



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO.83 OF 2013

(Being an appeal from original conviction and sentence by Hon. E.S Olwande, Ag SPM, in Butere PMCCR. Case No.336 of 2012 delivered on 22/03/2013)

JOSAM WESONGA MAKOKHAAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

Introduction

1. The appellant herein Josam Wesonga Makokha was arraigned before the Principal Magistrate's Court in Criminal Case Number 336 of 2012 on three counts of robbery with violence contrary to Section 296(2) of the Penal Code. In Count 1, it was alleged that on the night of 7th September 2012 along Ebuyangu – Ekeru road Shitsitswi sub location in Butere District within Kakamega County jointly with others not before Court, while armed with dangerous weapons namely clubs and knives robbed PILISILA MAKUTWA of identification card, ATM card, Nic bank, two mobile phones make C 3303/no.353980448259801, a suitcase, 4 sweaters, 4 shirts, 4 t-shirts, 3 dresses, 3 trousers and cash 20,000/= all valued at kshs.86000/= and at the time of such robbery used actual violence against the said PILISILA MAKUTWA.
2. In the alternative charge to Count 1 the appellant was charged with handling stolen property c/s 322(1) of the Penal Code. The particulars being that on the 9th day of October 2012 at Emuleche village Shinamwenyuli sub location in Butere District within Kakamega County, otherwise than in the course of stealing dishonestly retained a green Kenya Commercial Bank T-shirt, the property of PILISILA MAKUTWA knowing or having reason to believe it to be stolen property.
3. In Count 11 the particulars of the offence were that on the night of 7th September 2012 along Ebuyangu – Ekeru road, Shitsitswi sub location in Butere District within Kakamega County, jointly with others not before the Court, while armed with dangerous weapons namely knives and clubs robbed FRANCIS MAKUTWA OMUKALI of identification card, driving licence, two mobile phones make Nokia 1200 Samsun and cash kshs.4800/= all valued at kshs.9600/= and at the time of such robbery used actual violence against the said FRANCIS MAKUTWA OMUKALI.
4. The appellant also faced an alternative charge of handling stolen property c/s 322 (1) of the Penal Code. The particulars being that on the 9th day of October 2012 at Emuleche village Shinaravenyuli sub location in Butere district within Kakamega County, otherwise than in the course of stealing dishonestly retained a driving licence, identification card, the property of FRANCIS MAKUTWA OMUKALI

knowing or having reason to believe it to be stolen property.

5. In Count 111, the appellant was charged that on the night of 7th September 2012 along Ebuyangu – Ekeru road Shitsiswi sub location in Butere district within Kakamega County, jointly with others not before Court, while armed with dangerous weapons namely clubs and knives robbed JOSE REYES of driving licence, ATM card of Nic bank, brown wallet, brown shoes, brown open shoes, a mobile phone make Nokia 92 and cash 6000/= all valued at KShs.39000/=and at the time of such robbery used actual violence against the said JOSE REYES.

6. The appellant also faced an alternative charge to Count 111, the particulars being that on the 9th day of October 2012 at Emuleche village, Shinamwenyuli sub location in Butere district within Kakamega County otherwise than in the course of stealing dishonestly retained a brown wallet, brown shoes and brown open shoes the property of JOSE REYES knowing of having reason to believe it to be stolen property.

7. The appellant denied all the three counts and the alternative charges to all the three counts. The case proceeded to full trial during which the prosecution called 5 witnesses. After carefully analyzing all the evidence on record the learned trial Magistrate was satisfied that the prosecution had proved its case against the appellant on each of the three counts and convicted him accordingly. The appellant was sentenced to suffer death as by law provided.

The Appeal

8. Being aggrieved by both conviction and sentence, the appellant filed his appeal on the following home-made grounds:-

1. That the trial magistrate erred in law and facts when she pronounced an anti-ethical, degrading and inhumane sentence against the constitution of Kenya
2. That the trial magistrate erred in law and facts when she failed to weigh the onus of identification that was delicate both at the scene and identification parade.
3. THAT the trial magistrate erred in law and facts when she based the appellant's conviction on single witness.
4. THAT the trial magistrate erred in law and facts when she failed to note uncorroboration between PW1 and PW4 regarding who was at identification parade.
5. THAT the trial magistrate erred in law and facts when she failed to note that PW5 investigating officer was dishonest regarding his tracking game that did not correspond with his ambition.
6. THAT the trial magistrate erred in law and facts when she failed to detect frame-up by prosecution that amounted to innocent sentence and conviction of the appellant herein.
7. THAT the trial magistrate erred in law and facts when she was generally biased as she failed to digest the ingredients to facts adduced by prosecution.

