**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CRIMINAL APPEAL NO.41 OF 2015**

**STEPHEN MUTAI MOCHANA…....APPELLANT**

**VERSUS**

**REPUBLIC……..…..RESPONDENT**

*(Being an appeal against conviction and sentence in Kericho Chief Magistrate's Court Criminal Case No. 2202 of 2014 (Hon. L. Kiniale SRM)*

**JUDGMENT**

1. The appellant was charged in Kericho Chief Magistrate's Court in Criminal Case No.2202 of 2014 with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. The particulars of the offence were that on the 14th day of June 2014 at Morgan Estate in Kericho Township within Kericho County, jointly with others not before court, while armed with an offensive weapon namely a panga, robbed John Kiprono Tonui cash kshs.20,000/-, iPhone make 4S valued at ksh.30,000/- and immediately after the time of such robbery wounded John Kiprono Tonui.

2. He pleaded not guilty to the charge and after a full trial before the acting Senior Resident Magistrate, Hon. L. Kiniale, he was found guilty of the offence and sentenced to death as prescribed by law in the judgment dated 2nd September 2015.

3. Aggrieved by both his conviction and sentence, the appellant has preferred the present appeal. In his Amended Petition of Appeal dated 11th September 2015, filed by his Learned Counsel, Moturi Mbeche and Associates, the appellant impugns the decision of the lower court on the following grounds:

> ***1. The learned trial magistrate misapprehended the law, and particularly on identification of (sic) hence convicting the appellant.***
>
> ***2. The learned trial magistrate introduced extraneous matters in arriving at the guilt of the appellant.***
>
> ***3. The learned trial magistrate erred in law and fact in shifting the burden of proof of innocence to the appellant.***
>
> ***4. The learned trial magistrate erred in law and fact in convicting the appellant on evidence far short of the required standard in law.***

4. The appellant's case was presented by his Learned Counsel, Mr. Moturi, while Learned State Counsel Ms Keli appeared for the state.

**The Submissions**

**Submissions for the Appellant**

5. Mr. Moturi made submissions on the appellant's grounds of appeal together. His submissions were that the appellant's conviction was solely based on his identification by PW1 as the person who committed the offence.

6. Mr. Moturi argued that the offence was alleged to have been committed on 14th June 2014. However, a casual look at exhibit 4 (the identification parade form), indicated that an identification parade was held on 23rd February 2014, long before the alleged crime was committed. Mr. Moturi further noted that in the same exhibit, the officer who purportedly conducted the identification parade gives a certificate which he signed on 23rd July 2014. His submissions were therefore that the learned trial magistrate failed to appreciate the discrepancy in the date on which the identification parade was conducted and arrived at a wrong decision. Further, that the date when the identification parade was conducted is not an oversight.

7. Counsel submitted further that PW1 had testified and given a description of both of the assailants; that later at page 8, line 19, she had given a general description of the assailants, that one was tall and one short, and she emphasized that the only description she had given was that one was short and the other taller. In cross-examination, she stated she was not able to identify anyone as she did not get a good look. However, that in line 12, in cross-examination, she said she used the light of a torch to see (the appellant). His submission in this regard was that the trial court had failed to reconcile the inconsistent evidence of PW1 and arrived at a wrong decision in convicting the appellant. (It should be noted, however, that PW1 was Mr. Tonui, not Mrs. Tonui who was PW2).

8. Mr. Moturi's submissions were further that the offence was committed at midnight, and according to both PW1 and PW2, the only light were torches held by the assailants. With respect to the evidence of PW2 that she looked at the assailant when he asked her to send the money and not to look at the number. Counsel urged the court to take judicial notice of the fact that a person sending money would look at the hand set, not the face of the person.

9. Mr. Moturi submitted further that PW2 had described the assailant as one who spoke in Kiswahili but with a Kisii or Luhya accent. His submission was that the trial magistrate failed to appreciate that PW2 was not sure even on voice identification. Further, that PW1 and PW2 are the only witnesses who witnessed the robbery, but that at no time does either of them give evidence that they knew the appellant prior to the incident.

10. With respect to the evidence of PW3 regarding the mobile number to which PW2 was ordered to send money by M-Pesa, Counsel observed that the evidence was that the name and number were Samson Kiprop 0724 746 759. The said Samson Kiprop, however, according to PW3, was not in court, though he used the number, and his intelligence, to trace the appellant. Mr. Moturi's submission was that the conditions for physical or voice identification were not conducive to enable the trial magistrate arrive at the decision to convict the accused.

