**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 150 OF 2009**

**SHADRACK KIMINGICH WANJALA…….. APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(From original conviction and sentence in criminal case Number 8 of 20079in the Chief Magistrate's Court at Kiambu – E. Mwenesi (PM) on 1st April 2009)***

**JUDGMENT**

1. The appellant's appeal is predicated on grounds that the provisions of **Section 207(1)** and **Section 169(1),** both of the **Criminal Procedure Code** were not complied with in his trial. He has also attacked the weight of the evidence and in particular that of identification.

2. Miss Njuguna, the learned state counsel opposed the appeal on behalf of the state arguing that the prosecution proved their case beyond reasonable doubt, and that the appellant was properly identified during the robbery. She however urged us to quash the convictions in counts **IV** and **V** out of the five counts because they were not read out to the appellant at the beginning of the case.
3. The appellant and another were arraigned before court on 5th January 2008 charged with five counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. It was alleged that on 25th December 2009 at Lyton Estate in Kiambu, jointly with others not before court, while armed with dangerous weapons namely, pangas and rungus they robbed several complainants as follows:

**Hezron Oloo Kangata, of a mobile phone make Dorado T2626 valued at Kshs.3,500 and cash Kshs.3,400 in count 1.**

**Charles Mwaru Nyameu of a mobile phone Nokia 1112 valued at Kshs.2,500/= and cash Kshs.8,000/= in count II**

**James Kehongo of a mobile phone make Siemens A 50 valued at Kshs. 2,500/= and cash Kshs.2,000/= in count III.**

**Gilbert Mutaruki of a mobile phone make Nokia 1112 valued at Kshs.3,120 in count IV.**

**Beatrice Kwamboka of a mobile phone make Nokia 1112 valued at Kshs.3,120 in count V.**

and at, or immediately before, or immediately after the time of such robbery used actual violence against the said five victims.

4. The record indicates that the learned trial magistrate read out the charges in count **I**, **II** and **III** only, to which the appellant responded. The charges in count **IV** and **V** were not read, and the appellant did not respond to them. This would mean that plea was not taken in count **IV** and count **V**, and that the trial as pertains to these two charges was flawed ab initio. Any conviction and sentence flowing therefrom cannot therefore be allowed to stand.
5. We have scrutinized and re-evaluated the evidence on record bearing in mind that the duty of the first appellate court, is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion, but to make our own findings and draw our own conclusions, in line with **Boru & Anor V Republic Cr. App No. 19 of 2001 [2005] 1 KLR 649.** In the foregoing case the learned judges of the Court of Appeal held *inter alia* that:

   ***"A duty is imposed on a court hearing a first appeal to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well as to deal with any questions of law raised on the appeal"***

6. There is no dispute that **PW1, PW2 and PW3** were robbed on the night of 24th and 25th December 2008. **PW6** was attacked by a gang of six men who held him hostage for about six hours. They were armed with rungus (clubs) and pangas (machetes). They cut him on the head and **PW8** the medical witness classified the injuries sustained as harm. They took from him a mobile phone worth Kshs.3,500/= and another Kshs.3,500/= in cash. **PW2** testified that three robbers entered his house, while **PW4** did not specify how many entered his house. These two witnesses were not injured but they too lost their property to the robbers.

7. The question for determination in the first three counts is one of identification. The robberies occurred one after the other, in the dead of the night in a compound at Lyton state. The gang of six went on a robbing spree, and broke the doors to the complainants' houses one after the other, and robbed them. Only **PW1** was walking outside when he was attacked. **PW1, PW2** and **PW4** testified that they were able to see and identify the appellant at the moment when the other robbers shone the torch light on him as he divided the stolen money among them.

8. While the evidence of recognition is safer than the identification of a stranger, the Court must satisfy itself as to whether such evidence meets the required standard. The Court in ***Charles O. Maitanyi vs. Republic, Cr. Appeal No. 6 of 1986, (1986) KLR, 198***, stated that:

   ***"It is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.***

9. The appellant raised an alibi defence in which he stated that on the material date and time he was asleep in his house. He called his wife as **DW3** to lend credence to his alibi defence. The appellant who at first wished to tender his evidence under oath, changed his mind and testified without oath. This cannot be held against him since this was a criminal trial under which he bore no burden whatsoever to explain himself. We are also cognisant of the case of **Kiarie v Republic [1984] KLR pg 740**, where the Court of Appeal held that:

   **An alibi raises a specific defence and an appellant who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.**

10. We note however, that the learned trial magistrate did not address himself on the issue of alibi at all. We have therefore subjected the said evidence to fresh scrutiny to draw our own conclusion.

