e] That the Learned Trial Magistrate erred in both law and fact by putting reliance on the evidence adduced by **PW1** to **PW4** without observing that the same was surrounded by and tainted with discrepancies, contradictions and inconsistencies;

[f] That the Learned Trial Magistrate erred both in law and fact in convicting him and yet failing to independently analyze and evaluate the evidence before drawing conclusions as by law required;

[g] That the Learned Trial Magistrate erred both in law and fact by convicting him without taking into account the weight of the defence evidence adduced by him;

[h] That the Learned Trial Magistrate erred both in law and fact by failing to find that the Prosecution had not proved its case beyond reasonable doubt.

Consequently, the Appellant prayed that his appeal be allowed, the conviction quashed and the sentence set aside.

[4] With the leave of the Court, the Appellant filed the following Supplementary Grounds of Appeal on **20 December 2018**:

[a] That the Learned Trial Magistrate erred in both law and fact by relying on the purported identification parade whereas, from the record, no identification parade is indicated as having been produced in court by the parade officer or the investigating officer;

[b] That the evidence of **PW1** was admitted in total violation of **Section 151** of the **Criminal Procedure Code** as no oath was administered and therefore pursuant to **Article 50(4)** of the **Constitution,** the same should be excluded;

[c] That the credibility of **PW1** indicates that the was a person of doubtful integrity and not a straightforward person hence his evidence was questionable;

[d] That the Learned Trial Magistrate erred in both law and fact by holding that the case for the Prosecution was proved beyond reasonable doubt, whereas the evidence on record does not support such finding.

[5] The Appellant argued his appeal by way of written submissions which he filed along with his Supplementary Grounds of Appeal. He explicated his Grounds of Appeal by submitting that, although **PW2** claimed to have conducted an identification parade in his case, he nevertheless failed to produce the identification parade form as an exhibit; and therefore that the Learned Trial Magistrate misdirected himself by relying on the purported identification parade as a basis for conviction. He accordingly submitted that without the identification parade the evidence of identification by **PW1** was worthless. He relied on **Criminal Appeal No. 109 and 116 of 2012: Kelvin Kimathi Nyaga vs. Republic** for the proposition that a court must always satisfy itself that it is safe to act on the evidence of identification presented before it.

[6] Secondly, the Appellant took issue with the evidence of **PW1,** contending that he was not sworn before his evidence was taken by the lower court; and therefore that the evidence of **PW1** was taken in utter violation of **Section 151** of the **Criminal Procedure Code**. He also urged the Court to look at the **Essentials of Criminal Procedure in Kenya by Partick Kiage** on the issues of swearing and affirmation and disregard **PW1's** evidence pursuant to **Articles 25(c)** and **50(4)** of the Constitution, contending that the said evidence was taken in violation of his constitutional right to a fair trial. However, having compared the typed proceedings of the lower court with the original record, this ground is baseless, as the original record confirms that **PW1** was duly sworn before his testimony was taken.

[7] On another plane, the Appellant impugned the evidence of **PW1** on the ground of credibility. According to him, **PW1** is a person of doubtful integrity and therefore unreliable as a witness. He said so because he was refractory as to whether or not he had known him before the robbery incident; and on whether or not the Appellant's personal documents were found in the recovered motor vehicle. The Appellant relied on **Ndungu Kimanyi vs. Republic [1979] KLR 282** for the principle that a witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person. Again, there is no basis for this contention as the original record does show that the Appellant was unknown to the Complainant prior to this incident.

[8] Lastly, it was the submission of the Appellant that failure by the Prosecution to call the arresting officer was a fatal omission; as he was the most crucial witness who could have linked him with the motor vehicle that was allegedly recovered in Nairobi. He cited **Criminal Appeal No. 181 of 1984: John Kenga vs. Republic** and **Bukenya and Others vs. Uganda [1972] EA 549** and urged the Court to draw the inference that had the witness been called before the lower court, his evidence would have been adverse to the Prosecution Case.

[9] On the death penalty that was passed against him, the Appellant relied on **Francis Karioko Muruatetu [2017] eKLR** and urged the Court to bear in mind that the mandatory nature of the death sentence has since been declared unconstitutional by the Supreme Court. He accordingly prayed that his appeal be allowed; that his conviction be quashed, and the sentence set aside.

[10] Ms. Mumu, Learned Counsel for the State, opposed the appeal. In her submission, all the ingredients of the Charge of robbery with violence as prescribed in **Section 296(2)** of the **Penal Code**, were proved beyond reasonable doubt by the four Prosecution Witnesses who testified before the lower court. She pointed out that credible evidence was adduced to show that the offenders were more than two in number; that they were armed with guns; and that the Complainant was injured in the course the incident, in respect of which a P3 Form was produced before the lower court. **Ms. Mumu** also submitted that an identification parade was conducted in Nairobi by **PW3** in which the Appellant was identified by **PW1**. She was of the view that **the Muruatetu Case** is of no avail to the Appellant as it did not outlaw the death penalty. In the circumstances, she urged for the dismissal of the appeal.