11. With respect to voice identification, his submission was that certain conditions must be met for voice identification; that the court must be satisfied that it is the voice of the accused, and the identifying witness is familiar with it, which is missing in this case. Counsel relied on the decision in **Choge vs R Criminal Appeal No.1985 KLR 1** where the Court of Appeal set out the conditions for voice identification. He observed that it is apparent from the identification parade form that the appellant was not asked to utter a single word for the witness to identify his voice.

12. He submitted further that the fact that the incident took place for 30 minutes in darkness using torches and in the absence of any evidence that the assailants directed the torches at their own faces made it unsafe to allow the conviction to stand. Counsel cited the decision in **Maghenda vs R Criminal Appeal No.55 of 1986 (1986) KLR 255** in which the court held that identification by voice is not reliable.

13. With regard to the decisions cited by the state, Mr. Moturi sought to distinguish the case of **John Mwangi Kamau vs Republic Criminal Appeal No.63 of 2014** on the basis that the alleged offence took place at 3.00 p.m in broad day light and the assailants did not conceal their faces. The conditions were therefore conducive for identification. In his view, in convicting the appellant, the trial magistrate failed to warn herself of the graving of the sentence as robbery under section 296 (2) is a capital offence, and analyse the evidence. His prayer was that the conviction be quashed and sentence set aside.

**Submissions by the State**

14. In response, Ms. Keli opposed the appeal. Her submissions were that the evidence presented was overwhelming, the witnesses were reliable, credible, consistent and corroborative. The trial court properly analyzed the evidence and applied the legal principal applicable to a charge of robbery with violence and arrived at a correct verdict, and the conviction was safe and should be allowed to stand.

15. Ms. Keli noted that while the appellant had raised four grounds of appeal, the submissions of his counsel were only on the first ground, and she would therefore address only this ground.

16. With respect to the alleged inconsistency in the identification parade form, her submission was that there was no inconsistency in the date of the identification parade form. The offence was committed on 14th June 2014, and there was therefore no inconsistency in the dates as it is indicated on the top of the identification parade form that it was conducted on 23rd July 2014. Ms. Keli's submission was that the date on the top of the identification parade form was 23rd February 2014. However, it was clear from page 3 of the form where it is dated 23rd July 2014 that the parade was conducted on 23rd July 2014.

17. It was also her submission that the date on which the identification parade was conducted was clear from the evidence of PW2. She testified that they were attacked on 14th June 2014, then confirms that she was later called to an identification parade. This, according to Ms. Keli, was after the 14th July 2014 and thought PW2 does not specify the date, the date emerged clearly from the evidence of PW5, who confirmed that the identification parade took place on 23rd July 2014. Her submission therefore was that there is no discrepancy in the dates and the identification parade was properly conducted.

18. It was the position of the state that this was not a case of voice identification. Ms. Keli observed that while Counsel for the appellant had referred to PW1 not being able to identify the assailant, it is only PW2 who had attended the identification parade as she is the one who saw the assailants. PW1 was not able to have a good look at the assailant and did not attend the parade. PW2 took part in the identification parade and identified the appellant who was standing next to her during the robbery and ordering her to send money by M-pesa. He was not masked, and it was the testimony of PW2 that the assailants had powerful torches so she was able to see his face very well and was able to identify him.

19. According to Ms. Keli, even though PW2 described the appellant as a person who spoke Kiswahili in a Luhya or Kisii accents, it was not on the basis of his voice that she identified from. Rather, she identified him because she saw him, and had spent 30-45 minutes with him. In her view, the authorities relied on by the appellant are not applicable in this case as they deal with voice identification.

20. The state's case therefore was that there was an identification parade that was properly conducted, the appellant was identified and there was a transaction that took place as evidenced in exhibit No.1, the mini M-pesa statement. There is therefore no doubt that it is the appellant who committed the crime and was duly charged and convicted.

21. The state relied on the decision in **John Mwangi Kamau vs R** (supra) with respect to what should be considered on an identification parade and how it should be conducted. It reiterated that the identification parade at which the appellant was identified was proper and in accordance with the law. Further, that it was not necessary for him to be told to utter a word as his identification was not based on voice identification.

