



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT CHUKA**

**HCCRA NO.49 OF 2015**

**(FORMERLY MERU HCCRA 37 OF 2015)**

**ELIJAH MAWIRA JUSTUS.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An Appeal from the Judgment and conviction of B.N. IRERI – P.M made on 12.3.2015 in Chuka Principal Magistrate’s Criminal Case No. 1365 of 2011)***

**JUDGMENT**

1. Elijah Mawira Justus, the Appellant herein, was on 21<sup>st</sup> December, 2011, arraigned before the Chuka Principal Magistrate’ Court with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The Appellant was the fifth (5) accused in Chuka Principal Magistrate’s Court Criminal Case No.1365 of 2011. In that case, it was alleged that on 6<sup>th</sup> November, 2011 at Kiereni trading centre in Mugwe Location, Tharaka Nithi, the Appellant, with six (6) others, jointly while armed with dangerous and offensive weapons namely knives, pangas and metal bars, robbed Denis Muchiri Karere of one mobile phone make Nokia, one wallet, one Equity Bank ATM Card, one national identity card, 10 Safaricom Sim Cards, assorted documents and cash Kshs.33,000/= all valued at Kshs.37,700/= and at the time of robbery, injured the said Dennis Muchiri Karere and murdered Salome Sharon Mwendu.
2. The Appellant denied the charge but after trial, he and his co-accused were convicted of the offence and sentenced to suffer death. All those convicted, including the Appellant, appealed against the said decision. However, at the hearing of their appeals, each of them insisted that his appeal be heard separately. Accordingly, the court proceeded to hear each Appellant separately notwithstanding that the appeals emanated from the same conviction and sentence and that most of the grounds were similar.
3. In his Amended Grounds of Appeal, the Appellant contended that; the trial court failed to consider that no description or names of attackers were given to the police; that the circumstances surrounding the attack were not favourable for identification; that the Appellant was not arrested with any exhibit or weapon; that the trial court erred in convicting the Appellant on a single identifying eye witness contrary to section 163 of the Evidence Act; that the identification parade was flawed; that the trial proceeded despite the Appellant having blocked the same at Meru High Court; that the Appellant’s defence was wrongly rejected and that the court failed to consider that the informer who led to the Appellant’s arrest was not summoned to testify. This being a first appeal, it is incumbent upon this court to review and re-examine the evidence afresh in order to draw to its own independent conclusions and findings. **See Okeno .V. Republic [1972] EA 32.** However, in doing so, the court must at all times have in mind that it did not have the advantage of

seeing the witnesses testify.

4. The evidence before the trial court was that on 6<sup>th</sup> November, 2011 at about 8.30pm, Dennis Muchiri Karere (PW2, the complainant) was in his house with his wife, Sharon Salome Mwende and son watching television. There was a knock at the door and he asked his wife to open. Immediately, about seven (7) male persons entered armed with knives, iron bars and whips. They injured the complainant and demanded for money whereby he gave them Kshs.33,000/= . They ransacked the house and took away his national identity card (PEXh.3), Equity A.T.M. card (PEXh 4) and assorted cards (PEXh 5 (a) – (g)). They also robbed him of his phone. The complainant's wife was all along calling for help but because it was raining outside, there was no help that came their way. She sustained injuries to which she succumbed to later on at the Chuka District Hospital. After the robbers had left, the complainant's brother came and helped take the complainant and his wife to Chuka District Hospital. The complainant was treated and discharged the following day but his wife died. The complainant was later called to Chuka Police Station where, on various days he attended identification parades in which he identified all the accused including the Appellant herein.
5. In cross-examination, the complainant told the court that there was electric light on that material night; that his was a single room; that he did not give any description of the robbers to the police; that before the identification parade, he was kept in a private room. That he identified his attackers in the parades out of their physical appearances. He indicated that the attackers took about 30 minutes during the robbery. That at the parade, he identified those who had attacked him and that the police did not describe to him the people he was to identify.
6. Dr. Justus Kitili (PW1) produced the Post Mortem Report (PEXh 1) for Sharon Salome Mwende. The report showed that the body of the deceased had a deep cut on the neck and that she died of massive hemorrhage. Bonface Mugendi, PW3 recalled that in the morning of 7<sup>th</sup> November, 2013 (sic) he was going to work when, he found a mobile phone and papers strewn on the road including the national identity card for the complainant. He notified the area assistant chief (PW5) who collected the items and surrendered them to the police. Loyd Mugambi (PW4) told the court that on 6<sup>th</sup> November, 2011 at about 8.00pm he went to the complainant's shop after he had heard screams from there. His response however, was delayed by rain. On arriving, he saw the deceased lying in a pool of blood. The complainant looked confused at the time. When going home, he collected about ten mobile sim cards and a 500 note S/No. BN 8724408 which he surrendered to (PW5)
7. Bedford Kinyua Mukiri (PW5), the Assistant Chief of the area, told the court how the brother of the complainant came to his house on 6<sup>th</sup> November, 2011 at about 8.00pm and told him that the complainant had been attacked by robbers. He went to the complainant's home and found the complainant's wife being put in a vehicle while bleeding profusely. He called the police from the Chuka Police Station. When they came, he and the police entered the complainant's room and found blood on the floor. The complainant told them that he had been robbed by some people but did not mention their names.
8. S.S.P Benjamin Marua, PW6 was the O.C.S Chuka Police Station at the time. He recalled how he was requested by the Investigations Officer (PW8) to carry out identification parades for, inter alia, the Appellant. That on 28<sup>th</sup> November, 2011 at about 10.30am, he filled the identification forms for an offence of robbery with violence. He then organized eight people for the parade; he called the Appellant and warned him of the offence; that the Appellant willingly agreed to participate in the parade and signed the forms but said that he did not have a friend to witness the exercise. That, at the time, he had kept the complainant in the crime office. That when he called the witness, the complainant identified the Appellant by touching him. After the parade, the Appellant stated that he was not satisfied with the parade but nevertheless signed the parade forms. The identification parade form was produced as PEXh. 15. When cross-examined by the Appellant, PW6 denied that he had called the Appellant to his office for the witness to see him. He

