



**Mokaya & another v Republic (Criminal Appeal E037 of 2023)
[2024] KEHC 12194 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E037 OF 2023
TA ODERA, J
OCTOBER 9, 2024**

BETWEEN

LAWRENCE ONYIEGO MOKAYA 1ST APPELLANT

DOUGLAS MOSE NYABUTO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the Judgment of Hon. C. Ogweno (SRM) delivered at Kisii Chief Magistrate's Court Criminal case. NO. 688 of 2020 on 6th September, 2023)

RULING

Introduction

1. The Appellants herein being dissatisfied with decision of the lower court delivered on 6th September, 2023 wherein they were convicted for the offense of robbery with violence contrary to section 296(2) of the penal code and sentenced to 30 years in prison filed with the decision of the Judgement of the learned trial Magistrate delivered on 6th September, 2023 and thus filed this Appeal vide a Petition dated Appeal on 4th May,2023 which was based on the following grounds;
 - a) That the Appellants did not plead guilty and still maintain that they were not guilty.
 - b) The learned Magistrate erred in law and in fact by deliberately overlooking that that the testimonies of PW1 and Pw2 were false.
 - c) That the learned trial magistrate erred both in law and in fact by not stating to what extent and to what point the prosecution proved its case beyond reasonable doubt.
 - d) That the trial magistrate erred in law and in fact by not taking into consideration that the identification parade that was carried out was flawed.



- e) The learned magistrate erred in law and in fact by basing her judgment on matter not proved.
 - f) The learned magistrate erred in law and in fact by objecting the appellant's defense which was remarkably comprehensive in casting doubts on the evidence of the prosecution.
 - g) That the sentence that was imposed on to them was harsh excessive and punitive given that they did not commit the offense.
2. Based on the above grounds the Appellant the quashing their conviction and set aside their sentence.

The Factual Background

3. As first appellate court, this court will re-evaluate the evidence adduced before the Trial Court and arrive at my own conclusion but bearing in mind that it neither saw nor heard the witnesses during their testimony in court. See *Okeno vs. Republic* (1972) EA 3.
4. The Appellants were jointly charged with the offence of robbery with violence contrary to section 296 of the penal code. The particulars of the offense were that on the 9th day of April 2020 at Gesure Sub-location in Igemo sub-location Marani sub-county within Kisii County the Appellants jointly with others not before court armed with dangerous weapons namely machete, clubs and iron bars robbed Moses Ogamba Mosoti of a tiger generator, Hot Point DVD, GLD Woofer, Phone make Tecno S A1, neon ray, strawberry flap, Tekno buttoned phone and Kshs 55,000 all valued at Kshs. 85, 650 and at that time of the robbery they used violence against the said Moses Ogamba Mosoti.
5. On 26th May 2020, the appellants were presented to court for plea taking wherein they pleaded not guilty to the charges read to them.
6. During the hearing of the prosecution's case the prosecution called a total of 6 witnesses to prove their case against the Appellants. Moses Ogamba Mosoti a complainant in the matter testified as PW1, he stated that on 09.04.2020 at around 11 pm, he was asleep at his house with his wife Elizabeth Nyaboke and his 5 children when he heard people break his door. The said people then entered into his house claiming to be Police officers who had been sent by the area chief. He came out of his room when he heard one of his children scream. He found about 8 people in the house. They asked for money. He gave them Kshs 6,000/= The persons claimed they had been sent by the assistant chief. One of them hit him on the head using a metal rod. The wife to PW1 also gave them Kshs 49,000/- after he was hit using a metal bar. They locked them inside their bedroom and went away. They called their children who opened the door. They found out that the robbers had taken away a generator, woofer, Neon Ray smartphone and a Hotpoint DVD. He went to hospital for treatment and later reported the matter at Rioma Police Station. The police visited the scene and found a stone which the suspects had used to break the door.
7. It was his evidence that he saw the people who robbed them as they had lit torches which illuminated the house. The lights were switched off but he was aided by the said torches lights to see their faces. The men even asked them to look at their faces and told them that there is nothing they could do to them. After a month he was called and informed that one of the stolen phones had been recovered. He went to the police station with a receipt to confirm that the phone was his. He was treated and examined at Marani hospital and his P3 form was filled.
8. He was later called to Rioma police station where an identification parade was conducted and he managed to identify the accused persons whom he had seen on the fateful night rob and caused injuries to them for a period of one hour.