22. Counsel also relied on **Nairobi HCCA No.166 of 2012 – Stephen Thema Wanjohi vs R** to submit that the ingredients of robbery with violence were proved by the prosecution, and urged the court to dismiss the appeal as it lacked merit.

**The evidence**

23. As this is a first appeal, I am required, as the first appellate court, to evaluate the evidence placed before the trial court and reach my own conclusion. In doing so, I must remember that I have not had the benefit of seeing and hearing the witnesses – *see* ***Kiilu & Another –vs Republic [2005]1 KLR 174***.

24. The prosecution in this case called 5 witnesses. PW1 was John Kiprono Tonui, the complainant. His evidence was that he and his wife were asleep on 14th July 2014 between 12.00 midnight and 1.00 a.m. They were woken up by two people who had broken into and entered their house. They demanded money and were given kshs.20,000/-. They demanded to be given ATM cards and any money from M-pesa. They were given two ATM cards for Equity and KCB Banks and the PIN Numbers. His wife gave them money and they demanded more money from M-pesa. She had kshs.3000/- which she sent by M-pesa to one Samson Tirop.

25. According to PW1, the robbers had torches which they used inside the house. He was not close to them and the description he gave to the police was that one robber was tall and one short. One stood near the door and the other next to his wife's side of the bed. He had not seen the robbers well. He later discovered they had stolen his iPhone and the house girl's Samsung phone and his wrist watch. He jumped on the robber who had stood near the bedroom door and they struggled, and the robber cut him on the head with a panga that he had. The robbers ran off when the complainant's wife and house girl screamed. In cross-examination by the accused, he stated that money was sent by M-pesa to one Samson Kirop.

26. The second prosecution witness, PW2, was Beatrice Tanui, PW1's wife. Her evidence was that she and her husband were asleep in their bedroom around midnight on the material day when two people entered their bedroom. They demanded money. Both had torches. They took ksh.20,000/- from her handbag, then asked her to send money by M-pesa to a certain number. She later identified the appellant at an identification parade. He was the one ordering her to send money by M-pesa. She testified that she looked at his face when he told her to send the money, and that she saw his face very well. She had also heard his voice while he was issuing orders for about 30-45 minutes. She later learnt that the money she sent had been sent to a Samson Kiprop. She also stated that she knew the person she identified was the accused, and that he spoke in Kiswahili but his accent was like Kisii or Luhya.

27. In cross-examination by the accused, she stated that she had seen him when she was sending the money by M-pesa. That the people who attacked them had bright torches, pangas and a metal cutter. That she heard the appellant's voice. She maintained that she had seen his face as he stood very close to her during the robbery, and that she identified him in the identification parade.

28. PW3 was PC George Maitha stationed at the Directorate of Criminal Investigations Office (DCIO) Kericho. His evidence was that he was on standby at the Directorate, and he was the officer assigned to respond to the distress call by the complainants. He went to the scene with another officer and a driver where they found a crowd of people and interrogated the complainants. They found a pair of large (big) scissors outside the kitchen window. They asked PW1 to go for a P3 form the following day.

29. Later they were informed that there was a suspect and acting on information, they traced him to Tengecha Lane. He attempted to run when he saw the police. They also found his associates through his phone, but they had run away to Kitale. They also called PW2 who had given a description of the accused, and she was able to identify the accused.

30. It was also his testimony that they traced the number to which money was being sent, 0724746759. The number was being used by a certain lady who was in contact with the accused. He produced a print out from Safaricom (Exhibit 3).

31. PW4, Dr. Misoi Isaac, a registered clinical officer, produced the P3 form in respect of PW1. His examination showed that PW1 had two cut wounds on the head, back and left hand near the shoulder (sic). The probable weapon was a sharp object.

32. The last prosecution witness, PW5, was CIP Abdulrahman Mohamed attached to Kericho Police Station. His evidence was that he was requested by the DCIO, Kericho, to conduct an identification parade. He inquired from the appellant if he was ready to appear in the identification parade and the appellant agreed. PW5 looked for 8 other members (sic) who were of similar heights, build and complexion as the appellant. The accused chose where he wanted to stand.

33. PW2 was called and she identified the appellant by touching him. The accused signed the identification parade form, which PW5 produced in evidence. In cross-examination, he stated that the identifying witness spoke to the accused and all the others in the identification parade, and that she also used his voice to identify him. He conducted the identification parade on 23rd July 2014.