indicated that the members of the parade were of the same size and height and that he never forced the Appellant to sign the parade forms.

9. Corporal Benson Sindani (PW8) was the investigating officer. He recalled how on the morning of 7<sup>th</sup> November, 2011 he was informed of the robbery by his superiors who had visited the scene the previous night. He visited the scene that morning whereby he found PW5 and members of the public. He recovered from PW5 the documents that had been stolen but which had been collected from the road (PEXh 2-7). He found the household items scattered all over the room and blood on the floor. He then visited the complainant at the hospital who narrated to him how a gang of six to seven (6-7) people had attacked him and his wife the previous night. That he had identified them by way of lamp light that was on. He identified one of the suspects by name as he was a neighbour and that he used to see the others at the stage near where he worked. PW8 went to the home of the named suspect but the suspect escaped. He then circulated the names of the suspects. He later on learnt that the Appellant was one of those who had been arrested and was at Chuka Police Station. He arranged for an identification parade that was conducted by PW6 whereby the Appellant was positively identified. That there had been a wave of robberies within Chuka. One informer was killed as a result of which many people feared to testify in this case. He caused the body of the deceased to be photographed which photographs he produced as PEXh 18 (a) (b) and (c) and a report of scene of crime as PEXh 19.
10. In cross-examination, PW8 stated that the complainant did not give him the Appellants physical description; that informers mentioned the Appellant's name; he denied framing the Appellant with the offence. He could not however, recall whether he was the one who arrested the Appellant on 9<sup>th</sup> November, 2011.
11. When put on his defence, the Appellant offered to give sworn evidence but called no witness. He told the court that he used to do the business of selling samosas in Chuka Town. That on 6<sup>th</sup> November, 2011, he sold samosas the whole day. At 4pm he bought meat and onions, went home and prepared samosas till 12.00am when he slept. That on 8<sup>th</sup> November, 2011 at about 3.30am, he had a bang on the door. Police officers led by PW6 entered his house and arrested him for an offence they did not tell him. On 9<sup>th</sup> November, 2011, he was called to the office of the OCS and told that he was harbouring thieves in his house an allegation he denied. On 10<sup>th</sup> November, 2011, he was told that he was a suspect for a case of robbery but he executed bond to keep peace in remand. He was in custody for 14 days. Later, he was charged with the offence currently facing him after being paraded on 28<sup>th</sup> November, 2011.
12. At the hearing of the appeal, the Appellant relied on his written submissions. He submitted that since the complainant was attacked and got injured, he did not have an opportunity of seeing his attackers and that is why he did not disclose the names of his attackers to the Assistant Chief, PW5; that the investigations officer relied on the information given by informers who were not called to testify; that nothing was recovered from the Appellant. He further submitted that since the complainant did not give any description of the suspects, the identification parade was not in accordance with the law; that the evidence of the complainant, PW5 and PW8 was contradictory as to the light used to identify the attackers as well as the hospitalization of the complainant. That the trial court had overlooked his defence in breach of section 169 (1) of the Criminal Procedure Code. That one Kinyua, the brother of the complainant did not testify and that no exhibits or weapons were recovered from the Appellant.
13. Mr Ongige, Learned Counsel for the state opposed the appeal. He submitted that the prosecution had called all the necessary witnesses; that the arrest and bond to keep the peace did not prejudice the Appellant; that the identification parade was conducted in accordance with the Police Force Standing Orders; that the Appellant had indicated that he had no friend; that the trial court had properly warned itself of convicting on the evidence of a single witness and that there was a sufficient evidence to support the conviction. Counsel relied on the case of **Shadrack Omwaka – v- Republic [2016]eKLR** in support of his said submissions.
14. The first ground was that the trial court erred in proceeding with the trial yet the Appellant had