The appellant therefore prays that the appeal be allowed the conviction quashed and the sentence of death set aside.

The Prosecution Case

9. The Prosecution called 5 witnesses whose evidence was as follows: PW1, Philisila Lukhania Makutwa (hereinafter referred to as Pilisila) told the Court that on 9th September 2012 at about 9.45pm, she was on her way to Bungoma to visit her parents. She was travelling from Kisumu and was in the company of her father Francis Omukoli Makutwa who testified as PW3 (Francis). She was also travelling in the company of her husband, Jose Miguel Reyers together with their one year old child. They were all travelling in a Toyota NZE car.

10. On reaching Shitsiswi area, the car got a tyre puncture on the right front wheel forcing all of them to get out of the car to facilitate change of tyre. As the process of changing the tyre was ongoing with

Francis and Jose Miguel Reyes changing the tyre while she held the child 2 people suddenly appeared on the scene. She stated that the car's parking and hazard lights were on, as well as the light of her mobile phone which she was using to light on the wheel being changed.

11. Pilisila also testified that when she heard some people speaking near the boot she moved to see who it was and that is when she heard a person speaking to Jose in Kiluhya and telling him to be down. Since Jose did not understand Kiluhya he asked that person if he needed help. In a split of seconds, she saw Francis coming hit by another man. Francis was hit several times as he cried out and as Pilisila screamed.

12. Francis then fell down and the attacker moved to where Pilisila was and ordered her to lie down. Pilisila shone her torch on him even as he ordered her to lie down. She stated that because she was pregnant she could not lie down at once and the attacker hit her on the back while then produced a knife and also hit her with something. That looked like a club. When Pilisila sought to know why he was beating her, he placed the knife on her stomach. He also proceeded to cut her on the left arm near the elbow. The trial Court observed the scar. Pilisila continued shining her phone light on him, and this angered him, but not before she had seen him very clearly. She identified the appellant as the person who attacked her and cut her on the left arm. Pilisila surrendered her phone to him after which another attacker went to where she was and pushed her behind the vehicle. Pilisila stated that she saw the face of this second attacker with the help of the car's lights and that she could identify him if she saw him. She stated that the appellant was very violent during the attack. The appellant and his accomplice demanded money and before she could remove the money from the wallet he went about searching Francis and Joe's pockets. The second attacker took Pilisila's wallet, 2 phones make Samsung which were black and pink respectively. The attackers also took Pilisila's ID card, ATM card and NHIF card among other documents. They also took away her suitcase with assorted clothing in it, including the items stated in the charge sheet. They also took away the baby's clothes and a Spanish book belonging to the child in addition to some other personal belongings for the child.

13. Pilisila stated further that Francis driving licence and ID were stolen plus his 2 phones a Nokia and Samsung. Francis shoes were also stolen by the attackers. Jose was robbed of shoes and a wallet containing his ATM card, Alien ID card and kshs.6000/=.

14. After the robbery, the attackers ordered Pilisila, Francis and Jose to get back into the car and not to move until the attackers had made their escape. At that time Francis was bleeding from the forehead and the back of the head. After the attackers left, Pilisila Francis and Jose changed the tyre and then drove on to Mumias Police Station where they made a report of the incident.

15. After making the report at Mumias Police Station, the group drove to Bungoma District Hospital to seek treatment. Pilisila was treated and discharged as per the treatment.

16. On the following day they went and reported the matter to Butere Police Station where they were issued with Police abstracts. Pilisila told the Butere Police Station OCS that she could identify the attackers if she saw them. On 10th October 2012, she received a call from the Butere Police Station informing her that a suspect had been arrested with some items which could be theirs. She travelled to Butere on 11th October 2012 and at about 4.00pm, she was conducted to an identification parade where she saw the appellant wearing one of the stolen T-shirts. Pilisila was able to identify the appellant by facial appearance and by his voice. The appellant was wearing a KCB foundation T-shirt which had some faded parts because of jik bleach. The partially faded KCB Foundation T-shirt was identified as PMFI – 2.