34. After PW5 had testified, the appellant stated that he wished to make a statement. He complained that before the identification parade, he was shown to the witness in the DCIO's office

35. At the close of the prosecution case, the trial court found that the accused had a case to answer, and he was placed on his defence. He elected to give an unsworn statement. In his statement, he said that on 21st July 2014 at around 10.00 a.m, he met 4 police officers who stopped him and sought to interrogate him. They said they were looking for a person called Mutai. They went with him to his home and searched it but did not find anything. They went to Kericho and he was put in custody. Later, he was taken to the CID office in Kericho where he met a lady whom he alleges was the one attending an identification parade to identify him. He denied committing the offence with which he was charged.

36. In her judgment dated 2nd September 2015, Hon. Kiniale found the accused guilty as charged. She set out the evidence which I have set out briefly above, as well as the accused person's unsworn statement. The trial court identified three issues as falling for determination. The first was whether an offence of robbery with violence had been committed, and if the robbers were armed with dangerous and offensive weapons. Her analysis of the evidence of PW1, 2 and 3 led her to the conclusion that the answer to this issue was in the affirmative.

37. The second issue was whether the accused person was properly identified. She referred to the decisions in **Roria vs R [1967] EA 583 and Kiarie vs R** and **Charles Maitanyi vs R [1996] 1 KLR 198** with respect to the need for caution in receiving identification evidence. She also considered the guidelines for receiving and considering identification evidence set out in **Regina vs Turnbull [1976] 3 NLR 445**.

38. From the evidence of PW2, the court concluded that she was the only one in a peculiar position to participate in the identification parade as she was the only witness who had the longest close physical contact with one of the suspects. The evidence of PW1 and 2 was that there was security light outside, and both the accused persons and his accomplice had very bright torches which they used.

39. The trial court also noted that the incident took over thirty minutes or thereabouts. Her conclusion was that this was sufficient time for eyes to get accustomed to the dark and by the use of the torches used by the accused and his accomplice, the witness had favourable circumstances to observe and therefore positively identify the appellant.

40. The trial court also found with respect to the identification parade that the appellant was at liberty to decline participation but did not. She noted the comments on the form that he was unhappy because he was positively identified. He did not raise any issue in his cross-examination of PW2 that he had seen her or that they had met before the identification parade nor did he raise any issue regarding his participation in the identification parade. The court's finding was that he was properly identified.

41. She therefore answered the third issue that she had identified in the affirmative – that the prosecution

had proved its case against the accused beyond reasonable doubt. She discounted his defence as merely an explanation of how he was arrested.

**Analysis and Determination**

42. Having read and considered the record of the trial court and heard Counsel for the appellant and the state, I believe that the appeal before me turns on one main issue and one subsidiary issue. The main issue is whether the appellant was properly identified so as to warrant his conviction for the offence of robbery with violence that he was charged with. The subsidiary issue is related to the first, and it is whether the identification parade was properly conducted, or whether there was such a discrepancy on the dates when it was conducted as to leave no nexus with the appellant and the offence he was charged with as to render his conviction on the basis of such identification unsafe.

**Identification Parade**

43. The subsidiary issue is fairly straightforward. It relates to the date on which the identification parade was conducted. The identification parade form produced by the prosecution bears at the top a date that appears to be 23rd February 2014. It relates to a robbery with violence charge against the appellant, Stephen Mutai Mochana. The investigating officer is shown as Corporal George Maitha, while the parade was conducted by IP Mohamed. The witness is shown as Beatrice Chepkemoi Tonui. The third page of the exhibit is dated 23rd July 2014.

44. Can any credence be placed on the submission by Mr. Moturi that there was no nexus between the appellant and the identification parade form, and that the form relates to a parade that was conducted on 23rd February 2014, while the robbery took place in June 2014? I think not. The totality of the evidence shows that there is no real doubt that an identification parade took place on 23rd July 2014, at which the appellant was identified.

45. It is noteworthy that the appellant did not at any point challenge the occurrence of the identification parade. He had two complaints following the evidence of PW5 who produced the identification parade form. The first was that he had been shown to the witness who identified him, while the second was that the people who were with him in the parade were not of the same age or appearance as he was. These, however, are matters that he should have raised, but did not, at the identification parade. The only statement recorded in the form is that he was not happy that he was identified. I therefore find no merit in this argument by Counsel for the appellant.

