REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J

HCCR APP NO 44 OF 2017

(Formerly High Court Narok Sub-Registry No.s 2A, 2B, 2C & 2D of 2016)

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No. 570 of 2015

in the Chief Magistrate's Court, at Narok, T. A. Sitati, SRM)

STEPHEN MONI OLE KELEMBO ALIAS MAINE.....1ST APPELLANT

PARKEN LOSIKANY.....2ND APPELLANT

LETEIYO OLE KARKAR.....3RD APPELLANT

NKUYATA OLE NKAIYIAKA.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Background and basis of appeals

1. This is an appeal against the conviction and sentence delivered by Hon. T.A Sitati (SRM) in Narok Chief Magistrate's court on 29th December, 2016. The essential facts of the case in the lower court were that the appellants, posing as police officers on the night of 4 th April 2014, stormed into the house of the complainant Kituli Silanke in the pretext that he had been keeping elephant tusks. They ransacked the house and made off with Kshs 100,000/= in cash from his pockets, two mobile phones and another 20,000/= from his house. They beat up his wife, and locked up the complainant's farm worker, Swakei Sena. They then disappeared into the night.

2. In the lower court trial, Leteiyo Ole Karkar was the 1st Accused; Parken Losikany was the 2nd accused; Nkuyata Ole Nkaiyiaka alias Naroosora was the 3rd accused; and Stephen Moni Ole Kelembu alias Maine was the 4th accused. They were each charged with two counts of robbery. The first count was robbing Kituli Ole Silanke with violence money and mobile phones all valued at Kshs 128,000/= on the night of 4th and 5th April, 2014. The second count was that of robbing with violence one Karaine Ole Munene with violence clothing and a phone worth Kshs 29, 920/= on the night of 8th and 9th April, 2014. Each accused denied the offences.

3. After a full hearing, the appellants were each convicted in count 1 only with the offence of robbery with violence against Kituli Ole Silanke, contrary to **section 296(2)** of the **Penal Code.** They were each sentenced to death. They filed separate appeals in the High Court at Narok. On application by the 3rd appellant – with the support of the other appellants –the appellate Judge in Narok disqualified himself from hearing the matter, on the ground that he had heard and dismissed another appeal by the 3rd appellant (Narok Criminal Appeal No 15 of 2016). The learned Judge thus transferred this appeal to Naivasha for hearing.

4. The appellants' appeals herein are premised on following grounds:

1st Appellant's (Stephen Moni Ole Kelembo* alias Maine - *4th Accused) grounds of appeal

5. The 1st appellant's grounds are summarized as follows. That the learned trial Magistrate erred in law and fact:

a. by convicting the appellant on reliance of evidence on special mark on forehead but failed to note that the evidence was not recorded anywhere especially when PW1 made report to the police

b. by convicting the appellant on evidence of identification parade which was not conducted following procedures of conducting identification parades.

c. by convicting the appellant but failed to note that some of the uncalled witnesses were crucial to the prosecution case especially PC Dimba who arrested the appellant.

d. by holding that accomplice evidence could in law be taken as conclusive evidence in corroborating the prosecution case; while the evidence on record does not point to any of the accused as accomplice nor as the perpetrator of this crime

6. The 1st appellant argues that PW1's evidence that one of the assailants had a mark on the face was an afterthought, and that the court should question why PW1 did not give this information to anyone else and also did not indicate that information in his report in the OB. Further, he points out that PW1 testified that he had seen the 1st appellant prior to the incident in cattle auctions but wonders why or how this information was not shared when he was making his report or talking to any other person.

7. He also states that an identification parade was not conducted for him. He relies on the evidence of PW8 who stated that the 1 st appellant stood as member no.5 while the parade form shows that member no. 5 was Mr. Ferdinand Maina box nil. Thus, he was not properly identified. In addition, the 1st appellant states that the parade was unfair since he was placed among mostly Kikuyu men which made him an easy target for identification since Kikuyus and Maasais have different features and he was the only one with pierced ears and removed teeth and also that his photos were taken and could have been shown to the complainant prior to identification.

8. Finally, the 1st appellant's submission was that PC. Diba, his arresting officer, was a crucial witness and should have attended court for questioning on the issue of an alleged grudge between them. He was not called. Further, the 1st appellant states that he was arrested after being named by the 4th appellant and that is the evidence the court used to convict the 1st appellant but the record shows that the 1st appellant was arrested after an informer informed police that he had been spotted around the area and that the evidence of a co-accused cannot be used against an accused person if the co-accused person's testimony is unsworn.