9. When cross –examined by the 1st Appellant person, he stated that he had not met him before the incident. He indicated that their attackers were many and he could not recall the exact number. He stated that it's only two people who entered his room and not three as was in the witness statement. He insisted that he had a chance to see him given that he had shone the light on his face telling him that there was nothing he could do to him. He yielded that there were no items recovered from the 1st appellant. He denied ever seeing the 1st Appellant before the incident. He equally denied that the police had shown him the photograph of the 1st appellant before the identification parade was conducted.
10. When cross examined by the 2nd Appellant PW1 stated that he was amongst the two people who entered his bedroom. He indicated that some of their attackers had jungle green jackets and others had civilian clothes. He said that it was her children who saw the house hold items being taken out of the room. He was unable to state where the mobile phone was recovered. He insisted that he was able to see the 2nd appellant since lights were shone on his face.
11. On re-examination he confirmed an identification parade was conducted and stated that the persons who were in the parade were of different heights.
12. Elizabeth Nyaboke Ogamba who is Pawl's wife testified as PW2 and stated that on the night of 09.04.2020 and 10.04.2020, she was sleeping at home with her husband when they heard people asking that they open the door, claiming to be police officers. They broke the door and entered the house. The men switched off the power at the metre box. Two men entered the bedroom and demanded money from PW1. She gave them Kshs 6,000/-. They hit her with a metal rod on the head and she gave them her ATM card and Identity card. When they left, she called for rescue. The robbers had taken away a generator, DVS, clothes school bags woofer and 4 mobile phones.
13. On identification, she stated that the men had shorn torches on their faces and asked them whether they knew them and that it was then that she saw their faces. Later on, they tried to call one of their stolen mobile phones which was answered by a woman. The neon Ray mobile phone was later on recovered. She went to Marani hospital where she was treated. She later reported the matter to the police station. They gave the police a physical description of the attackers. One had dreadlocks while the other was clean shaven. She later took part in the identification parade where she identified 1st and 2nd Appellants who were in the same parade. She stated that she had not seen the two men prior to the incident. He denied ever seeing prior to the parade.
14. When cross examined by the 1st Appellant, she stated that the 1st Appellant wanted her to see his face clearly as he demanded for money. She stated that he had shone the torch against his face. She however yielded that she could not tell the color of his clothes as it was dark and the touches were only focused on their faces. She also yielded that even though the phone was recovered, she did not inquire from the police from who the phone had been recovered from. She also stated that she was outside the police station when the parade was arranged.
15. When cross examined by the 2nd Appellant, she stated that she had identified him as he had a unique hairstyle since he had shaved the sides of his head and left a lot of hair at the middle. She also indicated that torches had very bright lights and had illuminated the whole house and thus could see all of them. She stated that he was standing by the door and had prevented her husband from going out. She equally just like the PW1 yielded that the parade had short and tall people.
16. When re-examined by the prosecutor she stated further that the attackers were in their house for around 1 hour and that she had seen their faces.