[11] This being a first appeal, it is expected of this Court to subject the evidence that was presented before the lower court to a fresh analysis and evaluation, for the Court to come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32** by the Court of Appeal for East Africa made this point thus:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."

[12] Accordingly, I have carefully considered the evidence that was presented before the lower court by the Prosecution. The record of the trial court shows that the Complainant's evidence was taken on **13 June 2012**. He told the court that he was then a taxi operator, with his base outside **Miyako Hotel** in **Eldoret Town**; and that on the **1 February 2012**, he was at his work station when two people, a man and a woman, approached him and asked him to take them to **Moi Teaching and Referral Hospital** and then to the **Islamic Centre**. He had his own motor vehicle, **Registration No. KBN 275N, Make Toyota Fielder**, which he was using for his taxi business.

[13] It was the evidence of **PW1** that, on the way, as they approached **Moi Teaching and Referral Hospital**, the man, who sat in the co-driver's seat and who he identified to be the Appellant herein, instructed him to stop and pick up some two people. They then proceeded on past the **Islamic Centre** when the Appellant suddenly changed the gear to neutral, whipped out a gun and demanded to know how much money he had. That the Appellant proceeded to snatch his mobile phone from him as he forced him to drink some water-like substance. He soon blacked out and when he regained his consciousness, he found himself at **Ravine**. With the help of members of the public, he contacted his wife on phone and was consequently picked up from **Ravine** and taken to **Eldoret** where he recorded his statement the following day.

[14] PW1 further told the lower court that he was informed the following day that his stolen motor vehicle had been recovered in **Nairobi;** whereupon he was required to travel to **Nairobi** to identify the same. He testified that, while in **Nairobi**, he was also required to view an identification parade and was able pick out the Appellant from the parade. **PW1** identified the **Motor Vehicle Registration No. KBN 275M** before the lower court and also presented its log book to the court.

[15] PW2 before the lower court was **Chief Inspector Boaz Waiswa**, who was then attached to **Kasarani Polce Station** as the Officer in Charge, Crime. His evidence was that he was on duty on **3 February 2012** when **Cpl Ndiwa** of CID, Eldoret requested him to carry out an identification parade in respect of the Appellant who was then held in custody at the **Kasarani Police Station** as a suspect. He then proceeded to make arrangements for the parade and looked for persons with similar features as the Appellant; explained to the Appellant the purpose of the parade and the rules; and then proceeded to conduct the parade whereat the Appellant opted to stand between parade members numbers 5 and 6. His evidence was that the identifying witness, who was **PW1** herein, positively identified the Appellant and that the Appellant had no complaint about the manner in which the parade was conducted.

[16] Joel Suter (PW3), a Medical Officer attached to **Huruma District Hospital, Eldoret**, told the lower court that that **Paddy**, the Complainant herein, went to their facility seeking treatment; and that he presented a history of having been attacked by four people. He further stated that he examined him and found him with injuries on the left side of the jaw, left palm, as well as conjuctiva. He filled and signed the P3 Form in which he set out his findings and conclusions and had it produced before the lower court as the **Prosecution's Exhibit No. 3.**

[17] The last Prosecution Witness was the Investigating Officer, **Cpl. Ndereba (PW4)** who was attached to **Eldoret Police Station** at the material time. His evidence was that he was the duty officer on the night of **1 February 2012** when a report was made via police radio of the theft of **Motor Vehicle Registration No. KBN 275M Toyota**. Thereafter, at about 10.00 p.m., he was informed by the DCIO that the motor vehicle had been recovered in Nairobi, and a suspect arrested. He also confirmed that the Complainant was found at **Eldama Ravine;** was rescued and escorted to **Eldoret.** Thereafter, they proceeded with the Complainant to **Nairobi**, where he identified the recovered motor vehicle at **Buruburu Police Station**. He also stated that an identification parade was arranged for and conducted in respect of the suspect at **Kasarani Police Station** in which the Complainant positively identified the suspect, the Appellant herein. The Appellant was then escorted to **Eldoret** where he was charged. He confirmed that the stolen motor vehicle was also produced before the lower court before being released to the Complainant.