2nd appellant's (Leteiyo Ole Karkar- 1st Accused) grounds of appeal

9. The 2nd appellant's grounds are summarized as follows. That the learned trial Magistrate erred in law and fact:

a. by convicting the appellant in reliance of evidence of recognition but failed to note that PW1 had not reported to have known his assailants to the police in his first report in OB NO. 14/5/04/2014 in Narok police station; thus bringing doubts as to this evidence. It was therefore an error in law to convict on erroneous evidence.

b. in misconstruing the circumstances of the arrest of the appellant in connecting him with the Robbery in question; while the truth was the appellant had no nexus with the purported robbery.

c. by dismissing the appellant's plausible defense and failed to advance reasons as to why the appellants defence was not acceptable.

10. The 2nd appellant argues that PW1 did not properly identify him as lighting in his house was insufficient and the only source of light was flashlights. Further, he argues that PW1 did not describe the assailants to the police and no remarkable features are sworn, that the dressing code was not indicated; that there were no peculiar features on their appearance; and that he could identify the assailants if he saw them again. In addition, he states that his arrest was not in connection with the robbery and that his defense was truthful.

3rd appellant's (Parken Losikany- 2nd Accused) grounds of appeal

11. The 3rd appellant's grounds are summarized as follows. That the learned trial Magistrate erred in law and fact:

a. by convicting the appellant in reliance of evidence of recognition but failed to note that PW1 did not report to have known his assailants to the police or to have personal knowledge of the appellant prior to his arrest, in his report to police in OB/NO. 14/ 5/2014.

b. by convicting the appellant but failed to note that his arrest was not connected to the robbery but an earlier business with pw1's brother which turned sour.

c. by convicting the appellant in reliance to evidence of recording and procurement of a confession were not followed which made the confession invalid.

d. by convicting the appellant but failed to note that the appellant's defence was plausible therefore able to overturn the prosecution evidence.

12. The 3rd appellant submits that if PW1's evidence that he knew him as a previous neighbour was an afterthought since he did not report to the police and was not able to state that one of the robbers is a long time neighbor and give his description to the police the way he did in court and that the evidence of recognition therefore fails as there was no evidence of personal knowledge. Further he states that there was no positive identification on that night if the incident since the use of spotlights did not provide enough light for recognition and that the magistrate failed to warn himself on the dangers of conviction based on evidence of a single identifying witness.

13. 3rd appellant further submits that PW1 testified to knowing him personally as his age mate and even sold the 3rd appellant's motorcycle to PW1's and wonders why this information was not given to the police during recording of his statement. He states that his arrest was therefore not in line with the robbery as PW1 testified that they entered the bar where 3rd appellant was and started questioning him about a motorcycle and not a robbery.

14. It is the submission of 3rd appellant that the law concerning confessions is very clear, that it must be voluntarily made that a person looking at the interest of the accused as to be called, that the accused should not be stressed or induced and that the officer recording the confession must be an officer not below the rank of an inspector of police or a magistrate and this was not followed because PC Chemosit is not a police constable and so he could not in law record a confession and Losikany did not disclose to have voluntarily recorded a confession. He submits that his defence was plausible and should have been considered by the trial court but it did not.

4th appellant's (Nkuyatta Ole Nkaiyiaka – 3rd Accused) grounds of appeal

15. The 4th appellant's grounds are summarized as follows. That the learned trial Magistrate erred in law and fact:

a. in reliance of the evidence of recognition by PW1 but failed to note that the conditions for positive identification were difficult.

b. by convicting the appellant basing his conviction on evidence of a poorly conducted identification parade but failed to note that, the rules drafted under chapter 46, the Kenya Police force standing orders were not adhered to.

c. in misconstruing the circumstances of the arrest of appellant in connecting him with the robbery of PW1 and holding that the appellant had made a confession to corroborate the prosecution evidence but failed to note that, the appellant was prosecuted in CR. Case file No.889 of 2014 and that the arresting officer did not testify in the instance case.

16. The 4th appellant submits since PW1 testified that the source of light during the incident was flashlights, there was no way that light would have been enough to allow recognition of the assailants since PW1 was not the one in possession of the flashlights. He is also concerned that PW1 did not give descriptions of the assailants and only stated that he could recognize them if he saw them again and he states that those are two different things. That even if a victim states that he could recognize his assailants if he saw them again, he should be able to explain what features or what details would make him remember the assailants which PW1 never did.