17. Samuel Makori Ogamba son to the PW1 and PW2 testified and PW3 and stated that on 09.04.2020 at around 11pm, he was at home with his parents and 3 siblings. He heard a bang on the door twice. He went to the sitting room to check. While at the door, he was accosted by 3 people. One hit him on the back of the head and on the left hand till he fell down. They then tied his hands behind. They then brought his sisters to the sitting room then went to their parents' bedroom. They assaulted the dad while demanding for money. The parents gave them money which they shared amongst themselves. The men then took away their mobile phones - Neon Ray, Strawberry flap, Teena 51, a small button Techno phone, GLD woofer, Tiger generator and a Hotpoint decoder. His sisters then opened their parents' room door. They had injuries on the head.
18. He identified the assailants to be around 8 in number. They were in the house for around 15 - 20 minutes. He stated the assailants had switched off the power supply and broke the bulbs. The men had torches which had bright lights which illuminated over wide area with a strong intensity and could cover a wide area. They had no masks and had civilian clothes. It was his evidence that the men did not speak to him but heard them call each other 'Lang'at.' He was able to identify two of the attackers as they had shone the light against their faces while they asked mother if she could recognize their faces. He was at the time lying down next to his parents' room.
19. He identified one of the two men to be the 2nd Appellant. He states that he identified him as he made several trips between the sitting room and his parents' room while carrying a torch. He recorded his statement at Rioma Police station. He stated that his mobile phone, make Neon Ray, (Pexh3) was stolen while charging in the sitting room. It was later recovered. He identified the receipt of purchase issued on 11.03.2020 at the sum of Kshs 4,000/-
20. On cross examination by the 1st Appellant he stated that he had not seen him before. When cross-examined by the 2nd Appellant, he stated that he was on the ground facing down as the 2nd accused person was watching over him. He stated that he lifted his face to see what was happening. He also stated that he was lying one meter from the parents' room. He insisted that he was more concerned with remembering his face and not the clothes he was wearing. He said that he was unable to tell how the mobile phone was recovered. He reiterated that he could see the assailants as they had big torches that were quite bright. Of the 8, he could only identify the 2nd accused person.
21. Moses Keengu a clinical officer working at Marani sub-county Hospital testified as PW4 and produced the three P3 forms for Moses Ogamba, Elizabeth Nyaboke and Samuel Makori who were examined at the facility. He disclosed Moses Ogamba had a deep cut wound on the head which was stitched. Elizabeth Nyaboke had bruises on the face and swelling on the skull. Samuel Makori sustained superficial cut wound on the head and soft tissue injuries on the abdomen. All injuries were classified as harm.
22. IP Aloysius Muthini testified as PW5; and stated that that on 09.05.2020 while was at Rioma Police Station when Cpl. Zebedeyo requested him to conduct an identification parade. He had two suspects in the cells at the time. The witnesses were inside the OCPD's office at the time. He asked for 8 participants of the same age, height, class of life and general appearance. He filled the names of the 8 participants in the form. He then called the 1st suspect, Lawrence Mokaya. He informed him of the importance of the identification parade and he agreed to participate upon signing the forms. He proceeded to call PW1 took him to the OCS office where the participants were. Prior to taking him to the room he was reminded that the suspect could or could not be amongst the participants. When PW1 got into the room he was able to identify the 1st Appellant by touching his left shoulder. He thereafter allowed Moses to move out of the room without interacting with other witnesses. He then called in the 2nd witness, (PW2) who when she walked in front of the participants was able to identify