17. PW3, Francis Makutwa Mukazi, (Francis) corroborated Pilisila's testimony as to what happened on the fateful day until they were attacked by 2 robbers after the car in which they were travelling got a puncture. He stated that as he was bending down to change the car tyre with the help of light from Pilisila's mobile phone, he heard Pilisila ask loudly "who are these people?" Pilisila sounded alarmed so he turned to look. As he stood up, someone hit him on the head with a cane. When he tried to move to the front of the car, he was hit a second time at the back of the head. He lost balance and could only see blurred visions, but he said he was able to identify the man who hit him. He was bleeding. Again he was

hit on the right hand whereupon he lost control.

18. After Francis lost control on having hit on the right hand the attacker left him and went for Pilisila and grabbed her by the collar as he also demanded to know what was in the vehicle. Francis stated that the same was illuminated by the parking and hazard lights of the car. Pilisila was screaming as she asked the attacker why he wanted to kill her. He said he turned and saw the attacker pointing a knife at Pilisila's throat. He was about 3 metres away from where Pilisila and the attackers were. The attacker demanded money from Pilisila. He then moved to the attacker and asked him to spare their lives. All this while Jose had been ordered to lie down and was being kicked around by the second attacker. Francis gave out some money to the attacker in response to the attackers demand for money, after which he ordered everybody to lie down. He complied. The attackers then searched his pockets and those of Jose and took away money and mobile phones together with his national ID, driving licence and KShs.4800/= in cash. They also took away the shoes he was wearing, before taking away a suitcase containing Pilisila's clothes, 2 mobile phones and cash.

19. Francis further testified that they were attacked by 2 robbers, one tall and the other one short. After the robbery, the robbers ordered them back into the car as they (robbers) vanished into the dark night.

20. They later fixed the tyre and drove to Mumias Police Station where they reported the incident. The same night, they drove to Bungoma District Hospital for treatment. He identified his treatment notes PMF1 – 5. He was treated and discharged.

21. On the following day, they went and reported the robbery to Butere Police Station at which they also recorded their statements. They were thereafter issued with P3 form – he identified his P3 form as P Exhibit 6. A month after the incident he was called by Butere Police and informed that his documents had been found. He went to Butere Police Station and identified his driving licence – PMF 1 – 3d and the accompanying KRA receipt for renewal fees for the licence – PMF 1 – 3e. When called the identification parade at Butere Police Station, he was not able to identify anyone.

22. During cross examination, Francis stated that he could not identify the attackers at the scene after he was hit several times on the head and the right hand and because he was bleeding.

23. When Pilisila and Francis went to Bungoma District Hospital, they were treated by Elias Adoka clinical officer who testified as PW2. He testified that he filled P3 forms in respect of Pilisila and Francis, though it is a different clinical officer, one Monica Chemitich, who treated the two.

24. According to PW3, Francis had cuts and bruises on the forearm and the right shoulder with swelling on the face. He concluded that Francis had suffered soft tissue injury. As for Pilisila, PW3 stated that she had a history of having been attacked on 7th September 2010. On examination, he found that she had a swelling on the face and pain in the left hip joint. Pilisila was found to be 7 months pregnant. She had a cut wound on the left hand and a bruise on the right shoulder. The injuries were estimated to be about a month old. PW2 stated that the probable weapons used to inflict the injury were blunt and sharp objects. PW2 classified Pilisila's injury as harm. Her P3 form was produced as PExhibit 4, while the treatment notes were produced.

25. Pilisila also testified that at the Police Station she saw Jose's open brown shoes – PMF1 – 3a and the closed brown shoes – PMF 1 – 3b. She also identified the child's Spanish book – PM 1 – 3c. Francis driving licence – PMF 1 – 3d and id card – PMF 1 – 3e were at the station. Jose's wallet – PMF 1 – 3 f was also identified by Pilisila. Pilisila later recorded her statement with the police. She later took the P3 form to the hospital to be filled – PMF 1 – 4.

26. During cross examination, Pilisila confirmed to the Court that the incident took place on a dark night but she stated that though she had at first panicked, she was able to identify the assailants at the scene. She however admitted that she did not give any description of the assailants to the Police. She also stated that the appellant took considerable time with them and spoke with them: She also said that the vehicle parking light was on and that her phone light was also on and stated that those are the lights she used to

identify the appellant at the scene.