17. He further submits that the ID parade was flawed as there was no friend or Advocate called to ensure the rights of the appellant were taken care of and that the police took a coloured photograph of him prior to the parade and might have shown this to the identifier therefore prejudicing him and further since PW1 had not given any descriptions to the police, without the parade PW1 would not have been able to identify him.

18. The 4th appellant also maintains that his arrest was not connected to PW1's robbery incident as the arrest was through an informer who was not called as a witness in court and that form of evidence should be treated as hearsay evidence. PW1 also did not play a part in his arrest as he was named by his accomplices after their arrests. He mentions that no written confessions or admissions were recorded or produced in court and that the confession was obtained illegally and that failure of prosecution to call the officer who arrested him as a witness was fatal to the prosecution case.

Issues for determination

19. From all the foregoing, I consider the issues for determination that run through the appeals to be as follows:

1. Whether in respect of each of the appellants they were properly arrested and identified in connection with the said robbery

2. Whether the identification parades were conducted in accordance with the law.

3. What were the effects of failure to call the arresting officer

4. Whether accomplice evidence is acceptable in court and what are the grounds for its consideration

20. This court, as a first appellate court, must review and re-evaluate all the evidence availed taking into account the fact that it did not have the benefit of hearing the witnesses and seeing their demeanour. See: **R v Okeno (1972) EA 32**. This I will do in respect of each of the issues raised by the appellants.

Identification and arrest of appellants in connection with the robbery with violence

21. Each of the appellants has questioned whether they were properly identified as the suspects or assailants in this case. In his evidence, PW1, Kituli Silanke (complainant), linked the various appellants to the case as persons who had taken part in the robbery on the fateful night.

He testified, for example that:

> ***"When the first accused came close to me to bark orders that I lay down, I saw him. It was 1st accused. He is the one who actually took the cash"*** (pg 46 record of appeal)
>
> ***"I told them that Kshs 120,000 and phones had been stolen. It was 2nd accused and 4th accused who had come back to make the inquiry"*** (pg 46 record of appeal)
>
> ***"I used to see 1st accused at Ewaso Nyiro and Olenguluo cattle auctions"*** (pg 48 record of appeal)
>
> ***2nd accused used to be our neighbor at Ololulunga but migrated out of the village***

22. PW1 thus identified the 1st, 2nd and 3rd appellants when the group of assailants invaded his home as they had bright spotlights which lit up the room. He testified that each of the assailants had a spotlight, and they were shone haphazardly all around the room and he, PW1, had an opportunity to see their faces in the shining light, shortly before the 1st accused came close to him and ordered him to lie face-down on the floor.

23. PW1 added that 1st accused was the one who actually took the cash and that he used to see him at cattle auctions at Ewaso Nyiro and Olenguluo. Further, he said, the 2nd accused used to be a neighbor at Ololulunga before he migrated out of the village and that 4th accused was a regular person in the village. In cross-examination, PW1 reiterated the details he gave in evidence in chief.

24. PW9, PC Chemosit, testified that PW1 reported the robbery which he noted in OB 14/5/4/14. There, he noted that PW1 stated that he could positively identify the suspects if he saw them again. On cross-examination, he stated that PW1 said that one of the men had punctured ear lobes and was a black man; and that another of the suspects was a previous neighbor who he described as slightly brown, which descriptions are in the initial report. The trial court which had the opportunity to see the witnesses, also indicated that the description befitted both the 2nd appellant and the 3rd appellant respectively.

25. According to PC Chemosit the 2nd accused (3rd appellant) named the 3rd and 4th accused (4th and 1st appellant respectively). With the information from the 2nd accused, the 3rd accused was arrested through information from a police informer and the third accused also named the 4th accused who was also arrested via information from a police informer. The 3rd and 4th accused were then identified by PW1 through an identification parade.

26. At the time of arrest, the 2nd appellant was in the company of the 3rd appellant, PW1 having spotted them near Hekima hotel in Narok town. It was PW1's evidence that he used to see the 2nd appellant at Ewaso Nyiro and Olenguluo cattle auctions and the 2nd appellant confirms in his defence that he is a cattle trader while the 3rd appellant was a longtime neighbor who had relocated but he did not remember his name.

