REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO 48 OF 2015

(FORMERLY MERU HCCRA 39 OF 2015)

LAWRENCE GIKUNDI MUGO.....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. On 21st December, 2011 Lawrence Gikundi Mugo, was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code in Chuka Principal Magistrate's Court Criminal Case No.1365 of 2011. In that case, the Appellant was the sixth (6) accused. 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 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 Mwende.

2. The Appellant denied the charge but after trial, he and his co-accused were found guilty, 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 the appeal, each of them applied that his appeal be heard separately. Accordingly, the court decided to hear each Appellant separately and write a separate judgment even though the appeals emanated from the same conviction and sentence and most grounds were similar.

3. In his Petition and Supplementary Grounds of Appeal, the Appellant contended that the proceedings were conducted in Kiswahili and English, a languages he was not conversant with; that the prosecution failed to summon vital witnesses who had been mentioned; that the trial court erred in failing to find that there was no enough evidence for which to convict the Appellant as the same was full of inconsistencies and was uncorroborated; that the court failed to consider that the initial report did not have the Appellant's description and that he was not arrested through information given by the accused; that the identification parade was in breach of the Police Force Standing Regulations and that his defence was not

considered. This being a first appeal, it is incumbent upon this court to review and re-examine the evidence afresh in order to draw 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 prosecution case was that on 6th November, 2011, at about 8.30pm Dennis Muchiri (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. On opening the door, about seven (7) male persons entered armed with knives, iron bars and whips. They cut the complainant with a knife and demanded for money whereby he gave them Kshs.33,000/= which he had. 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. The complainant's wife sustained injuries to which she succumbed later on at Chuka District Hospital. After the robbers had left, the complainant's brother helped in taking the complainant and his wife to the Hospital. The complainant was treated and discharged the following day (PExh 8) but his wife died. He was later called to the 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 the material night; that his was a single room; that he did into give any description of the robbers to the police; that before the identification parades, he was kept in a private room. He told the court that the attackers took about 30 minutes during the robbery and he identified them in the parades out of their physical appearances. 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 identified that the body of the deceased had a deep cut on the neck and muscle and that she died of massive hemorrhage. Bonface Mugendi (PW3) recalled that in the morning of 7th November, 2013 (sic) when he was going to work, he found a mobile phone and papers strewn on the road, including the national identity card for the complaint. He notified the area assistant chief (PW5) who collected 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 of the rain. He saw the deceased lying in a pool of blood and the complainant looked confused at the time. When he was 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) was the Assistant Chief for the area. He told the court how the brother of the complainant came to his house on 6th 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 narrated to court how he was requested by the Investigation's Officer to carry out inspection parades for, inter alia, the Appellant. That on 28th November, 2011 at about 9.45 am, 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; and he signed the forms but said that he did not have a friend to witness the exercise. That the Appellant stood between the 4th and 5th person in the parade. That before the parade, PW6 had kept the complainant in the crime office. That when he called the witness, the complainant identified the Appellant by touching him. 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 13. When cross-examined by the Appellant,

PW6 stated that the people he put in the parade were of similar height and complexion with the Appellant; that they did not however have similar clothes. He stated that his office did not have space where he conducted the parade.

9. Corporal John Mwai Mbili (PW7) attached to Chuka Police Station recalled how on the 27th November, 2011 at about 1.20pm he accompanied other officers including PW6 to Kathungu the area near Chuka Hospital where they arrested the Appellant and another accused. The O.C.S informed him the Appellant was a suspect in a robbery with violence case. He had seen the Appellant before within Chuka Town. PW8, Corporal Benson Sindani was the investigating officer. He recalled how, 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 from the complainant but 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 Chuka 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 since he was his neighbour and that he used to see the others at the stage which was near where he worked. He then circulated the names of the suspects. He later learnt that the Appellant was one of those who had been arrested. He arranged for an identification parade that was conducted by PW6 in which 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 PW2 had told him that he used to see the Appellant and could identify him. That he had informers but did not know if the informers had a grudge with the Appellant. He denied ever having photographed the Appellant before the Appellant was paraded. He indicated that the complainant never saw any of the suspects, the Appellants included, prior to the parade.

11. Corporal Elijah Wachira PW9 told the court how on the 27th November, 2011 at about 1.20 pm he in the company of other officers, including PW6, they arrested the Appellant following a tip off. Nothing however, was recovered from the Appellant.

