REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 58 OF 2017

HASSAN OTIENO NYAORI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

[Being an appeal against the conviction and sentence of the Chief Magistrate's

Court at Kisumu (Hon. W.K. Onkunya SRM) dated the 6th July 2017

in Kisumu CMCCRC No. 252 of 2016]

JUDGMENT

1. The Appellant, **HASSAN OTIENO NYAORI**, was convicted on two counts of Robbery with Violence Contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code.**

2. On the first count, he was sentenced to suffer death as by law prescribed.

3. However, the learned trial Magistrate held in abeyance, the sentencing on the second count.

4. In his appeal, the Appellant faulted the whole trial, on the grounds that the witnesses who testified for the prosecution were never sworn before they testified. He therefore submitted that there had been a violation of the provisions of **Section 151** of the **Criminal Procedure Code.** The said statutory provision reads as follows;

> ***"Every witness in a criminal cause or matter shall be examined on oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath."***

5. A perusal of the typed record of appeal does not reveal the administration of oaths to the witnesses before each of them testified.

6. However, a perusal of the hand-written original record of the proceedings reveals that each of the witnesses was duly sworn before he or she testified.

7. After each of the said witnesses gave evidence-in-chief, the Appellant cross-examined them.

8. Ordinarily, when a witness is not sworn before he or she testifies, the witness would not be cross-examined.

9. However, I must not be understood to be saying that the process of cross-examination of a witness, of itself, implies that the said witness had actually been sworn.

10. In this case, the original hand-written record shows that each witness was sworn. Therefore, the proceedings were not irregular as alleged by the Appellant or at all.

11. The second ground which the Appellant canvassed was that the Identification Parade at which he was allegedly identified, was not conducted in accordance with the Standing Orders.

12. He said that the identifying witness was told to identify the Appellant twice.

13. Furthermore, the said witness is said to have identified him because she was told to identify the person who was standing at the door.

14. And the Appellant complains that he was not like the other members of the parade.

15. In this case, there were two accused persons. There were also two complainants. Therefore, there were two Identification Parades.

16. Each of the complainants attended two separate parades, and each of them identified the Appellant, in separate parades.

17. Clearly, therefore when **PW1** testified that she was told to identify the accused person twice, she meant that she attended the two distinct parades, where she was expected to identify the two accused persons.

18. She identified the Appellant in one parade, but she failed to identify the Appellant's co-accused in the other parade.

19. I find nothing irregular at all about **PW1** having been asked to attend two parades, where she was expected to identify two separate suspects.

20. I also find that during the parade, the Appellant was not identified because he was standing near a door.

21. When **PW1** said that the Appellant stood near the door, she was making reference to what had transpired on the date of the robbery. It was on that day that two men entered into the house where the two complainants were seated.

22. At that time, there was lighting from a bulb, and **PW1** described the light as having been bright. Therefore, the light enabled **PW1** to clearly see the two men.

23. She said that one of the men entered into the sitting room, whilst holding a gun. The other man was not armed.

24. It is the un-armed man who stood by the door, and whilst he was there, **PW1** was able to identify him positively.

25. It is thus clear why **PW1** was able to identify the Appellant later, at the parade.

26. PW3 was also able to positively identify the Appellant, in a separate parade.

27. Both complainants were able to identify the Appellant because he stood confidently at the place near the door, within a room which was well-lit.

28. In contrast, the other intruder was moving around. Indeed, **PW3** said that the said *"other intruder"* did not want to have his face seen by those who they were robbing.

29. PW3 was able to identify the Appellant because she saw him clearly. She even tendered a description of the Appellant to the police, prior to the Identification Parade.

30. The Appellant expressed surprise that **PW1** had testified that she had not previously seen him.

31. Obviously, that statement has been put completely out of context by the Appellant.

32. PW1 testified that she had not seen the Appellant prior to the day when the robbery took place. She did not say that she had never seen the Appellant prior to the Identification Parade.

33. One of the issues raised by the Appellant was that his conviction was erroneous because the prosecution failed to call essential witnesses. In particular, the Appellant named **NAHASHON MATOKE** as an essential witness.

34. The said **NAHASHON MATOKE** is an uncle to **PW1**. He was not present at the house where the robbery took place.

35. PW1 contacted him immediately after the robbery, and he went to the house. Thereafter, he accompanied the two complainants to the Kisumu Police Station, where a report was made.

36. Matoke did not witness the robbery. Therefore, he was not an essential witness, by any stretch of imagination.

37. I have re-evaluated the evidence tendered by the prosecution. I find that the Appellant was positively identified at the scene of crime.

38. In his defence, he only talked about the time of his arrest. He said nothing about what he was doing on the date and at the time when the offence was committed. His defence did not cast any shadow of doubt on the evidence adduced by the prosecution.

39. There is no merit in the Appellant's assertion, that the trial court did not take his defence into account.

40. In conclusion, there is no merit in the appeal. It is therefore dismissed in its entirety. I uphold both the conviction and the sentence.

DATED, SIGNED and **DELIVERED** at **KISUMU** this **25th** day of **June** 2018.

FRED A. OCHIENG

JUDGE