27. Pilisila stated that when she went for the Identification parade, she greeted each member of the parade, in an effort to get the voice of the appellant and that she was able to identify him not only by voice but also by appearance and the T-shirt he was wearing. Pilisila also stated that When they made a report to the Police she told them about the brown pairs of brown – one open and one closed but she could not confirm if the information was recorded in the OB. at the canteen was able to identify the appellant who stood between member numbers 6 and 7. That before Pillisila picked out the appellant, she went round greeting each of the person' on the parade. That after being identified by Pilisila the appellant did not make any comment but expressed his satisfaction with the way the parade had been conducted. He thereafter signed the Identification Form. It was PW4's testimony that he conducted the parade in accordance with Chapter 46 of the forces Standing Orders. The Identification parade form was produced as P Exhibit 8. PW4 also identified the appellant as the suspect in respect of whom he had conducted the Identification parade on 11th October 2011.

28. In cross examination PW4 stated that the appellant was the 9th person on the parade, and that Pilisila identified him both physically and by voice and also by the T-shirt which he wore on that day and which T-shirt Pilisila identified as belonging to her: that the appellant had a small scar of a cut wound on the head near the hair line, though the mark could not be seen during the trial.

29. PW4 also testified that the T-shirt which was identified by Pilisila had a mark on it and that she was able to identify it by that mark. The witness as PExhibit 1.

30. Regarding the examination of Francis, who was aged 62 years at the time, he was found to have several club beatings on the head and was bleeding profusely. He had a cut wound on the occipital area of the head and also had a swollen and painful right hand. PW2 classified those injuries as grievous harm. The P3 Form for Francis was produced as P Exhibit 6, while the treatment notes made by Monica Chemitich were produced were produced as PExhibit 5.

31. PW4 was number 231209 Chief Inspector Saitra Mwita, OCS of Butere Police Station. He testified that on 11th October 2012 at around 11.30am to 12.00pm he conducted an Identification parade in respect of the appellant herein the Investigating officer also attended the parade. He stated that after the appellant was informed of the impending parade, he consented to participate in it. That the appellant was also informed of his right to call a friend or a solicitor to account the parade but he chose to be alone at the parade. PW4 stated that he arranged the parade in such a way that all the 8 members of the parade were of similar complexion as appellant. He stated that Pilisila who was outside denied a suggestion by defence Counsel that the voices of two different people can be similar. Regarding Pilisila's greeting to the parade members, the witness stated that Pilisila asked them in Kiswahili how they were, where they came from and whether they had seen her before. The witness also stated that though there was some handwritten addition to the 3rd copy of the Identification parade forms, the information on all the form was the same and that he had only written the words upon realizing that the carbon had not been placed properly on this 3rd copy.

32. The last Prosecution witness, PW5 was number 92480 Police Constable Eric Kimathi Kiome. He was the Investigating officer in this case. He stated as follows:- On 8th September 2012 at about 1.00pm, he was in his home at Butere Police Station when he was summoned by the DCIO and informed of the robbery incident which forms the basis of this case against the appellant. He went to the office where he found Francis, Pilisila and Jose. He recorded their statements. Francis furnished him with his (Francis) phone IMEI number. He then proceeded to the scene at Shitsitwi area along the Sabatia – Ekeru road. Finding nothing at the scene, he went back to the station and issued both Francis and Pilisila with Police abstract forms for their lost ID's and driving licence.

33. While he was recording the statements, Pilisila told PW5 that she could identify the persons who attacked them because she had spoken with one of the attackers and had identified the people by the lights of the vehicle and also by the light from her mobile phone.

34. After recording the witness statements she sent the IMEI numbers to Safaricom and Safaricom gave him the number which was being operated using the stolen phone. That the person using the phone kept moving between Shitsitswi, Mumias, Amagoro and Bungoma; so it was not easy to track the user. Then on 9th October 2012 at about 8.00am, he found out that the operator of the phone was in the Shitsitswi area. At about 4.00pm on the same day, he got information that a person was trying to sell a mobile phone at Mulambo in Butere District. Eventually he arrested the person who was trying to sell the mobile phone with the help of the informer.

35. Upon arrest of the suspect, a search was conducted on this person, but the phone that was found on him was not the stolen phone. The suspect was however found with the following; a brown wallet in which was the ID card for Francis (Ref No.MFI – P3). The suspect was also found with the ID card for Peter Baraza Ngobaro (MFI – P9a), the suspects voter's card (MFI – 9b) and an Equity Bank card bearing the suspect's name (MFI – 9c). On being asked who Francis was the suspect stated that that was the name of his deceased father.