- the 1st Appellant by pulling him away from the rest. He then proceeded to prepare a certificate of conducting identification parade confirming that the participants were of similar general appearance, age and height and the standing orders were complied with.
23. Thereafter he proceeded to brief the 2nd appellant about the importance of the identification parade which was going to be conducted and inquired whether he was willing to participate in the same. The Appellant agreed and signed the identification parade form. He proceeded to call in PW1 briefed him as he had done before. PW1 walked in front of the participants and identified the 2nd Appellant by touching his left shoulder. When he asked the Appellant whether he was satisfied with the parade he remarked that he was satisfied and proceeded to sign the identification parade. PW1 left the office without interacting with PW2 who in the similar fashion came into the room where the participants were and identified the 2nd Appellant by touching his chest. The Appellant was satisfied with the parade and signed the form. PW5 then prepared certificate of an officer conducting an identification parade as initially stated. He signed the parade form. He revealed that he was an inspector of police when he conducted the parade and proceeded to produce the identification parade form exhibit in the case.
 24. When cross-examined by the 1st Appellant, he stated that he did not know when the incident occurred and that he was only informed it happened on 9th April, 2020. He stated that he could not tell who arrived at the police station earlier between the 1st appellant and the complainant. He insisted that there was no communication between them and the Appellants prior to the identification parade being conducted. He stated that there were 8 members who participated in the parade. He reiterated that he asked him whether he was ready for the parade and he answered in the affirmative. He maintained that the 1st Appellant was not forced to maintain his position and that he elected not to change position. He went on to state that he was not aware whether the Appellant had been shown photos of the Appellant prior to the identification parade and that the 1st Appellant was not forced to sign the identification parade form.
 25. When cross-examined by the 2nd Appellant, he stated that he conducted the parade between 2 to 3 pm. He reiterated that he did not know who arrived first to report the matter as he was not the investigating officer. He reiterated too that the participants of the same physical appearance to both the two appellants and that the two witnesses did not interact during the conduct of the parade. He revealed that the room where the parade was conducted had a back window and there was no way the witnesses could see the Appellant prior to the parade. He insisted that the two Appellants were not standing together during the parade and that they participated without any form of coercion. He reiterated that he was not aware whether their photos had been taken prior to the parade being conducted and shown to the witnesses.
 26. PW6 was CPL Zebedayo Wawire of Marani DCI. He testified that on 10th April, 2020, PW1 reported a breaking into his house. He reported that the breaking happened at around 11 pm allegedly by police officers. He reported that the suspects were in jungle green clothes which looked like those of police officers. They cut the main power supply and shone the entire house with torches. The suspects were armed with iron bars, pangas, knives and metal bars. They stole from them a generator, DVD Player, woofer and 4 phones which were all valued at Kshs. 87,000. They assaulted PW1 who sustained injuries on the head. The wife PW2 had head injuries and to their son PW3 had injuries on the pelvis.
 27. He testified that PW1 and PW2 when interviewed revealed that the two men entered their room with very bright lights and would shine the lights on their faces and asked them whether they knew them. He then proceeded to record their statements and gave them P3 forms to be filled by the medical officer who had examined them at Marani hospital prior to them reporting the matter.



