REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 105 OF 2014

KIOKO KAWEMBE………………..………………………APPELLANT

VERSUS

REPUBLIC…………………………………………………..RESPONDENT

(Appeal against the conviction and sentence of Hon. D.G. Karani (PM) in Kithimani Principal Magistrates Court Criminal Case No. 822 of 2011 delivered on 27th February, 2014)

JUDGEMENT

1. The appellant was charged with two counts of offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code and third count of burglary contrary to section 304 (2) and stealing contrary to section 279 (B) of the Penal Code.

2. The particulars of the offence of robbery with violence were that the appellant on 15th December, 2011 at around 1.30 am at Matuu town in Yatta District within Machakos County jointly with others not before court being armed with dangerous weapon namely wooden object (timber) robbed Geoffrey Sambu Kakai of a mobile phone make Nokia E71 valued at KShs. 34,900/-, '*Kabambe'* mobile phone valued at KShs. 2,000/-, cash KShs. 1,800/-, two brief case bags, extension socket and DVD player make Sony all valued at KShs. 49,150/- and immediately before the time of such robbery struck the said Geoffrey Sambu Kakai and that the appellant on the night of 15th December, 2011 at around 1.30 am at Matuu town in Yatta District within Machakos County, jointly with others not before court being armed with dangerous weapons namely panga and a wooden object (timber) robbed Fredrick Otieno Omondi of a mobile phone make TECNO valued at KShs. 6,000/-, wallet containing Kshs. 2,000/- and national identity card and immediately before the time of such robbery struck the said Fredrick Otieno Omondi.

3. The particulars of the third count were that the appellant on the night of 15th December, 2011 at around 1.30 am at Matuu town in Yatta District within Machakos County, jointly with others not before court broke and entered the dwelling house of Justus Muteti Kaveva with intent to steal therein and did steal from therein one DVD player make Sony valued at KShs. 3,500/-, Nokia 1110 valued at KShs. 2,000/-, camera make Yashica valued at KShs. 2,500/- the property of the said Justus Muteti Kaveva.

4. The appellant denied the charges and was put to trial. The prosecution brought a total of four (4) witnesses. The testimonies were as follows: Geoffrey Sambu Kakai (PW1) was on 16th December, 2011 at about 1.30 am asleep when he heard people shouting saying 'Government'. This was followed by a bang at his door occasioning the door to give way. The robbers switched on the sitting room light and forced open the bedroom door. His bedroom light was on at the time. They got hold of him and forced him to sit on the bed. One of the gangsters had a box haircut and the other had a face mask muffin. The robbers were four in number. Two of them had torches and demanded money. He was hit on the head

using a plank piece of wood when he told them that he had no money. The robbers also demanded for PW1's phone. They made away with PW1's phones Nokia E-7I and '*Kabambe*', Sony DVD, two briefcases and KShs. 1,800/- which was inside one of the briefcases. The said items were said to be all valued at KShs. 49,150/-. After ransacking PW1's house, the robbers proceeded to PW1's neighbour's house where he heard the neighbours scream. When things went quiet at PW1's neighbour's, the neighbour opened for PW1. They then proceeded to Matuu Police Station where they made a report then proceeded to Matuu General Hospital. Later on 19th December, 2011 at about 6.30 am while on his way to work, PW1 met the appellant. When he attempted to stop him, he took on his heels. PW1 pursued him up to Sana Sana Petrol Station. When the police who he had by then notified arrived, he pointed him out to the police who was now pretending to be a tyre puncture repairer but was disowned by the attendants. PW1 recognized him as one of the robbers who was standing guard over him at the time of the robbery. PW1 had seen the appellant previously. He used to meet him within Matuu. He stated that he recognized the appellant even when he entered the house during the incidence since the lights were on. He further stated that the appellant was stepping on his toes while asking him to disclose where the money was. He stated that the appellant had a box haircut.

5. Rukia Were (PW2) who is PW1's wife gave a similar testimony to that of PW1. She further stated that she was on 22nd December, 2011 called to record a statement. She was later shown a group of people from which she picked out the appellant as one of the robbers. She stated that she positively identified the appellant as one of the robbers. That the parade had about seven people and she identified the appellant from his box hairstyle and was also able to identify him physically.

6. Justus Muteti (PW3) was on 16th December, 2011 at about midnight asleep when he heard a loud knock at his door and was ordered to open. He instead locked himself in the inner room of his house. His house was then broken into and a Sony D.V.D, Camera make Yashica phone and a remote control were stolen all valued at KShs. 8,000/-. He went out when it was calm after which he and PW1 went to make a report to the police.

7. Superintendent of Police, Festus Kiambi (PW4) was on 22nd December, 2011 at about 3.30 pm was requested by the investigating officer to conduct an identification parade in respect of the appellant. He prepared by getting eight (8) people within an enclosure not accessible to members of the public. He briefed the appellant about the parade and asked if he was agreeable to the parade being conducted to which he consented. The appellant chose a position among the eight people that were already lined up. He then called upon PW2 who identified the appellant and stated that she identified him by the hairstyle he had. The appellant expressed dissatisfaction stating that he had never seen PW2 before but signed the form. The identification parade form was produced as P. Exhibit 2.

8. The appellant was put to his defence where he gave an unsworn statement. He stated that he was on 15th December, 2011 arrested at Sana Sana Petrol Station by two officers who took him to Matuu Police Station without informing him the reason behind the arrest. Subsequently, the trial magistrate found the appellant guilty and convicted him of the offence of robbery with violence and sentenced him to suffer death penalty.