36. PW5 then proceeded to the suspect's home in Shitswitwi area where they recovered driving licence belonging to Francis – MFI – 3d and KRA receipts bearing the same names – MFI – P7. They also recovered a Spanish book for children – MFI – P3, brown open shoes – MFI – 3a, brown closed shoes – MFI – 3b, a red metal box – MFI – P10, 2 padlocks, 2 chargers and other items. he proceeded to make an inventory of all these items and gave a copy to the appellant.

37. Later PW5 called the complainants to Butere Police Station and the items named herein above were identified. PW5 also stated that during the Identification parade conducted by PW4, the appellant was identified by Pilisila. The appellant was thereafter charged with the offences herein. PW5 produced PExhibits 2,3a – 7, 9a – c, 11 and 11.

Submissions on no case to answer

38. At the close of the Prosecution case, Counsel appearing submitted that the Prosecution had failed to establish a prima facie case against the appellant and urged the trial Court to make a finding to that effect and to acquit the appellant under the provisions of Section 210 of the Criminal procedure Code. Counsel pointed out that the issue of identification of the appellant had not been proved beyond doubt because of insufficient lighting. That there were contradictions in the evidence given by Pilisila and Francis. He submitted that all these curial flaws in the Prosecution evidence should be resolved in favour of the appellant.

39. In response, the Prosecution maintained first that there were no contradictions in its evidence and two that the appellant had been positively identified by both Pilisila and Francis. It was also submitted that the Identification parade evidence pinned to the appellant to the robbery after he was picked out by Pilisila. He urged the Court to put the appellant on his defence.

40. In her ruling the learned trial Magistrate acquitted the appellant of the charge in Count 111 since the complainant therein did not testify. On counts 1 and 11 and the alternative charges, she found that the Prosecution had established a prima facie case against the appellant and proceeded to put him on his defence.

The Defence Case

41. The appellant gave unsworn evidence. He did not call any witness. He told the Court that on the September 2012 he was at his home in Ebuwantsi village of Shinamwenyuli sub location in Marama location. He worked up to about 7.00am and remained at home with his family until 8th September 2012.

42. On 9th September 2012, he left home at about 10.30am and went to Harambee market to charge his phone. At 3.15pm, he went back to the market to collect his phone. He stated further that when he tried to switch on the phone, he found it could not work because apparently the battery was different when he made enquiries with the shop owner one Charles Juma, a scuffle ensued. During the struggles Juma's

battery and 2 phones fell down and broke. He later recovered his battery and set off for his home.

43. Before he went too far some people who were on motor cycles told him to accompany them back to Harambee market. He complied and at the market they told the shop owner to produce the destroyed items. They also told him (appellant) to pay for the broken battery and phones. When he tried to state his case, he was kicked until he fell down and they struck him across the face until he nose bled.

44. Thereafter, the man on the motor cycle took his voter's card and treatment card. Later, he was ordered to board one of the motor cycles and taken to Butere Police Station. At the station, one of the Police officers removed 2 ID cards from a drawer together with 3 pairs of shoes and asked him whether he (appellant) knew anything about these items. When he denied knowledge of the items he was taken to a backroom and beaten. He bled from the nose and mouth. He also stated that he was wearing 2 T-shirts one white T-shirt on top and a KCB T-shirt inside. He was ordered to remove the white T-shirt and remained with the KCB T-shirt which was clean.

45. He was kept in cells until the day of the Identification parade. He was thereafter taken to Court and charged. He denied any knowledge of the charges against him.

Judgment of the Trial Court

46. After a careful analysis of the evidence laid before her the trial Court was satisfied its case on both counts 1 and 11 beyond any reasonable doubt. The trial Court was satisfied that the appellant had been properly identified both at the scene of the robbery and during the Identification parade by Pilisila. The appellant was found guilty as charged on Counts 1 and 11 and convicted of the same. He was sentenced to suffer death as by law provided. The trial Court made no finding on the alternative charges. It is not clear from the sentence whether the appellant was sentenced to one or two death sentence. We wish to point out at this stage that the trial Court should have clearly indicated that appellant was sentenced to suffer death on Count 1 while holding the sentence on Count 11 in abeyance, for a man can die only once.