28. He testified that he thereafter commenced investigations. On 8th May, 2020 he received a call from Oyugis that notorious robbery suspects had been arrested and was invited to interrogate them. A contingency of officer from their office went to Oyugis Police station where they met two suspects being the 1st and 2nd Appellant. The 1st Appellant had been arrested before near Nyakoro Sub-location in a separate case. They thereafter proceeded to obtain order to detain the two pending investigations. The 2nd Appellant admitted that they had robbed the victims upon reference by the 1st accused person. He thereafter proceeded to organize an identification parade given that the victims had indicated ability to identify the suspects which he organized for and was conducted by PW5 who prepared identification parade forms. He indicated that upon conducting a search, they made no recoveries. However, he indicated that a Neon Ray Phone was recovered from one Everline Achieng who upon interrogation revealed that she had bought the same from one Lucas Okello who was a hawker in Oyugis town. Lucas had been given the phone by a man who had failed to collect it.
29. When cross-examined he stated that the 1st Appellant he stated that he visited the scene on 10th April, 2020. He indicated that the witnesses did not know them but could remember their faces after the incident given that the appellants had shown bright torches in the house after switching of the main power house. He yielded that even though the stolen phone had been recovered from Eveline Achieng, they treated her as witness and did not conduct any search in the Appellant's house.
30. When cross-examined by the 2nd accused person he stated that the assailants had introduced themselves as police officers. He stated too that the assailants broke into the house when the victims failed to comply. He indicated that he saw a stone that was used to break the house. He reiterated that the assailants were unknown to the victim but were only able to identify them during the incident. He indicated that when he interrogated the 2nd appellant, he listed all the items he had stolen from the accused. He indicated that he did not make any recoveries from him. He also reiterated he did not arrest Everline as she was treated as a witness. He indicated too that accused person had also been suspected of stealing from the area chief.
31. Upon closure of the prosecution case the Appellants were put on their defence. DW1 was the first Appellant. He testified that on 9th April, 2020 he was at Rioma Police station. He was released at around 6.10 Pm and rushed home since it was a curfew period and remained at home till the next day. On 10th April, 2020 he travelled to Kapenguria where he used to work as a carpenter. After 2 weeks he travelled back home to attend a burial. On 3rd May, 2020 after a church service which he had attended with his family he received a call from Dennis Oyaro who told him that he had been given his number by his sister called Evans Oyaro who was the 1st Appellant's girlfriend. He wanted some money from him since the girl friend was sick. He decided to travel to Nyamira to see the patient with a boda boda person who was unknown to him. On their way they were confronted by 6 police officers from Rachuonyo who said they were tracing a phone which had been stolen from Oyugis and that they had recovered the phone from Dennis and proceeded to arrest them. He explained to them that Dennis was unknown to them. He accompanied them to his house where they conducted a search but made no recoveries. They were then taken to Oyugis police station pending further investigation. On 8th May, 2020 while at Oyugis Police station police officers from Rioma Police station visited them claiming that there was a robbery incident which had taken place at Marani and was required for an identification parade. They took their photos and left. They were later taken to Rioma Police station for an identification parade at Rioma Police station on 9th May, 2020 and was arraigned in court on 26th May, 2020. On cross-examination he stated he did not have any witnesses to confirm that on 3rd May, 2020 he was in church.
32. The 2nd Appellant on his part testified that he is a boda boda rider and denied being a robber. He stated on 3rd May, 2020 he was at work. At 2.30 pm he got a customer who asked him to drop him at



- Kegogi. He proceeded to drop the customer at Kegogi and on his way back he met another client who asked to drop him to and from Nyamira whom he later knew was called Lawrence. While at Egesairo, 2 persons in civilian came and asked him whose motor cycle he was riding and he told them that the same belonged to him. They told him that they were police officers from Rachuonyo to whom it had been reported that the motor cycle had been stolen and asked them to accompany them to the station so that they could prove the ownership of the motor cycle.
33. He boarded the police vehicle and went to Oyugis Police station together with Lawrence. Lawrence told him that he did not know the reason of his arrest. They were later taken to Kegogi. Some police officers went with Lawrence to his house while others went with him to his house. While at his house he produced log book to the motor cycle, they then took him back to the Station. On 7th May, 2020, officer from Rioma police station visited them and took their photos. They returned on 8th May, 2020 and took them to Rioma Police station for an identification parade. They were later after the parade taken back to Oyugis police station where they were remanded until 26th May, 2020 when they were arraigned in court.
34. The trial court in its judgment dated 6th September, 2023 found the Appellants guilty of the offense of robbery with violence contrary to section 196 (2) of the Penal Code and upon consideration of their mitigation and taking into consideration that the accused person had been condemned to death in another matter, she sentenced each of them to serve 30 years imprisonment.
35. It is against the said Judgment that the Appellant filed this Appeal based on the grounds I have highlighted hereinabove.
36. In response to the Appeal the Prosecution filed a preliminary objection under section 350 of the CPC arguing that the Application was defective as they filed a single appeal instead of separate appeals. This court considered the Preliminary objection and dismissed the same. Thereafter this court directed parties that appeal be disposed of by way of written submission. Only the Appellants filed their submissions which I have considered in my determination of the Appeal.
37. This is an appellate court and it has the duty to re-evaluate the evidence on record and arrive at its own conclusion bearing in mind that it never had an opportunity to see the witnesses during their testimony.