[18] In his defence, the Appellant told the lower court that he clocked off work at about 5.00 p.m. and went home. In the evening he went to **Monaco Bar** where he had drinks until about 11.00 p.m. He thereafter left for his home aboard a motorcycle; and that on the way, they had a mishap in which the motorcycle overturned and the Police were involved; and that it then became apparent that the motorcyclist had no licence. According to him, that was how he got arrested for not wearing a helmet, and for being drunk and rude to the police officers; and was thus escorted to **Kasarani Police Station**. He was later informed that he had been arrested in connection with a robbery incident and was required to appear in a parade and choose where to stand; and that **PW1**, who had had an opportunity to see him in cells earlier, viewed the parade and purported to identify him. After that he was escorted to Eldoret CID office and was charged with robbery. He denied that his personal documents were found in the recovered motor vehicle. He likewise denied that he had anything to do with the said motor vehicle or the alleged robbery.

[19] The offence of robbery with violence is defined in **Section 295** of **the Penal Code,** wherein it is provided that any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery. Further to the foregoing, **Section 296(2) of the Penal Code**, pursuant to which the Charge against the Appellant was laid, stipulates that:

> **"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, he shall be sentenced to death."**

[20] In the premises, the Prosecution was under obligation to prove any of the following key ingredients of the charge:

> **[a]** That the Appellant was armed with a dangerous or offensive weapon or instrument; or
>
> **[b]** That he was accompanied by one or more other person or persons; or
>
> **[c]** That immediately before or immediately after the time of the robbery, he wounded, struck or used any other personal violence against the Complainant;

[21] From the evidence adduced before the lower court, there is no dispute that the Complainant was at the time operating as a taxi driver. His base was outside **Miyako Hotel** in **Eldoret Town.** He was using his own motor vehicle, **Registration No. KBN 275N, Make Toyota Fielder**, for his taxi business. Accordingly, it is indubitable that, on the **1 February 2012**, he was at his base, outside **Miyako Hotel,** when two people, a man and a woman, approached him and asked him to take them to **Moi Teaching and Referral Hospital** and then to the **Islamic Centre.** The Complainant gave uncontroverted evidence that, on the way, as they approached **Moi Teaching and Referral Hospital**, the man, who sat in the co-driver's seat and who he identified to be the Appellant herein, instructed him to stop and pick up some two people; which was done; and that after passing the **Islamic Centre**, the Appellant suddenly changed the gear to neutral, whipped out a gun and demanded to know how much money he had. The woman also produced a gun at almost the same time; and that the Appellant proceeded to snatch his mobile phone from him as he forced him to drink some water-like substance which caused him to lose his consciousness. When he regained his consciousness, he found himself at **Ravine** the following day. He had been robbed of not only his Phone Make Samsung, a Seiko 5 wrist watch, a golden bracelet and money in cash, **Kshs. 6,800/=,** but also the Motor Vehicle **Registration Number KBN 275M**.

[22] The evidence of the Complainant was augmented by the evidence of **PW3**, who confirmed having attended to the Complainant at **Huruma District Hospital** and filled the P3 Form upon examining him. He confirmed that the Complainant had injuries on the left side of his jaw, the left palm and conjuctiva. He produced the P3 Form as an exhibit before the lower court. He classified the injuries suffered by the Complainant as "Harm". Clearly therefore key ingredients of the offence of robbery with violence were proved before the lower court, noting that proof of any one of the ingredients set out in **Section 296(2)** of the **Penal Code** would have sufficed. (See **Suleiman KamauNyambura vs. Republic [2015] eKLR)**. The Prosecution presented evidence before the lower court to prove that the offenders were more than two persons in number with a common intention of robbing the Complainant; and that they were armed with dangerous or offensive weapons, namely pistols; and that at the time of the robbery, they assaulted and wounded the Complainant, thereby causing him actual bodily harm. Hence, the only remaining issues arising from the Grounds of Appeal and the submissions made herein by the Appellant and Learned Counsel for the State are:

[a] Whether the Appellant was positively identified as one of the people who robbed the Complainant;

[b] Whether the Appellant was sufficiently connected to the recovered stolen motor vehicle;

[c] Whether the death sentence that was meted on the Appellant by the lower court was warranted.

[a] On the Evidence of Identification:

[23] The evidence of the Complainant was that the incident occurred at about 10.30 p.m in the night; and therefore it was undoubtedly dark. It was therefore imperative that the evidence of the Complainant, as the only identifying witness, be subjected to a thorough examination and careful testing by the lower court to rule out the possibility of mistake. The guidance given in **R. vs. Turnbull & Others [1973] 3 AllER 549,** is that:

> **"...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?**

[24] Likewise, in **Wamunga vs. Republic [1989] KLR 426**, the same principle was restated thus:

> **"It is trite law that 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 conviction."**

[25] The Court of Appeal in **the Wamunga Case** went ahead and made suggestions as to how this careful testing should be undertaken. Here is what the Court of Appeal had to say in this connection:

> ***"It is at least essential to ascertain the nature of the light available. What sort of light, its size and its position relative to the suspect; are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of Senior Magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the greatest care."***

[26] The Complainant explained that the Appellant sat in the co-driver's seat and that as he drove along there was some conversation between them before he lost consciousness. There, however, was no indication as to the circumstances then prevailing, or the source of light if at all; or an explanation as to how the Complainant was able to see the Appellant; a person he admittedly did not know prior to this incident. There was no indication that the Complainant gave a description of the Appellant or any of the robbers to the Police at the first opportunity. Hence, all the Complainant said was that he positively identified the Accused in Nairobi.