The alibi defence was raised at the tail end of the trial and did not run through the cross examination of the witnesses. It was also raised in an unsworn defence leaving no room for its testing on cross-examination. This evidence cannot however, be considered in isolation. It must be considered together with the rest of the evidence on record.

11. That the need to exercise care even in cases of evidence of recognition exists, was stated in **R. V. Turnbull (1976) 3 ALL ER 549, page 557,** where the court stated that:

***"recognition may be more reliable than identification of a stranger, but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

The appellant was known to **PW1**, **PW2** and **PW4** before the attack. **PW1** said that he was with the robbers from 8.30 p.m. to 2.00 a.m. and that the attack occurred outside where there was full moon by which someone could see far. Further that the robbers also had torch light. They lived in the same estate and worked together for the same employer. He had known him for a period of four months, and according to **PW1** the appellant used to visit him and admire his mobile phone. Further, that when the gang left **PW1** they attacked people in the camp but were arrested within ten minutes of parting with **PW1**.

12. **PW2**, testified that he had retired to bed with his family when the robbers visited him at 1.30 a.m. on the night in question. He stated that three people entered his house, of whom he was able to identify the appellant because he was his workmate. He identified him because he is the one who took the money and the robbers shone the light on him to see how he was dividing it. He had known the appellant for one year, and it was he who led other members of the public to the applicant's house within the estate to arrest him, ten minutes later. The appellant was still in the same clothes he had seen him in during the robbery.

13. **PW4,** a third neighbour whose house was broken into on the night of infamy, also identified the appellant as one of the robbers. Although the appellant was not convicted for robbing **PW4**, this was due to failure in the procedural aspect of the case and does not make this evidence of **PW4** and **PW5** any less useful. His evidence corroborates that of **PW1** and **PW2** in placing the appellant at the scene of the robbery. He too testified that the appellant was his colleague in the Tea Estate, and he was able to see and identifying him when his cohorts shone the torch on him.

14. From the evidence, it is clear that the appellant was in a gang numbering about six men who went on a robbing spree on the night of 24th and 25th December 2008 at Lyton Estate in Kiambu. Having formed a common intention, it matters not which specific robber entered which house, or which part he played in the robberies. Their actions were part of the same transaction. The acts of each are therefore attributable to all and the acts of all attributable to each as if they committed them individually.

15. Taking the evidence on record in totality, we are satisfied that the error of the trial court in failing to consider the alibi defence, did not lead to a finding on identification, of a nature that would lead us to conclude that it is reasonably probable that without this error the trial court would not have convicted the appellant.

16. On sentencing the learned trial magistrate pronounced himself thus:

**"SENTENCE**

**Accused 1 first offender. Offence capital. In each count accused shall suffer death as per the law prescribed. Sentences to run concurrently."**

We reiterate what both the High Court and the Court of Appeal have stated in numerous cases where an appellant is convicted on two or more counts of robbery with violence under **Section 296(2)** of the **Penal Code**, that such an appellant cannot be handed more than one death sentences. Common sense dictates

that a life once taken in satisfaction of the first sentence cannot be restored to allow for the execution of the sentences in the subsequent counts. The proper thing to do therefore, is to impose the death sentence in one count and order all the other sentences to remain in abeyance.

17. This appeal therefore succeeds in counts **IV** and **V** but is dismissed in counts **I**, **II** and **III**. The appellant will serve the sentence imposed upon him in count **I** while the sentences imposed upon him in counts **II** and **III** will remain in abeyance.

It is so ordered.

**SIGNED DATED** and **DELIVERED** in open court this **24th** day of **September 2013**.

**A.MBOGHOLI MSAGHA** **L. A. ACHODE**

**JUDGE** **JUDGE**