27. It is clear that PW1 was a single identifying eyewitness. His evidence is challenged by the appellants on the grounds that he, PW1, did not give descriptions of the assailants in his initial reports to police and information immediately after the incident.

28. PW1 has, however, given a plausible narration of events and the record shows that some description, though not much, was given and in particular as regards the 2nd and 3rd appellants. He explained that he was able to see the faces of the assailants with the flashlights even though there was no electricity in his house, because the torches in the hands of the assailants were shining all around the room haphazardly. The distance and situation of incidence, being that they were all in the same room enabled him to actually have a clear glimpse of the faces of the assailants. Some of the assailants, he said, mistakenly shone the spotlights lights on each other's faces.

29. Further, according to PW1, since he had seen the 2nd appellant in cattle auctions prior to the attack, and had seen the 3rd appellant as a previous neighbor in the area, it was easy for him to remember the faces though he did not know their names as he stated that he had never interacted with the appellants on a personal level. In my view PW1gave a genuine explanation why he stated that he could positively identified his assailants if he saw them again.

30. The issue of identification was discussed at length in the case of **Charles Amboko Anemba & another v Republic [2015] eKLR** where the court relied on the following cases to reach its determination: **R v Turnbull & Others (1976) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***"... 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."***

31. In **Wamunga v Republic (1989) KLR 426** the Court of Appeal stated:

"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."

32. Finally, in the Court of Appeal cases of **Nzaro v Republic (1991) KAR 212** and **Kiarie v Republic (1984) KLR 739** the principle was laid down that:

"evidence of identification/recognition at night must be absolutely watertight to justify conviction."

This principle must be taken into account.

33. I also note that the trial magistrate made reference to and properly took into account the Court of Appeal case of **John Muriithi Nyaga v Republic [2014]eKLR, 26,** where the court stated:

"It is acceptable law that evidence of rcognition is stronger than of identification of someone known is more reliable than identification of a stranger."

34. From all the foregoing, I am satisfied that the trial court properly tackled the issue of identification and narrowed down on how and why each accused person was linked to the robbery and found guilty.

35. I now deal with the identification parades and the issue of whether they were ptroperly conducted.

Were the identification parades properly conducted?

36. Before the trial, the 1st and 4th appellants underwent an identification parade. They both argue that the parade was not conducted properly because PW1 did not give any description to the police on the features of the assailants. They further submit that their photographs were taken and could have been shown to the sole identifier, PW1, leaving them at a disadvantage and an easy target for identification.

37. According to the 1st appellant, the parade was unfair because he was placed among mostly Kikuyu men. This, he argued, made him an easy target for identification as Kikuyus and Maasais have different features, and he was the only one with pierced ears and removed teeth. On his part, the 4th appellant submitted that at the parade he was not afforded the right to have a friend or advocate with him to ensure his rights were taken care of in accordance with the identification rules.

38. The law on the proper conduct of identification parades is now quite settled. The Court of Appeal in the cases of **John Mwangi Kamau v Republic (2014) eKLR** and **Douglas Kinyua Njeru v Republic (2015)eKLR** clearly restated the requisite parameters for conducting parades

39. In the **John Mwangi Kamau** case the Court expressed itself 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. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

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;"***

40. The trial magistrate noted in his judgment that as much the 1st and 4th appellants alleged that their photos were taken and could have been shared to PW1, they did not pose that question for clarification to PW1 during cross-examination. On the other hand, PC Chemosit during cross-examination confirmed that he did in fact take photographs but that he did so only after the parade.

41. PW7 Chief Inspector John Manyara conducted the parade in respect of Accused 3 (Appellant 4). He got 8 members of a parade and lined them along the corridor of the cells. There were three parades. In parade 3 Kituli Silange was the identifying witness, and identified the 4th appellant by touching, and stated that he knew the accused well as they used to meet at Ewaso Nyiro cattle market. PW7 narrated the procedure used. The parade form was completed as required.

42. PW8 Chief Inspector Innocentus Mutua, testified that he conducted the parade in respect of the 4th Accused (Appellant No 1). PW8, stated that he had 9 members of the parade including the 1st appellant. In the parade, he stated, he arranged members who were of similar appearances, complexion and heights as the 1st Appellant. The appellant chose where he wanted to stand between 4th and 6th members. The witness identified the accused by touching him. He stated that before the parade he had explained to the 1st appellant his rights to call either a friend, relative or advocate to be present but the appellant was content. The parade form here was properly completed.