commenced proceedings in Meru to stop the same. I have considered the record. There was no evidence that there was any proceedings in Meru High Court to stay the prosecution of the Appellant in the lower court. And even if there was, it was not shown that either the Appellant obtained a stay or that he ever applied for such stay before the trial court and the same was denied. What the record shows is that the Meru High Court had at some stage directed that the trial do proceed before the Chuka Principal Magistrate's Court one (1). That ground fails.

15. The second ground was that the trial court failed to consider that the prosecution had failed to summon crucial witnesses. That one Kinyua, a brother to the complainant, and the informers were not called to testify. On the part of the prosecution, Mr Ongige submitted that all the necessary witnesses were summoned and testified. This court has considered the record. The prosecution summoned a total of ten (10) witnesses. The offence was committed at night. The complainant told the court that at the material time, he was with his wife and son when the robbers attacked. He had lived with his wife for only four (4) years. There was no evidence to show that the couple's son was of any material age and capable of testifying. The only other eye witness apart from the complainant was his wife, who however died from injuries sustained from the attack. The only role of the complainant's brother, Kinyua, played was to take the complainant and his wife to hospital and the report he made of the incident to PW5. PExh 1 and PEx 8 which were the post mortem report and P3 report, respectively, were produced and PW5 testified. That evidence was sufficient and there was no need for Kinyua to appear and rehearse the same. To my mind, there was no other material witness who would have been called to add to or subtract on the prosecution case.

16. As regards the contention that police informants were not called to testify yet they led to the arrest of the Appellant, the court relies on the case of **Kigecha Njuga .V. Republic [1965] E.A 773** the court stated that:-

***“Informants play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desires the courts to hear the details of the information an informer has given to the police, clearly the informer must be called as a witness.”***

17. Further, in the case of **Joseph Otieno Juma .V. Republic [2011] eKLR**, the Court of Appeal observed as follows:-

***“Finally, whether the informers should have been summoned to testify, we are of the view that their protection springs from public interest considerations because were they to testify, their future usefulness in the same role could be extinguished or their effectiveness in their work considerably impaired!***

***However, all the same, in the circumstances, we think there was no need for any additional witnesses to testify since the trial court had already found that the evidence of PW1 was credible and sufficient having identified the Appellant at an identification parade.....”***

18. In the present case, there was the evidence of PW8, the investigating officer that after the short release of one of the Appellant's co-accused, one of the police informants whose name PW8 disclosed was killed. In this regard, it is crucial that the identity of such informants be kept privileged. The necessity of their being called to testify can only then arise where there are gaps in the prosecution evidence and that it is only information or evidence of such informers that can clear the innocence of an accused person. In the present case, I am of the view that the firm and unshaken evidence of the complainant was sufficient and there was no need to call the informants whose information may have led to the arrest of the Appellant. That ground also fails.