12. When the Appellant was placed on his defence, he offered to give sworn evidence but called no witness. He told the court that he used to do business of buying and selling goats and chicken. That he was arrested on 27th November, 2011 together with one other suspect and other women for allegedly dealing with bhang. That PW8 photographed him before the parade, and that when he was called to the office of the OCS, he met the complainant there who later on identified him in the parade. That he protested on how the parade was conducted since the people paraded were not similar.

13. At the hearing of the appeal, the Appellant relied on both oral and written submissions. He submitted that the complainant was not able to identify his attackers and that is why he did not disclose the names of his attackers to the Assistant Chief, PW5; that there was contradiction as to the source of light which the complaiant used to identify his attackers; that in his testimony he talked of electric light whilst he had told PW8 that he used a lamp light. That since the complainant did not give the description of the Appellant, the identification parade was flawed; that the Appellant had different clothes from the other members of the parade; that the Appellant was arrested on the basis of information received from informers who never testified; that nothing was recovered from the Appellant. That in any event, the trial court had overlooked his defence and therefore urged the court to allow his appeal.

14. Mr Ongige, Learned Counsel for the state opposed the appeal. He submitted that the complaint by the Appellant that the proceedings were conducted in a language he did not understand was baseless as both before the trial court and before this court, the Appellant addressed the court in Swahili language. He submitted that the suspect who was arrested together with the Appellant but released was because there was no evidence as against him. He further submitted that the prosecution called all the necessary witnesses; that the trial court had properly warned itself of convicting on the evidence of a single witness; that the trial court properly relied on the evidence adduced to find a conviction. Counsel relied on the case

of **Shadrack Omwaka – V- Republic [2016] eKLR** in support of his submissions. That the trial court had properly considered the appellant's defence but found it wanting.

15. The first ground of appeal was that the proceedings in the trial court were conducted in Kiswahili and English languages which the Appellant was not conversant with and there was no translation thereof. Neither, in his written submissions nor oral submissions did the Appellant address this ground. On his part, Mr. Ongige submitted that this ground had no basis. This court has perused the record. On 21st December, 2011 when the plea was read, the record shows that all the accused, including the Appellant replied in Swahili. At page 46 of the record, it shows that when a new Magistrate took over the case and was to give directions under section 200 of the Criminal Procedure Code, whilst five (5) of the accuseds replied in Swahili, two of the accused, the Appellant included addressed the court in English. In any event, when the Appellant appeared before this court at the hearing of the appeal, he conducted the entire appeal in fluent Kiswahili. Accordingly, the Appellant was not prejudiced when the trial was conducted in Kiswahili as the Appellant appeared both to the trial court as well as this court to be conversant with and to have mastered that language. That ground fails.

16. The second ground was that the trial court failed to consider that the prosecution had failed to summon crucial witnesses. The Appellant submitted that he was arrested as a result of information obtained from an informer who neither wrote any statement nor testified. 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. PW2 told the court that 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 their son was of any material age capable of testifying. The only other eye witness was the complainant's wife who succumbed to injuries sustained during the robbery. To my mind therefore there was no other material witness who would have been called to add to or subtract on the prosecution case.

17. As regards the contention that the original report did not mention the Appellant and that the police informants were not called to testify, I do not think the calling of the informers was necessary. The complainant had informed PW8 that he identified one of the robbers and that he had been seeing the others at the stage near where he worked. PW8 commenced investigations on the basis of the complainant's information then ropped in the assistance of police informers. Later on, the complainant positively and firmly identified the Appellant at the parade. When dealing with an issue of information obtained from informants in 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 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."***

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

> ***"Finally, whether he 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 in the same role could be extinguished or their effectiveness in their work considerably impared! 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….."***

19. In the present case, there was evidence of PW8, the investigating officer that after the short release of one of the Appellant's co-accused, one of the police informers whose name PW8 disclosed was killed. This shows how crucial it is that the identity of such informants be kept privileged. The necessity of their being called to testify can only rise where there are gaps in the prosecution evidence and that it is only

information or evidence of such informants that can clear the innocence of an accused person. In the present case, this court is of the view that the firm unshaken and credible evidence of the complainant was sufficient and there was no further need to call the informants who the Appellant says should have been called.