43. The number of participants in the parade and procedure was not in issue. The 1stappellant complains about the tribe of the participants and that people from that community have different features from him i.e majority were kikuyu men while he was maasai. This is an issue in respect of which there would have to have been evidence led as it is almost impossible to tell the tribe or community of a person from their physical features alone. Such evidence would have to demonstrate that there are specific features which are limited to just one or other particular tribe in Kenya.

44. In this case, the 1st and 4th appellants signed the parade forms where required in response to questions concerning calling a friend or solicitor to be present during the parades. They also signed to the fact on the forms that they had no complaints on how the parades were

conducted. None of the appellants have challenged or denied their signatures, nor indicated any coercion. On the strength of this, and having perused the parade forms, there is no basis to doubt that the parades were conducted correctly and that the outcomes are reliable. The failure of the complainant to give a description of the assailant does not invalidate the identification parade. I find that the identification parades were properly conducted and that the appellants signed the parade forms. On this ground, the appeals fail.

The role of accomplice evidence and grounds for consideration

45. The appellants fault the trial magistrate for relying on accomplice evidence to corroborate the prosecution case yet, they argue, the evidence on record does not point to any of the accused as accomplice nor as the perpetrator of this crime. In respect of this ground, accomplice evidence was given by 2nd accused and was corroborated by 3rd accused which led to the arrest of 3rd and 4th accused respectively.

46. I have noted that the trial magistrate was alert as to reliance on accomplice evidence when he stated, in dealing with 3 rd accused Nkuyatta Nkiyiaka at page 15 of his judgment, that:

> ***"Accomplice evidence by itself without more, is admissible evidence under section 141 of the Evidence Act"***

47. I must first, however, warn myself of the dangers of relying on such accomplice evidence. I have considered, with the utmost care, the law and the practice the courts are to bear in mind when confronted by accomplice evidence. **Section 141** of the **Evidence Act** provides that an accomplice shall be a competent witness against an accused person; and conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice.

48. The dangers of reliance on accomplice evidence were well stated in the case of **Emperor v Maganlal, 14 Bom 119** where Scott J held that though there may be cases of exceptional character in which an accomplice's evidence alone convinces the judge of the fact required to be proved, the uncorroborated evidence of such a witness should generally be held to be untrustworthy. The learned Judge gave three reasons to treat accomplice evidence with caution as follows:

> (1) because the accomplice is likely to swear falsely in order to shift the guilt from himself;
>
> (2) because as a participator in the crime he is an immoral person who is likely to disregard the sanctity of an oath; and
>
> (3) because he gives his evidence under promise of pardon or in expectation of an implied promise of pardon and is therefore liable to favour the prosecution.

49. In **Canisio s/o Walwa v The Republic (1956) 23 EACA 453**, the judges, after reviewing a number of previous authorities on the point, concluded their judgment with a compendious statement of what they regarded as the true rule of law on convictions based on the uncorroborated evidence of an accomplice and the proper manner of applying that rule to any given case. On page 458 of the decision the court held:

> ***"Generally speaking it is a practice, founded upon prudence when applying the rule as to the onus of proof, not to convict without any evidence corroborating that of accomplices. But there are exceptional cases in which a departure from that general practice is justified. The criterion as to whether such an exceptional case has arisen is the credibility of the accomplice or accomplices combined with the weight to be attributed to the facts to which they testify. The principal factors to be considered when assessing their credibility are not only their demeanor and quality as witnesses but also their relation to the offence charged and the parts which they played, in connection therewith, that is to say, the degree of their criminal complicity in law and in fact. A departure from the general rule of practice is only justifiable where, on applying that criterion in that manner, it clearly appears that the accomplice evidence is so exceptionally cogent as to satisfy the Court beyond reasonable doubt, and where accordingly the judge or judges of fact, while fully conscious of the general inherent danger of any such departure, is or are convinced that in the particular instance concerned the danger has disappeared."***

50. After due consideration of all the evidence and in light of the authorities referred to, I see no basis for faulting the trial court in its reliance on the accomplice evidence. I am satisfied that the said evidence was corroborated and persuasive enough to warrant the conviction meted by the trial court. Accordingly, I would not disturb the trial court's finding on this ground.