19. The other grounds were that the trial court erred in convicting the Appellant on evidence of a single witness; that the circumstances of the attack were unfavourable to identification and that the identification parade was flawed. The Appellant further contended that he was not found in the possession of any of the stolen items or any weapon. The Appellant submitted that due to the vicious and sudden attack, the complainant did not have enough time to identify his attackers or describe them either to PW5 or the police. On the ground of uncorroborated and contradictory evidence; it was the Appellant's contention that the complainant testified that he used electric light to identify the robbers, yet he (PW2) had told PW8 that he had used lamp light to identify the attackers. This court has considered the record.
20. When the complainant testified, he was firm that there was electric light at the time of the attack. Indeed he and his late wife were watching television. Obviously the television must have been using electricity. He was categorical as to the weapons that the attackers had. That testimony remained firm and unchallenged. In my view, the post mortem report (PEXh 1) and the P3 form in respect of the complainant (PEXh8) corroborated the evidence of the complainant as to the attack and injuries sustained. The two proved that not only did the deceased die but that the complainant was injured and treated at Chuka District Hospital. The evidence of PW8 was what he alleged to have been told. The testimony of the complainant having remained consistent, firm and unshaken stands. To my mind, the alleged contradictions were not material as to vitiate the decision of the trial court in its findings.
21. As regards the quality of evidence, it is clear that the only eye witnesses to the robbery were the complainant and his wife. After the wife died, it was only the complainant who remained. The Court of Appeal for Eastern Africa in Abdala Wendo .V. R [1953] 20 E.A.C.A 166 held that:-

***“Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”***

22. In Roria .V. Republic[1967] EA 573 the Court of Appeal for East Africa also held:-

***“A conviction resting entirely on identity invariably causes a degree of uneasiness.....***

***That danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification.”***

23. From the foregoing, it can be said that a court can still convict on evidence of a single identifying witness if the evidence is sufficient and the court warns itself appropriately of that danger. In this case, the trial court properly warned itself of the danger of relying on the evidence of the complainant who was the single identifying witness. This court likewise warns itself accordingly. I think it is important to note the following matters. The robbery took place at night where there was electric lighting; it took place in a single room; and the robbers took about 30 minutes ransacking the house. Indeed, the robbers frisked the complainant and asked him for more money after he had given them Kshs.33,000/=. They therefore conversed with the complainant. The identification parade of the Appellant took place on 28<sup>th</sup> November, 2011, approximately three weeks after the incident which cannot be said to be too long to have interfered with the complainant's memory. In view of the foregoing, this court's opinion is that these circumstances were favourable for identification. The complainant may have been shocked at first by the attack,

but considering the long time which the attackers took in the operation and the lighting at the time, it gave the complainant ample time and opportunity to recollect himself and identify his attackers. The complainant gave to PW8 in his very first report the name of one of the attackers. He also indicated that he knew the others to be people he used to see at the bus stage near where he worked. From the foregoing, this courts view is that the circumstances of the incident were favourable for identification. Accordingly, on the authority of **Amani Kitsao Mweni V. Republic [2015] eKLR**, the failure to give the description of the Appellant in the initial report is not fatal. Those grounds fail.

24. The Appellant complained that the identification parade was flawed; that he was called to the O.C.S's office to give an opportunity to the complainant to see him. This court has considered the record. When the Appellant cross examined the complainant, the Appellant did not challenge the witness on how he identified him at the parade. He never raised with him the allegation that he had been shown to the Appellant at the OCS's office. The Appellant only raised this with PW6 who strenuously denied the same. PW8 and PW6 were firm that the parade on the Appellant was carried out strictly in accordance with the rules. I accept the evidence of PW6 and PW8 on how the parade was conducted. In my view, the contention by the Appellant that he was taken to the OCS's office so that the complainant could see him or that he was photographed and the photograph shown to the complainant to have been an afterthought. He did not indicate these complaints in PExh 13 the parade form or put them to the complainant when the latter testified. Those were the earliest opportunity when the Appellant could have raised these issues but he did not. I have seen the parade form for the Appellant and considered the testimony of PW6 who conducted the parade; the number of persons put on the parade were eight which is the required number in law; the Appellant willingly offered himself to the parade; he indicated that he had no friend and no objection of any kind was raised to the parade. The witness is shown to have been accommodated at a secluded room and when called to the parade, he identified the Appellant. From the foregoing, it is unclear where the flaw with the identification was as alleged by the Appellant. This court finds that there was no flaw with the identification parade. That ground also fails.

25. As regards the defence of the Appellant, the Appellant told the court that he spent the whole of 6<sup>th</sup> November, 2011 selling samosas in town and went home. The Appellant did not shake the evidence of the complainant who had placed him at the scene of the attack. I find no fault with the trial court in its finding on the strength of the Appellant's defence. The same also fails.

26. In the premises, I find that the prosecution did prove its case against the Appellant beyond reasonable doubt and that the conviction was safe and the sentence lawful. I find the appeal to be without merit and dismiss the same.

**Dated and delivered at Chuka this 21<sup>st</sup> day of April, 2016**

**A.MABEYA,**

**JUDGE.**