REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 47 of 2015

(FORMERLY MERU HCCRA 36 OF 2015)

HAMISI GITONGA MUTEGI alias KALISONGO……...…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).***

J U D G M E N T

1. Hamisi Gitonga Mutegi alias Kalisongo, the Appellant herein was on 21st December, 2011, charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code before the Chuka Principal Magistrate's Court, Criminal Case No. 1365 of 2011. The Appellant was the second (2) accused in that case. It was alleged that on 6th 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 Ksh.33,000/- all valued at Kshs.37,700/- and at the time of robbery, injured the said Dennis Muchiri Karere and murdered Salome Sharon Mwende.

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. At the hearing of their appeals, each of them insisted that his appeal be heard separately. Accordingly, although the appeals emanated from the same conviction and sentence and most grounds of appeal were similar, this court opted to hear and determine each of such appeal separately since that was the wishes of the Appellants.

3. At the hearing of the Appeal, the Appellant submitted his written submissions which contained Supplementary Grounds of Appeal with which he substituted the original Petition of Appeal filed in court on 19th March, 2015. In his grounds, the Appellant contended that; the trial court failed to consider that in the first report made to the police, the same did not connect the Appellant to the offence; that he was convicted on weak evidence; that the trial court failed to consider that the Appellant was charged on the report of informers and not the complainant; that the identification parade did not comply with Chapter 46 of the Police Standing Orders; that the trial court failed to consider that nothing was recovered from the Appellant and that his defence was not properly considered. This being a first appeal, it is incumbent

upon this court to review and re-examine the evidence afresh and draw its own independent conclusions and findings. See **Okeno –v- Republic [1972] EA 32**. However, in doing so, the court must at all times consider that it did not have the advantage of seeing the witnesses testify.

4. The prosecution case was that on the 6th November, 2011 at about 8.30 pm, Dennis Muchiri Karere (PW2, the complainant,) was in his house watching television with his wife, Sharon Salome Mwende and their son. He heard a knock at the door and thinking it was a neighbor, he asked his wife to open. Immediately, about seven (7) male persons entered the room armed with knives, iron bars and whips. They cut the complainant with a knife and demanded money whereby the complainant gave them Kshs.33,000/- which he had. They ransacked the house and took away his national identity card (PExh3), 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, no one came to their help. The complainant's wife sustained injuries from which she later succumbed to at Chuka District Hospital. After the robbers had left, the complainant's brother came and assisted in taking the complainant and his wife to Chuka Hospital. The complainant was treated and discharged the following day but his wife died. The complainant was later to be 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 from which he identified the attackers; that the robbery took place in 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 appearance. He indicated that the attackers took 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 7th 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 6th November, 2011 at about 8.00pm he went to the complainant's shop after he had heard screams from there. He had however delayed to respond to the screams because it was raining. On reaching the scene, he saw the deceased lying in a pool of blood and the complainant looked confused at the time. On his way 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) was the Assistant chief of the area. He narrated to court how the brother of the complainant came to his house on 6th November, 2011 at around 8.p.m. and told him that the complainant had been attacked by robbers. He immediately 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 Chuka Police Station. When they arrived, he and the police entered the complainant's room where he saw blood on the floor. The complainant told him and the police who visited the scene that he had been robbed by some people but he did not mention their names.

8. S.S.P Benjamin Marua (PW6) was the O.C.S Chuka Police Station at the time. He told the court how he was requested by the Investigations Officer to carry out inspection parades for, inter alia, the Appellant. That on 18th November, 2011 at 11.30 a.m he filled the identification forms for an offence of robbery with violence. He organized eight people for the parade. He then called the Appellant and warned him of the offence; that the Appellant willingly agreed to participate in the parade, signed the forms but said that he did not have a friend to witness the exercise. The Appellant stood between the 8th and 9th person in the parade. That all this time, he had kept the complainant in the crime office. That when he called the complainant the witness identified the Appellant by touching him. After the parade, the Appellant stated that he was not satisfied with the parade because he had a special mark (one eye) and he was very dirty. He however signed the forms. The identification parade form was produced as PExh

10. When cross-examined by the Appellant, PW6 stated that he could not get any one eyed person to put in the parade and that he placed people of almost similar age in the parade. He denied having gone to the Appellant's home on 13th November, 2011 and removing his money and photographs. He insisted that he followed all the rules of conducting identification parades.

9. PW8 was Corporal Benson Sindani, the investigations officer. He recalled that on the morning of 7th 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 in 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 the attackers by way of lamp light that was on. He identified one of the suspects by name who hailed from his home area and stated that he used to see the others near the stage where he worked. With the help of his colleagues, PW8 visited the home of the named suspect but the suspect escaped. PW8 then circulated the names of the suspects and commenced investigations. He later learnt that the Appellant was one of those who had been arrested. He interrogated the Appellant and in an identification parade conducted by PW6, the Appellant was positively identified by the complainant. PW8 further told the court that there had been a wave of robberies within Chuka and that one informer was killed shortly after the Appellant was briefly released as a result of which, many people feared to testify in the 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 PExh19. In cross-examination, PW8 stated that the complainant had told him he could identify his attackers as one of them was his neighbour whilst he used to see the others at the stage near where he worked.