Effects of failure to call the arresting officer as a witness.

51. The final issue in the grounds of appeal concerns the failure by the prosecution to call the arresting officer to testify. It is evident, indeed conceded, that PC Diba who arrested the 1st appellant/ 4th accused Stephen Moni Ole Kelembo alias Maine, was not called to testify. The appellant testified that he was in Whispering Bar with his girlfriend when he was arrested by PC Diba. Later he was subjected to an identification parade.

52. The 1st appellant was arrested on the basis that PW1, Kituli Silanke, had accused him of being present and part of the gang that raided his house. He had testified as follows:

> ***"I told them that Kshs 120,000 and phones had been stolen. It was 2nd accused and 4th accused who had come back to make the inquiry"*** (pg 46 record of appeal) and ***"4th accused was a regular person at our village and cattle auctions"*** (pg 48 record of appeal)

53. In cross-examination by the 4th accused, PW1 said that he recognized the accused by his protruding scar on the face, but did not give his name to the police prior to his arrest. That was how PW1 was able to identify the 1st appellant at the parade.

54. Accused 3 Nkuyatta Ole Nkaiyaka after being arrested by PC Chemosit, disclosed the names of three others who had been involved in the robbery. These included the 4th accused, who had also been named to the police by accused 2 Parken Losikany, hence his arrest by PC Diba.

55. The starting point on this discussion is **Section 143** of the **Evidence Act** which provides as follows:

> ***"No particular number of witnesses shall, in the absence of any law to the contrary, be required for the proof of any fact"***

56. The above notwithstanding, the prosecution is generally under a duty to call all witnesses necessary to establish the truth, but need not call all witnesses who may have relevant information. The question here is whether a particular witness is material or not, for if the prosecution evidence is insufficient to prove the case then a conviction should not be supported. Here, there is nothing to suggest that the failure to call PC Diba lowered the value of prosecution evidence or prejudiced the accused.

57. The court of appeal in the case of **Julius Kalewa Mutunga v Republic [2006] eKLR** stated:

> ***"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive - see Oloro s/o Daitayi & others v R. (1950) 23 EACA 493, the investigating officer testified that he circulated a signal to all police stations with details of the offence committed and the particulars of the appellant. He subsequently received information from Isiolo police station that the appellant was in their custody for another offence and he dispatched his officers to have him transferred to Meru police station for interrogation. He was brought to the station and was charged with the offence. In our view, there was no oblique motive, and none was shown, for failure to call the person who made the arrest. We are also of the view that the omission did not cause a failure of justice in the circumstances of this case. That ground of appeal also fails.***

58. In **Alfred Bumbo and Others v Uganda. Criminal Appeal No. 28 of 1994,** the Uganda Supreme Court stated:

> ***"While it is desirable that evidence of a police investigating officer and of arrest of an accused person by the police, should always be given, where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not, as a rule, be fatal to the conviction of the accused. All must depend on the circumstances of each case whether police evidence is essential, in addition to prove the charge".***

59. On the strength of the above authorities, I am not persuaded that failure to call the arresting officer was fatal to the prosecution case. This ground of appeal therefore fails.

Mitigation in trial court and Sentence

60. The accused persons were each convicted for robbery with violence. After conviction, mitigation took place and the accused were sentenced to death by the trial court.

61. In the submissions of Accused 2, Parken Losikany, he asserted that he was not accorded a fair trial as far as sentencing was concerned. He invoked **Article 50(2)(q)** of the **Constitution** on a convicted person's right of review or appeal to a higher court. Given that this is an appeal it is proper to consider the propriety of sentencing for all accused persons.

62. Section 216 of the **CPC** provides that:

> ***"The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit to inform itself as to the sentence or order properly to be passed or made."*** (Underlining added)

63. I agree with the appellant that neither he nor the other accused persons were given a proper opportunity for mitigation. That is, they were not enabled to avail information to the trial court that would properly inform the trial court in considering the sentence or order properly to be made.

64. The trial court having invoked the provision to enable and receive mitigation, did duly record the "Mitigation in Swahili" at pages 108-109 of the record of appeal, for each accused person. On careful perusal of the mitigation by each accused person, I note the following. Accused 1 did not provide any evidence that would enable the court to inform itself as to the sentence or order properly to be passed or made. All he did was to attempt to show why he was not culpable. Similarly Accused Nos 2 and 4 only stated why they did not consider themselves culpable. Accused No 3 merely asked for the record of proceedings, blaming an informer for his arrest.