[27] Regarding the identification in Nairobi, **Chief Inspector Boaz Waiswa**, **PW2** before the lower court, who was then attached to **Kasarani Polce Station**, told the lower court that on **3 February 2012, Cpl Ndiwa** of CID, Eldoret requested him to carry out an identification parade for the Appellant who was in custody at the **Kasarani Police Station**. He then proceeded to make arrangements for the parade and that the Appellant opted to stand between parade members numbers 5 and 6. His evidence was that the identifying witness, who

was **PW1** herein, positively identified the Appellant; and that the Appellant had no complaint about the manner in which the parade was conducted. The record however shows that the identification parade form was never produced in evidence as an exhibit before the lower court, though a faint carbon copy of the Identification Parade Form forms part of the lower court record. There is no explanation at all for this anomaly. Hence, it is my considered view that the evidence of identification presented before the lower court was not cogent enough to form the basis of the Appellant's conviction.

[b] <u>On the Doctrine of Recent Possession</u>:

[28] In **<u>Isaac Ng'ang'a Kahiga *alias* Peter Ng'ang'a Kahiga vs. Republic Cr. Appl No. 282 of 2005 (UR)</u>** the elements of the doctrine were set out thus:

> **"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof;**
>
> **i) that the property was found with the suspect;**
>
> **ii) that the property is positively the property of the complainant;**
>
> **iii) that the property was stolen from the complainant;**
>
> **iv) that the property was recently stolen from the complainant**
>
> **The proof as to the time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."**

[29] There was credible evidence, adduced by the Complainant and **PW4,** that the Complainant's stolen motor vehicle was recovered at **Buruburu** in **Nairobi** and was duly identified by the Complainant. **PW4** relied on information given to him by the DCIO. He knew neither when the motor vehicle was recovered nor the exact circumstances of its recovery. Thus, he stated that he was on patrol as the Duty Officer on the night of **1 February 2012** when he received communication on police radio, at about 8.30 p.m. of the theft of the subject motor vehicle, **Motor Vehicle Reg. No. KBN 275 M**. He then added that at 10.00 p.m. he was called by the DCIO and told that the motor vehicle had been recovered in **Nairobi Buruburu** and a suspect had been arrested; giving the impression that the motor vehicle had been recovered the same night of the robbery. At any rate, he did not state exactly when the theft was reported to have taken place. Again, his evidence in this crucial aspect was not interrogated before the lower court for clarity.

[30] On his part, the Appellant did mention that he was arrested on the night of **1 February 2012** at about 11.00 p.m; thereby raising a pertinent question as to whether he could have committed the offence in **Eldoret** at 10.30 p.m., going by the evidence of the Complainant; and be in Nairobi by 11.00 p.m. on the same night. Clearly there was a missing link which the lower court ought to have interrogated further. Moreover, granted the evidence of **PW1** as to the time of the robbery, it is inexplicable that the Learned Trial Magistrate came to the conclusion that the Complainant was attacked during the day after 10.30 a.m.

[31] More importantly, there was absolutely no evidence presented before the lower court to show that the motor vehicle was found in the possession of the Appellant; and the Learned Trial Magistrate made clear findings in this regard thus:

> **"...prosecution has not explained how the accused was arrested as the arresting officer was not called as a witness. The testimony of PW1 Paddy and PW4 Corporal Ndereba is that they were informed of the recovery of the motor vehicle and arrest as a suspect. How and where they couldn't substantiate..."**

[32] In the light of the foregoing, where is the evidence that the motor vehicle was found in the possession of the Appellant; or that the Appellant's identity card and ATM card were recovered in the Complainant's car in Nairobi, as was suggested by the Complainant?

[33] In the premises, and from a reconsideration of the evidence adduced before the lower court, it cannot be said that the Prosecution proved beyond reasonable doubt that the Appellant was one of the four people who robbed the Complainant. Accordingly, it is my considered finding that his culpability was not established and therefore that his conviction was not safe. I would quash his conviction and set aside the sentence of death that was imposed on him. He should therefore be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF MARCH, 2019

OLGA SEWE

<u>JUDGE</u>