Analysis and Determination

38. I have re-evaluated the evidence on record and considered the Appeal herein, the Appellants submissions, parties and the impugned decision of the lower court, I find that the issues for determination are;
39. The ingredients of the offence of Robbery with Violence were well set down in the case of Oluoch – versus- Republic {1985} KLR 549. These are:
- a. That there are two or more assailants or
 - b. The assailants are armed with dangerous and/or offensive weapons or
 - c. Violence is visited upon the victim in the course of theft.
40. It is not denied that the complainants were violently robbed on the material night. This is also supported by the evidence on record. The issues arising for determination are:
- i. Whether Appellants were properly identified as the assailants
 - ii. Whether the trial court erred by ignoring the lapses in the investigation



- iii. Whether this court should quash the conviction of the Appellants and set aside their sentence

Whether Appellants were properly identified as the assailants

41. The law as regards identification under difficult conditions now well settled in the case of Cleophas Otieno Wamunga –versus- Republic –Court of Appeal Criminal Appeal No. 20 of 1989 at Kisumu the court stated as follows:

“We now come to the more troublesome part of this appeal namely the appellant’s conviction on Counts 1 and 2 charging him with robbery of Indalewa (P.W.1) and Lilian Adhiambo Wagule (P.W.3). Both these witnesses testified that they recognized the appellants among the robbers who attacked and robbed them.....what we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice is of vital importance that such evidence is examined carefully to immunize this danger. Whenever a case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendants in reliance on the correctness of the identification. The way to approach the evidence of visual identification was scantily stated by Lord Widgery C.J in the well-known case of Rumbull –versus- Republic {1976} KLR 549 at page 552 where he said: -

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

42. Further in the case of Osiwa =vs= Republic [1989] KLR 469, the Court of Appeal held that where the only evidence against an accused is that of identification or recognition, a trial court must examine such evidence carefully to be satisfied that the circumstances of the identification are favourable and free from possibility of error before it can safely make it the basis of a conviction.
43. From the account of the witnesses the only form of lighting at the scene at the time was torches carried by the robbers. The prosecution relied on identification by witnesses made in Identification parades. It is trite law that in order to mount fair and credible identification parades, an identifying witness should first have expressed their ability to identify a witness. The parade or investigating officer may go further and require the witness to give a description of the assailant to be identified before mounting the identification parade. PW6 testified that the PW1 and PW2 had expressed their ability to identify the assailants which desire necessitated him to organize for the same.
44. The conditions for carrying out a proper identification were set out by the police standing orders in chapter 42(7) (5) which provides that; -

Where a witness is asked to identify an accused or suspected person, the following procedure shall be followed:

- (a) The accused or suspected person shall always be informed of the reasons for the parade and that he or she may have a counsellor or a friend present when the parade takes place;
- (b) The police office-in-charge of the case, although he or she may be present, shall not conduct the parade.



- (c) The witness or witnesses shall not see the accused before the parade;
- (d) The accused or suspected person shall be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as him or her;
- (e) Where the accused or suspected person is suffering from any disfigurement, steps shall be taken to ensure that it is not especially apparent;
- (f) Not more than one accused or suspected person shall appear on an identification parade;
- (g) The accused or suspected person shall be allowed to take any position he or she chooses and shall be allowed to change his or her position after each identifying witness has left if he or she so desires;
- (h) Care shall be exercised that witnesses do not communicate with each other;
- (i) Where the witness desires to see the accused or suspected person walk, hear him or her speak, see him or her with hat on or off, this shall be done, but in this event the whole parade shall be asked to do likewise;
- (j) The conducting officer shall ensure that the witness indicates the person identified, without the possibility of error by touching;
- (k) At the termination of the parade, or during the parade, the officer conducting it shall ask the accused or suspected person if he or she is satisfied that the parade is being or has been conducted in a fair manner and make a note in writing of his or her reply thereto in form p.156;
- (l) When explaining the procedure to a witness the officer conducting the parade shall tell him or her that he or she shall see a group of people which may or may not include the person responsible, and the witness shall not be told, "to pick out somebody" or be influenced in any way whatsoever;
- (m) A careful note shall be made after each witness leaves the parade, to record whether he or she identified the accused or suspected person and in what manner;
- (n) A record shall be made by the officer conducting the parade of any comment made by the accused or suspected person during the parade, particularly comments made when the accused or suspected person is identified;
- (o) The parade shall be conducted with utmost fairness, otherwise the value of the identification parade as evidence shall be nullified; and
- (p) No police officers shall be used as witnesses in an identification parade unless a police officer is the accused or suspected person. The right of the accused person to privacy shall be respected at all times during the identification parade and care shall be taken to conduct identification parades with as much privacy as possible.
- (7) An identification parade shall not be conducted in public unless in exceptional and unavoidable circumstances and the suspect or accused person shall be