65. This aspect of the trial was improperly conducted as the accused persons' mitigation did not in fact amount to mitigation, in terms of section 216 CPC, for purposes of enabling the court ***"to inform itself as to the sentence or order properly to be passed or made."*** I think it is vitally important for the trial court to ensure that the accused are properly informed of the object of mitigation. This is particularly and critically necessary in cases concerning capital offences and felonies where the sentence may be substantial. In addition, the court must endeavor to ascertain that the information or evidence received from the accused at mitigation has a bearing on the sentence to be meted out

by the court.

66. The trial court in this case treated the aspect of mitigation lackadaisically while stating that:

> ***"The only sentence provided for by law is death which I hereby pass."***

This peremptory approach to sentencing must no doubt change even where the mandatory minimum sentence is prescribed by the Penal Code or other law. Going forward, this should be done taking into account the Judiciary Sentencing and Policy Guidelines.

67. It is of course appreciated that the sentence meted by the trial court in this matter was effected before the advent of the Supreme Court case of **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR.** That case held that the mandatory nature of the death penalty runs counter to constitutional guarantees enshrining respect for the rule of law. In that regard, the Supreme Court stated:

> ***"[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law."***

68. Therefore, a trial court dealing with an offence in which the death penalty may be meted is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence

> ***"[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution."***
>
> ***....***
>
> ***"Article 27 of the Constitution provides for equality and freedom from discrimination since every person is equal before the law and has the right to equal protection and equal benefit of the law. Convicts sentenced pursuant to Section 204 are not accorded equal treatment to convicts who are sentenced under other Sections of the Penal Code that do not mandate a death sentence. Refusing or denying a convict facing the death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. This is repugnant to the principle of equality before the law. Accordingly, Section 204 of the Penal Code violates Article 27 of the Constitution as well."***
>
> ***"[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. ……. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'over-punishing' the convict."***

69. Thus, failure or refusal to hear a convict in mitigation or to properly consider mitigating information on account of a mandatory death sentence is an unlawful and discriminatory practice. This is not to say that the death sentence pronounced by the trial magistrate was unlawful. It is the due process failure in availing a sentencing hearing that is at issue here. In **Muruatetu** the Supreme Court stated that the Death Sentence is allowable under the Constitution but within the law in the following terms:

> ***"[66] It is not in dispute that Article 26 (3) of the Constitution permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that Article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in Article 50 (1) of the Constitution must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."***
>
> ***"[69] Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."***

70. Subsequent decisions of the Court of Appeal in **William Okungu Kittiny v Republic [2018] eKLR** and **Dismas Wafula Kilwake v Republic [2018] eKLR** extended the reasoning in the **Muruatetu Case** to robbery with violence cases and to mandatory minimum sentences imposed by the Sexual Offences Act, respectively. Those principles should be borne in mind by trial courts.

71. Although the accused persons' grounds of appeal essentially failed, this court cannot close its eyes and take it for granted that the sentencing was properly done. There must be propriety in sentencing both in light of the statutory provision of **section 216 CPC** and also in light of the **Muruatetu** paradigm, which I found unsatisfactory in this case.

72. Accordingly, I determine that the proper orders in this case are as follows:

a. The appellants' appeals on conviction are dismissed on the basis that the trial court arrived at the proper conclusions on the facts and the law. As such the trial court's conviction is hereby upheld.

b. The sentencing hearing was improper. As such the court shall hold a re-sentencing hearing at which the accused persons will be permitted to avail, and the court will *"receive such evidence as it thinks fit to inform itself as to the sentence or order properly to be passed or made"* in terms of section 216 CPC.

c. The Probation Officer, Naivasha shall avail and file a pre-sentence report detailing information relevant for the consideration of the court at the sentencing hearing;

d. The Prisons Service shall avail a report on each of the accused persons prior to the sentencing hearing.

73. Orders accordingly.

Dated and Delivered at Naivasha this 26th Day of November, 2019

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Moni Ole Kelembo alias Maine - 1st Appellant in person

2. Parken Losikany - 2nd Appellant in person

3. Leteiyo Ole Karkar - 3rd Appellant in person

4. Nkuyata Ole Nkaiyiaka - 4th Appellant in person

5. Ms Maingi for the State

6. Court Clerk - Quinter Ogutu