The Duty of this Court

47. As the first appellate Court we are under a duty to reconsider and evaluate the whole evidence afresh with a view to reaching our own conclusions in the matter. We are also under the duty to carefully consider the judgment by the learned trial magistrate with a view to determining whether the conclusions reached by the said Court were well founded. In **Mwangi –vs- Republic [2004]** e KLR 28, the Court of Appeal held, and we agree, that an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate Court's own decision on the evidence. We are also fully aware of our duty to weigh the conflicting evidence and to draw our own conclusions, and it is only upon making our own conclusions on the evidence that we can firmly say whether or not the conclusions reached by the trial Court can be supported. We however must remember that it is only the trial Court which had the singular advantage of seeing the witnesses and seeing them demeanor. We are therefore minded to make an allowance for this. Generally see **Muthoko & another –vs- Republic [2008] 297 and Okeno –vs- Republic [1972] EA 32.**

Issues for Determination

48. Having very carefully reconsidered and evaluated the evidence afresh, which evidence we have set out in detail in the proceeding paragraphs of this judgment, and also having carefully considered the judgment of the learned trial Magistrate, we find that this appeal revolves around the issue of identification both at the scene and during the identification parade as conducted by PW4. In the circumstances, the following are the issues:-

- Whether the appellant was properly and positively identified at the scene.
- Whether the appellant was properly and positively identified during the identification parade and whether the said parade was conducted in accordance with the rules;

- Whether the ingredients of the robbery charges were proved by the Prosecution.
- We shall proceed to deal with these issues as we consider the law and the submissions.

Identification

49. The law on identification of assailants under difficult conditions is now well settled. In the case of **Joseph Ngumbao Nzaro –vs- Republic [1991] 2 KAR 212**, it was held that before accepting visual identification as a basis for conviction the Court has a duty to warn itself of the inherent dangers of such evidence. The reason being that injustice can occur because of difficult circumstances under which a robbery may have taken place. The Court therefore ought to satisfy itself not only about the conditions prevailing but must also address itself to the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, especially where the witness is encountering the assailant for the very first time.

50. In the case of **Republic –vs- Turnbull [1976] 3 All ER 549**, the Court held, inter alia, that “Recognition may be more reliable than identification of a stranger, but when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistake in recognition of close relatives, and friends are sometimes made.” In **Paul Etole & another –vs- Republic – Nairobi Court of Appeal Criminal Appeal No.24 of 2000(unreported)**. The Court of Appeal expressed itself thus in part of its judgment on the issue of identification under difficult circumstances.

“.....evidence of visual identification, such evidence can bring about miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of an accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true recognition may be more reliable than the identification of a stranger; but even when a witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused’s case, the danger of mistaken identification is lessened, but the poorer the quality the greater the danger.”

51. On this issue, the appellant herein has submitted that he was not properly identified both at the scene and during the Identification parade. On his part, Counsel prosecuting submitted that the appellant was properly and positively identified by Pilisila during the more than one hour that appellant was at the scene. That the parking and hazard lights of the car, in addition to the light from Pilisila’s phone provided sufficient light to enable the said witness to clearly and positively identify the appellant at the scene. He also submitted that the Identification parade at which the appellant was identified by Pilisila was also properly conducted and that in any event, the appellant consented to taking part in the parade.

52. We have ourselves, carefully considered Pilisila’s testimony, we do appreciate that the circumstances were indeed difficult because the robbery took place on a dark night and in a sudden manner. We are however fully satisfied that Pilisila clearly saw and identified the appellant. That she heard his voice several times as he spoke not only to her but also to Francis and Jose. We are also satisfied that she had a very long time with the appellant, more than one hour and at one moment, he stood very close to her as he put a knife on her stomach and demanded money. She stated that during this whole time she shone her phone light on his face and was thus able to clearly see and identify him. In fact when she kept shining her light on him the appellant got angry and she had to give her phone to him, but not before she had had a sufficient time to see his face clearly and to identify it. We have no doubts in our minds that the appellant was clearly identified by Pilisila at the scene.