informed of the decision to conduct the identification parade in public and be offered the opportunity to elect whether or not to participate in the identification parade.

- (8) If a witness desires to keep his or her identity secret and the circumstances are such that the Officer-in-Charge of the case deems such a course advisable for reasons of security, victimization, or any other reason, arrangements shall be made for the witness to view the parade from a concealed vantage point.
- (9) Where a witness identifies one or more of the persons on the identification parade, the persons.

45. The Appellant decried that they were both lined in the same parade despite the law providing that there should only be one accused person against at least 8 non-accused persons. A review of the testimonies of PW1, PW2 it is clear that the two accused persons were in one parade from which the PW1 and PW2 picked them. In the case of Joseph Kariuki vs Republic [1985] K.L.R. 507 the officer conducting the identification parade lined up four accused persons with twelve other persons in an identification parade. The court held that this was in breach of the standing Order which required that while conducting an identification parade, one accused person should be lined up against at least eight other than non-accused persons.
46. The accused persons have also submitted the learned trial magistrates agreed with their concern of the Appellant that the two accused persons were of different heights and had unique hair styles but held such irregularities ought to be overlooked. The parade officer ought to have ensured that the unique hairstyles of the accused are concealed before conducting the parade for fairness purposes since PW2 having gave the description of the appellants that they had different hairstyles with the 2nd accused person having a “Mohawk”, it would have been very easy for them to pick them out from the rest of the participants .This is a serious concern that casts serious doubts on the fairness of the identification parade that the learned trial magistrate ought not to have wished away.

The Court of Appeal in Samuel Kilonzo Musau vs Republic (2014) eKLR observed that;

“The purpose of an identification parade, as explained in Kinyanjui & 2 Others Vs Republic (1989) KLR 60, “is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion” It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness’s attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification.”

47. This is a criminal case and the standard of proof is that of beyond reasonable doubt. Taking into account the above highlighted lapses in the identification parade, there was a serious doubt in the identification of the appellants as the parade did not meet the threshold laid down in the police standing order.



Whether the trial court erred by ignoring the lapses in the investigation

48. The investigating officer in his testimony reveals a phone which was among the items that had been stolen was recovered from one Everline Achieng. He stated the said Everline had stated she had been given the phone by one Lucas Okello as security for some money. He stated that Lucas had been given the phone by a man who had failed to collect it. When asked why he did not arrest or charge Everline or even Lucas who had recent possession of one the stolen, item, he claimed that he had decided to treat her as a witness in the matter. It is clear that the said Everline was never bonded as witness nor was Lucas Apprehended to reveal the man who had stolen the phone. It is unfortunate the trial court despite the Appellant who were unrepresented pointed the said glaring in the investigation process during cross examination of the investigating officer, ignored them.
49. From the forgoing therefore, taking into consideration of the lapses in the identification parade and the gaps in the investigation I find that the prosecution failed to prove the offense of robbery with violence against the accused person beyond any reasonable doubt. I there proceed to quash the conviction and set aside the sentence. Accuseds are set free unless otherwise lawfully held.
50. It is so ordered.

T.A ODERA

JUDGE

9.10.24

Delivered virtually in the presence of: -

Both Appellants

Koima for the State

Court Assistant - Oigo