9. Aggrieved by the trial court's decision, the appellant lodged this appeal on the following grounds:

> a) That the learned trial magistrate erred in both law and fact in failing to observe that the prosecution's evidence was in variance with and did not establish the offence stated in the duplex and defective charge sheet, and therefore the case was not proven beyond reasonable doubt as required.
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> b) That the learned trial magistrate erred in both law and fact in convicting the appellant on the unreliable evidence of recognition in which the prosecution failed to disclose the descriptions, weight and sufficiency of light which would have enabled positive identification by recognition.
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> c) That the learned trial magistrate erred in both law and fact in failing or ignoring to deal with the

contradictory and conflicting evidence adduced by the prosecution witnesses including PW2 and PW4 over the unfair suggestive identification parade organized by the police.

d) That the learned trial magistrate erred both in law and fact in failing to consider not only the appellant's defence but also the failure by prosecution to avail essential witnesses, and failure to observe that the appellant's mode of arrest was even not connected to this case.

10. This being a first appeal, I am minded of this court's duty to re-evaluate and analyze the evidence afresh with a view of arriving at its own fresh conclusion.

11. Citing the decision in **Joseph Njuguna Mwaura & 2 others v, Republic (2013) eKLR** and **Joseph Onyango & Cliff Ochieng' Oduor v. Republic (2010) eKLR**, the appellant submitted that the charge sheet from which his conviction arose was wrongly framed and thereby defective and that it was therefore not safe to convict him on the basis of the said charge sheet. The respondent contended that no prejudice was suffered by the appellant since there was no risk of confusion in the mind of the appellant. In support of the said argument, the respondent relied on **Paul Katana Njuguna v. Republic (2016) eKLR**. The Court of Appeal decision of **Joseph Njuguna Mwaura** (supra) is distinguishable. The court in the said case held as follows:

> ***"We reiterate what has been stated by this Court (sic) in various cases before us: the offence of robbery with violence ought to be charged under Section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence, which are either the offender is armed with a dangerous weapon, is in the company of others, or if he uses personal violence to any person. The offence of robbery with violence is totally different from the offence defined under Section 295 of the Penal Code, which provides 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 steal. It would not be correct to frame a charge for the offence of robbery with violence under Section 295 and 296(2) as this would amount to a duplex charge".***

12. It is noteworthy that despite so holding, the court went ahead to dismiss the appeal. The test in dealing with a duplex charge was discussed in **Cherere s/o Gakuli v. R. [1955] 622 EACA,** where it was held that:

> ***"<u>The test still remains as to whether or not a failure of justice has occurred</u>. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity".*** (Emphasis mine).

13. A similar position was held by the Court of Appeal in a recent decision in the case of **Paul Katana** (supra). The court cited the decision of **Cherere** (supra) with approval and held that:

> ***"In the matter before us, we are unable to detect any prejudice which the appellant suffered.***

14. In the case at hand, the appellant participated in the hearing as though he understood the charge he was facing, further he did not raise the issue of duplicity in the first instance. He was able to cross examine all the witnesses.

15. It was further argued that there was inconsistency as to the dates of the offence as indicated in the charge sheet vis a vis the prosecution evidence. I note that the offence is said to have occurred on the night of 15th December, 2011 and through to the wee hours of the night. It is for this reason that the date 16th December, 2011 comes up. In the circumstances, I find that he was not prejudiced in any manner rather no confusion was suffered by the appellant. That ground therefore fails.

16. It was the appellant's contention that the prosecution did not satisfy the requirements for positive identification. He contended that there was no indication as to the intensity of light with which PW2 identified the appellant. That PW1 did not immediately after the incident tell PW2 that he identified

someone he knew. That the only description of the attacker given was his hairstyle which is in fact a common hairstyle. The respondent on the other hand, contended that the bedroom light was on at the time of the robbery. It was PW1 and PW2's evidence that the bedroom and living room lights were on at the time of the robbery. From the evidence on record, the robbers took a considerable time in the process. From the time of entry to the time PW1 was being ordered to give money. With the lights on as said, it was not difficult to identify someone. PW1 met the appellant a few hours after the incident and it is after that incident that he was arrested. The appellant did not give any explanation as to where he was on the material day instead he only talked of how he was arrested. I am satisfied that the Appellant was positively identified as one of the robbers.

17. On the third ground it was submitted that PW2 did not give information that she was in a position to identify the appellant. The validity or otherwise of an identification parade was discussed in **John Mwangi Kamau v. Republic (2014) e KLR** where the Court of Appeal held as follows:

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

In view of the foregoing holding, I find that the identification parade was properly conducted and the Appellant positively identified. Besides the Appellant was positively identified by PW.1 who spotted him at Sana Sana Petrol Station during the day and was promptly arrested.

18. It was also contended that there was failure to bring essential witnesses. It must be pointed out that the failure on the part of the Respondent to call all the remaining witnesses was not fatal since there is no hard and fast rule that the Prosecution must call the whole world since the Prosecution is guided by the clear Provisions of **Section 143** of the Evidence Act which states that no particular number of witnesses

shall in the absence of any provision of law to the contrary be required for the proof of any fact. The witnesses called were sufficient in my view and were able to prove the facts required to sustain the charge against the Appellant. The Prosecution indeed proved the essential ingredients of the offence of robbery with violence against the Appellant beyond any reasonable doubt. The Appellant was in company of others and armed with dangerous and offensive weapons and that they stole property from the complainant. Even though the doctor was not called to testify and produce P.3 form, I find the other ingredients of the offence in Section 296 (2) of the Penal Code were proved by the Prosecution beyond any reasonable doubt.

19. In the result it is the finding of this court that the Appellant's appeal herein lacks merit. The same is ordered dismissed. The conviction and sentence of the trial court I upheld.

It is so ordered.

Dated, Signed and delivered at Machakos this 19th day of **December,** 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Kioko Kawembe - the Appellant

Machogu - for the state

Kituva - Court Assistant