20. The other ground was that the trial court erred in convicting the Appellant on inconsistent and uncorroborated evidence. The Appellant submitted that his identification was not in accordance with the law and that he was not found with any of the stolen items or any weapon. The Appellant submitted that there was inconsistency on the light used to identify the robbers. On its part, the prosecution submitted that the evidence was consistent and corroborative. The record shows that the complainant told the court firmly that at the time of the attack there was electric lighting. That he and his wife were watching television. His testimony on that fact remained unchallenged and unshaken. To this court's mind, the alleged contradictions between the testimonies of the complainant and PW8 as to the alleged lighting was not material. As regards corroboration, the Post Mortem report (PExh 1)) and the P3 form (P Exh 8) corroborated the evidence of the complainant as to the attack. The Appellant was properly identified at the parade conducted by PW6.

21. In my view, the pertinent issue in this appeal turns on the sufficiency or otherwise of evidence of the single identifying witness. It is clear that the eye witnesses to the robbery were the complainant and his wife. After the wife died, it is only the complainant who remained to tell the story. On the issue of a single identifying witness, the Court of Appeal for Eastern Africa in **Abdalla 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 (emphasis added)***

23. From the foregoing, it is no doubt 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 the 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 there was electric lighting; the robbery took place at night; premises was a single room enabling close contact between the complainant and the robbers; The robbers took about 30 minutes ransacking the house. Indeed they frisked the complainant and asked him for more money after he had handed over to them Kshs.33,000/=. The identification parade of the Appellant took place on 28th November, 2011, roughly three (3) weeks after the incident which cannot be said to be too long as to affect the complainant memory. In my view, considering all the foregoing, it is safe to conclude that the circumstances were favourable for identification. The complainant may have been shocked by the sudden attack at first, but considering the duration of time which the attackers took in the operation, the lighting at the time, the small room in which the incident took place, the complainant, must have had ample time to recollect himself and identify his attackers. Further, at the parade he identified the Appellant without hesitation.

24. The Appellant complained that the identification was flawed; that he was photographed and called to the O.C.S's office in order to give opportunity to the complainant to see him. Firstly, when he cross-examined the complainant, the Appellant did not challenge the complainant on how he identified him at the parade. Secondly, he never raised with the complainant the issue of the complainant having been shown the Appellants photograph or having been shown to the Appellant or seeing the Appellant at the O.C.S's office. The Appellant only raised these with PW8 who strenuously denied the same. PW6 was firm that the parade on the appellant was carried out strictly in accordance with the rules. This court accepts the evidence of PW6 and PW8 on how the parade was conducted because, it would seem that the Appellant's contention may have been an afterthought. Thirdly, he did not indicate the issue of being photographed or being seen by the complainant in the office of the OCS in the parade forms (P Exh 13) when PW6 asked him whether he was satisfied with the parade. Further, he never raised them with the complainant when the latter testified. These in my view, were the very first opportune times that the Appellant had to raise those issues in the event they were genuine and not an afterthought. The grounds fail.

25. The other complaint was that the trial court did not consider that the complainant did not give any description of the Appellant in his first report. The record shows that the first time the complainant got the opportunity to make a report to the authorities is the 7th November, 2011 while in hospital. He was visited by PW8 the investigations officer. PW8 told the court that the complainant identified one attacker by name as he was a neighbor and stated that he used to see the others at the stage near where he worked. To this court's mind this was enough description. If the complainant used to see the attackers at the stage and that if were availed he would positively identified them, there can be no question about the initial description. In the case of **Amani Kitsao Mweni v. Republic [2015] eKLR,** the Court of Appeal observed that:-

> ***" Although the complainant did not give a clear description of his assailant to the people to whom he initially reported to the robbery, he was sure that he could identify his assailant if he saw him."***

In the present case, the complainant stated to PW8 that he could identify his assailants. That ground also fails.

26. As regards his defence, the Appellant narrated to the trial court how he was arrested on 27th November, 2011 at 12.00pm. That he was arrested with others whereby two were charged with bhang whilst one was released. The trial court found that the Appellant did not sufficiently challenge the evidence of the complainant. Indeed he never explained where he was on the night of 6th November, 2011 having in mind that the complainant had placed him at the scene of crime. In this regard, I find no fault with the trial court in having rejected the defence of the Appellant.

27. 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 21st day of April, 2016

A.MABEYA,

JUDGE