10. On being put on his defence, the Appellant offered to give sworn evidence but called no witness. He told the court that on 6th November, 2011, he went to Makamu Bar and drunk between 6.30 p.m. and 12.00 am then went back to his house and slept up to 7.00 a.m. Then on 7th November 2011, PW6 and other officers arrested him from his house. He was never informed why he was being arrested until 8th November, 2011 when he was brought to court and charged with robbery with violence. It was alleged that he had robbed one Nyaga Patrick. He denied the charge and was remanded until 15th November, 2011. He later learnt that PW6 had gone to his house and taken away his briefcase containing, inter alia, Kshs.52,000/- and photographs. That on 18th November, 2011, he was called to the office of the OCS (PW6) and while there, a person was called to come and identify where there was any of his properties in the briefcase of the Appellant but that person identified none. Later on, the Appellant was taken to a parade and the same person was called and he identified him by touching him. That he protested to PW6 that he was one eyed and that the witness had seen him. He was later charged with the offence facing him. The Appellant contended that PW6 had framed him for the Kshs.52,000/- which PW6 had allegedly taken. He claimed that he was forced to sign the parade forms.

11. At the hearing of the appeal, the Appellant orally submitted and further relied on his written submissions. He submitted that since the complainant was attacked and got injured, he did not have any opportunity of identifying his attackers and that that is why he was unable to give their descriptions at the time of reporting or disclose who his attackers were to PW4 and PW5. He further submitted that the identification parade was not properly conducted as the Appellant was the only one with a special mark, one eye. That the Appellant had been arrested earlier for another offence and not the present offence. That PW8 had relied on information from informers and the allegation that the Appellant was a harbitual criminal to charge him. The Appellant submitted that on the basis of **Kigecha v- Republic [1968] EA**, the informers should have been called to testify. He concluded that his defence was wrongly overlooked and therefore he urged that the Appeal be allowed.

12. Mr. Ongige, Learned Counsel for the state opposed the appeal. He submitted that the prosecution called nine (9) witnesses whose evidence was consistent; that the complaint had properly identified the Appellant; that the trial court had properly warned itself of convicting on the evidence of a single witness and that the conviction was supported by the evidence adduced. Counsel relied on the case of **Shadrack**

Omwaka –v- Republic [2016] eKLR to support his submissions.

13. The first two grounds of appeal were that the trial court failed to consider that the Appellant was charged on the basis of the report of informers and not that of the complainant and that the first report did not connect the Appellant to the offence. That the said informers were never called to testify. Ordinarily, the police are expected to carry investigations based on information received. The first report made to the police is expected to form the basis of commencing investigations. However, it is not to be expected that such information becomes the only basis on which the entire investigations will be based and the ultimate action by the police. In most cases, the police would use informers to confirm, cross-check or verify any information in their possession. In this regard, informers do play a crucial role in the society in which they work. In the case of **Kigecha Njuga -V- Republic [1965] E.A 773** the Court of Appeal 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 desire 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."***

14. 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 aware of the fact that their protection springs from public interest considerations, because were they to testify, their future usefulness is 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……"***

15. In the present case, the investigating officer (PW8) testified that after the short release of the Appellant from custody, one of the police informants whose name PW8 disclosed was killed. His testimony on this fact was never challenged by the Appellant. In this regard, this court's opinion is that in public interest, the identity of such informants should always remain privileged. The necessity of their being called to testify can only arise where there are gaps in the prosecution evidence and that it is only the information or evidence of such informers that can clear the innocence of an accused person.

16. Further, in the case of **Amani Kitsao Mweni –V- Republic [2015] eKLR** the Court of Appeal held:-

> ***"Although the complainant did not give a clear description of his assailant to the people to whom he initially reported the robbery, he was sure that he could identify his assailant if he saw him. We are satisfied that the complainant saw and talked to the appellant and was able to identify him as his assailant ……."***

Accordingly, where there is evidence that a complainant can identify the suspect, it does not matter that there was no initial description of the suspect. What matters is the favourability of the circumstances surrounding the identification.

17. In this case, the complainant told the court that the attack took place at 8.00pm inside a one roomed premises enabling close contact between him and the attackers. There was electric lighting and the attackers took 30 minutes to complete their mission. This must have given the complainant enough time to identify his assailants. He told PW8 that he could identify his attackers, he thereafter named one of them and stated where he used to see the others. He also identified the Appellant at the parade. In view of the foregoing, this court's opinion is that it was not necessary for the informers to attend and testify. Further, the circumstances of identification having been favourable, it does not matter that the

complainant did not give the description of the attackers to PW5. He however did give to PW8 on the day following the attack. Accordingly, the two grounds fail.