53. Now concerning the Identification parade, the appellant has submitted that there is no evidence

showing that Pilisila identified him by touching. We have noted from the Identification Parade Form that it does not say whether or not Pilisila touched the appellant, but it is clearly shown that the witness identified the appellant by facial appearance, by the voice and also because of the KCB green T-shirt which the appellant was wearing and which T-shirt Pilisila identified as hers by the jik bleach mark on it. We have also considered in detail Pilisila's own testimony during the Identification parade and we are satisfied that this witness knew exactly how she would go about identifying her attacker. She took time to ask each participant certain questions and she had no hesitation in pointing to the appellant as the person she had seen and heard on the material night. We have no doubt Pilisila's evidence on identification both at the scene and during the Identification parade.

54. There is one more point we wish to make on the issue of identification. We note that the only evidence of identification is that of Pilisila's because Francis could not pick out the appellant from the identification parade. In the case of **Roria –vs- Republic [1967] 583**, the appellant therein was convicted on the evidence of a single identifying witness. In determining that case, the Court of Appeal was guided by the principles laid down in the case of **Abdala Bin Wendo & another –vs- Republic [1953] 20 E.A.C.A 166** at p.168 to the effect that :-

“Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule 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 following a correct identification were difficult. In such circumstances, what is need 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.”

55. We agree with the principles above stated and add that we have tested with the greatest care the testimony given by Pilisila under the circumstances she found herself in and we are satisfied that she was a focused and steady witness who was able to withstand the rigorous cross examination without deviating from what she had stated in her evidence in chief. We therefore accept her evidence as being true. We do not agree with the appellant that Pilisila's evidence that in her panic, Pilisila did not identify him. Were the ingredients of the robbery charge against the appellant proved?

56. Section 296(2) of the Penal Code under which the appellant was charged in both counts 1 and 11 provides as follows:-

“296 (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) if the offender is armed with any dangerous weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

57. It is worth noting that the Prosecution needs to prove only one of the matters mentioned under subsection (2) above to satisfy the Court that the offence of robbery with violence has been committed. Those matters are any of the following:-

- being armed with any dangerous or offensive weapon or instrument, or
- being in company with one or more other person or persons; or
- if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.

58. The appellant herein has submitted that the core ingredients of the offence of robbery under Section 296 (2) of the Penal Code were not proved. He also submits that all the Prosecution was able to prove is that PW1 and PW3 suffered injuries arising from a violent assault.

59. We have carefully considered the evidence of both Pilisila and Francis and are satisfied that the appellant and his accomplice were armed with dangerous weapons as set out in the respective counts. We are also satisfied that he used the knife to cut Pilisila on the hand after he had threateningly placed the knife on her stomach. It is noted that Pilisila was seven (7) months pregnant at the time. It is also in evidence that the appellant was in the company of another, because Pilisila talks of two robbers, one tall and one short.

60. We therefore find that in this case, the Prosecution proved more than one ingredient of the offence of robbery with violence one of those ingredients being use of personal violence by cutting upon Pilisila and of beating upon Francis.

61. In effect therefore we are satisfied that the appellant was properly and positively identified as one of the two assailants who attacked the complainant herein. We are also satisfied that the Prosecution proved the offence of robbery with violence against the appellant beyond any reasonable doubt.

62. We hasten to add here, that the fact that the appellant was found in possession of recently stolen items during the robbery fortifies our finding that the appellant was one of the robbers who attacked the complainants in this case on the fateful night of 7th September 2012. In our view, the appellant did not adequately explain how he came to be in possession of the stolen items recovered from him during investigations. We have carefully considered the appellant's defence and find that that the same does not displace or weaken the Prosecution case that those items belonged to the complainant's herein and that they were stolen from them during the robbery in which the appellant, who was more violent than his accomplice participated. We dismiss the appellant's contention that those items were planted on him.

Other issues

63. The appellant has complained that the learned trial Magistrate failed to analyze the evidence and to give reasons for her conclusions. We have ourselves carefully considered the said judgment and agree with Counsel for the Respondent that the judgment of the learned trial Magistrate clearly shows the sequence of evidence and the reasons for her findings. In any event, we have ourselves reconsidered and evaluated the evidence and are satisfied that the evidence supports the charges against the appellant.

Conclusion

64. In conclusion, we find that this appeal lacks merit on both conviction and sentence. We dismiss it altogether and confirm the judgment of the learned trial Magistrate. Right of Appeal within 14 days.

Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 21st day of July 2015.

RUTH N. SITATI

ANTONY C. MRIMA

JUDGE

JUDGE

In the presence of:

Present in Court - Appellant

Mr. Omwenga (present) - Respondent

Mr. Lagat Court Assistant