**Identification**

46. The main ground of appeal in this matter relates to whether or not the appellant was properly identified. Counsel for the appellant has submitted at length on the issue of voice identification, particularly with regard to the statement by PW2 that the appellant spoke Kiswahili in a Luhya or Kisii accent. He submits that for proper voice identification, the appellant should have been known to the identifying witness, and that he should have been asked to utter some words.

47. Ms. Keli for the state maintains that the identification in this case was not voice identification. The witness had seen the appellant and was close enough to him to identify him at an identification parade.

48. I have read and considered the authorities relied on by the parties with respect to identification. I have also read the decisions relied on by the trial court in reaching her conclusion that it was safe to rely on identification evidence in convicting the appellant in this matter.

49. While a trial court may convict an accused person on the basis of the evidence of one identifying witness, the danger of relying on a single identifying witness has been emphasized in a line of decisions going down several decades-see **Abdallah bin Wendo vs R (1953) 20 EACA 166** and **Roria vs The Republic [1967] EA 583**. More recently, in **John Mwangi Kamau vs Republic** (supra) the Court of

Appeal sitting in Nyeri (Visram, Koome and Otieno –Odek JJA) expressed itself as follows:

> ***"Time and time again this Court has emphasized that evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested. In the case of R vs Turnbull and others (1976) 3 All ER 549, an English case, Lord Widgery C.J. had this to say:-***
>
> ***"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, 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 the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" 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 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 the actual appearance""*** (Emphasis added)

50. In the case before me, it was only PW2 who was able to identify the appellant, and she is the one who participated in the identification parade at which she picked him out by touching him. What were the circumstances under which she had seen him. The evidence before the court was that he was standing next to her side of the bed during the robbery. He had a big torch with him. It was to him that she gave her bag, and he removed Kshs.20,000/- from it. He asked her for ATM cards and PIN numbers. He gave her a mobile number to which to send money. Her evidence was that the entire episode took some 30-45 minutes during which she was physically close to the assailant and looked at him as he issued orders.

51. I have considered the manner in which the trial court dealt with the issue of identification. She warned herself, correctly, of the dangers of convicting on the evidence of a single identifying witness. She observed that it was only PW2 who took part in the identification parade. She further noted that the assailant stood next to PW2's side of the bed. That she had the longest close physical contact with one of the suspects. That the suspects had very bright torches that they used, and the incident took over 30 minutes. Her conclusion was that this was sufficient time for even eyes to get accustomed to the dark, and she was satisfied that PW2 had favourable circumstances to observe and therefore positively identify the suspect who stood closest to her.

52. I am inclined to agree with the conclusions reached by the trial court on this point. As the trial magistrate observed, PW2 stood closest to one of the suspects. She is the one who was being ordered to comply with their demands, to give them money, give them ATM PIN numbers, send money to a number that was being read to her. She also listened to his voice which she described as speaking Kiswahili with a Kisii or Luhya accent.

53. I am satisfied that in this case, the trial court properly found, based on the criteria in **R vs Turnbull and others**, that the circumstances were conducive for the witness to see the appellant, and to later identify him at an identification parade. This was not, as Counsel for the appellant argued, on the authority of **Maghenda vs Republic** (supra), a case based solely on voice identification. Had it been, then the court would have needed to take cognizance of the guidelines set out in the case of **Choge vs Republic (1985) KLR 1** where the court held:

> ***"Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual recognition. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were***

***such that there was no mistake in testifying to that which was said and who had said it. In the instant case, it was not safe to say that Okumu's identification of the 1st Appellant's voice was free from all possibility or error."***

54. While the witness did testify about the assailant's voice and the manner in which he spoke, unlike the decision in **Maghenda vs Republic**, the witness not only heard the appellant's voice ordering her for over half an hour, she was also physically close to him and was able to see him as he demanded money from her and ordered her to send money via M-pesa. Indeed, the length of time that she spent in close proximity to the appellant can be gauged from her evidence that he even gave her time to pray.

55. In the circumstances, I can find no basis to disturb the findings and conclusions of the trial court. The appeal is therefore without merit, and is hereby dismissed.

**Dated, Delivered and Signed at Kericho this 29th day of March 2017.**

**MUMBI NGUGI**

**JUDGE**