18. The other grounds were that the trial court erred in convicting the Appellant on weak evidence and in failing to consider that nothing was recovered from the Appellant. It is clear from the record that the only eye witnesses to the robbery was the complainant and his late wife. With the death of his wife, the complainant remained the single identifying witness in this case. It is trite that a court must be very slow to convict on the evidence of a single identifying witness. In the case of **Abdala Wendo –V- Republic [1953] 20 E.A.C.A 166** the Eastern Africa Court of Appeal 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."***

19. In **Roria - V – Republic [1967] EA, 573** the same court reiterated that:-

> ***"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."***

20. In this regard, a court can still convict on evidence of a single identifying witness if the evidence is sufficient and the court appropriately warns itself of the danger. In this case, the court has already found that the circumstances for identification were favourable, to wit, the attack took place in an enclosed small room giving close contact between the assailants and their victims; the duration of attack was quite long 30 minutes; there was electric lighting and the identification parade was held within three (3) weeks of the attack whereby the memory of the witness is expected not to have been considerably eroded. The Appellant was identified at that parade. The trial court properly warned itself of the danger of convicting the Appellant on the evidence of the single identifying witness. This court likewise warns itself accordingly. The evidence adduce sufficiently connected the Appellant to the offence notwithstanding that nothing was recovered from him. In this court's view therefore, the trial court cannot be faulted for convicting on the evidence adduced at the trial. Those grounds fail.

21. The other grounds were that the identification of the Appellant at the parade was an afterthought as no prior description of the Appellant was given and that the parade was in breach of the police force Standing Regulations. The Appellant complained that he was the only person with one eye out of the nine (9) members of the parade and that his clothes were dirty. He also complained that PW6 called him to his (PW6) office and while there, PW6 called a person to identify whether there were any of his items in the Appellant's briefcase. That later, this person turned to be the complainant who lives near the Appellant.

22. The record shows that PW6 denied the allegation that he called the Appellant to his office and that while there, the complainant got the opportunity to see the Appellant. It should be recalled that when the complainant testified, the Appellant did not put to him this allegation. In this court's opinion, this contention was an afterthought. In any event PW6 vehemently denied the allegation. Further, the trial court made a finding that PW6 had testified that he made all effort and had conducted the identification parade for the Appellant and his co-accused in accordance with the Force Standing Regulations. This court notes that PW6 availed at least nine (9) members in the parade as per the regulations; he warned the Appellant of the offence; he placed in the parade people of similar complexion and height and that he had

kept the witness in a secluded place before the parade. Further, the Appellant however willingly participated in the parade.

23. The Appellant however contended that he was the only person in the parade who had only one eye. Regulation 6 (d) of the Force Standing Orders provides:-

> ***"(d) the accused/suspect person will be placed among at least eight persons, as far as possible of similar height, general appearance and class of life as himself. Should the accused/suspect person be suffering from a disfigurement steps should be taken to ensure that it is not especially apparent." (Emphasis supplied).***

24. It is not in dispute that the Appellant was at the time of the parade and still is one eyed. The foregoing regulation requires that such disfigurement should not be apparent. In the present case, PW6 testified that he tried to look for people with one eye but could not get one. The question that arises is, was the Appellant's disfigurement so apparent as to be obvious. There was no evidence to that effect. The complainant did not state that he identified the Appellant because of his one eyed condition. If PW6 made all the effort to get people with one eye but could not get, what was he expected to do in the circumstances? I do not think whether in the circumstances there was anything he could have done. As regards the complaint that the complainant did not give any description of the Appellant, this court has already made a finding that the circumstances of identification were favourable. The complainant had told PW8 the name of one of his attackers and that he used to see the other attackers around the stage near where he worked. On the authority of Amani kitsao Mweni Case (supra). I do not think the failure by the complainant to have given the description of the Appellant in the initial report is fatal to the findings by the trial court. Further, it was not shown that the complainant identified that Appellant because of his condition of being one eyed. Those grounds also fail.

25. As regards the complaint that the Appellant's Defence was not considered, this court has considered the record. The Appellant's defence was that he was in Makamu Bar on the material day between 6.30 p.m. and midnight before he went to sleep. That he was arrested the following day for another offence not the present one and that PW6 charged him because of Kshs.52,000/- which PW6 had allegedly taken from the Appellant. The trial court was not satisfied with this defence. Firstly, when PW6 testified the issue of the alleged Kshs.52,000/- was not put to him by the Appellant. Secondly, the Appellant did not give the particulars of the case that he was allegedly first charged with robbery with violence. At page 3 of the record is a charge sheet dated 18th November, 2011 in which the Appellant was initially charged in this case. There was nothing to show that the Appellant was in Makamu Bar on 6th November, 2011 between 8 pm and 9pm during the occurrence of the offence. There is nothing produced to fault the trial court on its decision. That ground is rejected.

26. In view of the foregoing, I find that the prosecution proved its case beyond reasonable doubt, that the conviction was safe and sentence lawful. The appeal therefore is without merit. The same is hereby dismissed.

Dated and delivered at Chuka this 21st day of April, 2016

A.MABEYA

JUDGE