Kitheka v Republic (Criminal Appeal E84 of 2018)
[2023] KEHC 20443 (KLR) (19 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20443 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E84 OF 2018

FROO OLEL, J

JULY 19, 2023

BETWEEN

JEREMIAH KAIMENYI KITHEKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This appeal arise from the conviction and sentence from Nanyuki Criminal Case no.717 of 2016 delivered on 10.08.2018 by Hon. E. Ngugi (SRM) and delivered on her behalf by Hon. Njeri Thuku (PM) where the appellant was sentenced to serve thirty (30) years imprisonment.

2. The appellant had been charged with the offence of robbery with violence contrary to section 292(2) of the penal code. The particulars were that on 11th December 2015 at Solio Village Narumoru in Nyeri County within Republic of Kenya jointly with others not before court armed with dangerous weapons namely knives, robbed Ian Gitari Njeru of his motor vehicle registration number KBP 986C Toyota Probox, Samsung mobile phone, one jacket and cash Ksh.3,000/= all valued at ksh.487,499/ = and immediately after the time of such robbery threatened to used actual violence to the said Ian Gitari Njeru. The prosecution called five witnesses and on being placed on his defence the appellant gave sworn testimony. The appellant was convicted and filed this appeal.

Background

3. PW1 Ian Gitaru Njeru testified that he resides in Makutano within Meru County and was a taxi driver of motor vehicle KBP 968C Toyota Probox. The said motor vehicle was registered in the name of his wife Lydia Kendi Katwira. On 10.12.2015 at about 2.00pm he was enroute from Meru to Nanyuki when at Kathe he stopped to pick a customer (who later turned out to be the appellant herein). The appellant told him the he was going to Isiolo and he agreed to drop him at Isiolo junction once they had agreed on fare to be paid. While being dropped, the appellant told him that he had a private function

to attend on Friday of the same week and he would wish to hire, PW1''s motor vehicle to attend the funeral which was to be held in Thika at Gatanga. They negotiated and agreed that he would be paid Ksh.4,500/= plus cost of fuel. They also exchanged mobile phone numbers. He was using 0724xxxxxx while the client gave his mobile phone number as : 073xxxxxx.

4. The following day (11.12.2016) PW1 talked with the appellant and they agreed that he would pick him at Nanyuki town and the appellant would send fuel money to cater for the trip from Meru to Nanyuki. The same evening the appellant did sent ksh.1000/= from a Safaricom Agent till 11606 by the name Nyakio building opposite main stage Nanyuki. Later that evening the appellant called to confirm if indeed he had received the money sent and he confirmed the same. The following morning he travelled with his wife who was going to Nanyuki. At the appointed meeting place Engen Petrol station in Nanyuki, his wife alighted. He found the appellant, being the same person whom he had met the previous day. The appellant sat next to him. PW1 described him as a person, who was brown in colour, one front teeth was shorter and he could remember him well as he had spent the previous day with him. The appellant wore blue jeans, a white shirt, black jacket and white cap and was accompanied by a lady whom he was with the previous day and another gentleman.

5. The appellant fuelled and they began their journey to Gatanga. The appellant also informed him that they would pick his brother at Kenol on their way back. They did reach Gatanga safely and the appellant told him the deceased was his classmate. They sat through the funeral and even ate food prepared for mourners attending the funeral. PW1 noted that during the funeral, the appellant kept on disappearing and coming back. At 5.00pm they began their journey back. At Kenol they stopped and picked the appellants brother. The appellant alighted and helped his brother place goods in the boot of the probox and they continued with their journey until they reached Mwea junction where they lady client alighted. They carried another lady who alighted at Karatina. When they reached Wanga in Narumoru, the appellant told him that this brother would be alighting. It was almost 9.00pm by then.

6. PW1 state that he branched towards Solio Ranch so that his clients could alight. At this junction one of the passengers who was seated behind him suddenly held a knife against his neck. This was the client sitting directly behind him. He braked and was dragged to the back seat, where they tied him with a cello tape on his mouth, hand and legs. The assailant's stopped the motor vehicle at Solio forest and dumped him there. He slept alone in the forest and he could hear the sound of wild animals roaming about. In the morning he dragged himself towards the murram road. He saw a pick-up and managed to stop it. The driver helped him free his hands and gave him a phone which he used to call his wife. During the Robbery he lost his leather jacket, Ksh.3,000/-, driver's licence, ATM card, ID card and also his Samsung phone. While still with the pick-up driver there was a lady nearby who called a motorcyclist, who took him to Narumoru police station.

7. PW1 identified the cello tape, Safaricom print out, motor vehicle logbook and stated the agreement between him and the appellant was oral and was not written. The appellant was arrested on 26.06.2016. He was called to Narumoru police station to identify the appellant during a police parade. He positively identified the appellant and he was the same person in the dock. The stolen motor vehicle was never recovered.

8. In cross examination PW1 stated that he first met the appellant around 2.00pm when he was with a lady whom he introduced as his wife and appellant said his name was John and sent him Ksh.1000/ = for fuelling the car from Meru to Nanyuki. They had attended a funeral in Gatanga and on return journey he was to carry the appellant's brother who did not attend the funeral. There was also a lady, who had accompanied the appellant but she had alighted at Mwea. PW1 stated that he had first met the appellant at Isiolo junction and in his report to the police he had stated the he was robbed by four persons. The matter was reported to the police the following morning (12.12.2015) at 9.30am.

9. As regard the identification parade, PW1 stated that he was in Meru on 29.06.2016 when he received a call from Narumoru police station asking him to go and take part in an identification parade. He went accompanied only by his wife. PW1 denied the appellant's suggestions that before the identification parade was held he was shown the appellant and was categorical that he had not seen the appellant before the parade was held. Eventually during the parade, PW1 confirmed that he was able to identified the appellant based on facial appearance, one short tooth and he had earlier seen him the whole day during the funeral and when they first met. On the identification parade there were other brown people of similar complexion. Out of the 9 – 10 people in the parade PW1 identified the appellant and touched him on his shoulder. Once done, he was locked down in a different room. The investigating officer did not conduct the identification parade. It was conducted by a different officer.

10. In re-examination PW1 reiterated that he did not see the appellant before the identification parade was conducted and he could not remember exactly the number of persons in the identification parade. He had first met the appellant on 10.12.2015 and late spent the whole day with him on 11.12.2015 during the burial and thus was able to identify him by touching his shoulder and confirmed to the officer that indeed it was the appellant who robbed him.

11. PW2 Lydia Kendi Kathurima testified that PW1 was her husband and they lived in Makutano in Meru County. She was a businesswoman. PW2 testified that her husband was a taxi driver of motor vehicle registration no. KBP 968L which was registered under her name. The said motor vehicle regularly operated on Meru – Nanyuki road. On 10.12.2015 at about 7.00pm PW1 came home and told her about the business trip he would make to attend a burial in Thika. The client had already sent him Ksh.1,000/= to fuel the car. On 11.06.2015, they set off at 6.00am and arrived in Nanyuki at around 7.00am. They went directly to the Petrol station where PW1 and the appellant had agreed to meet. The appellant was accompanied by another lady. PW1 introduced PW2 to the appellant as the client who had hired him. She dropped off at the said Petrol station and she remained behind to run her own errands. She further stated the appellant was wearing blue jeans, white shirt, black coat and white cap.

12. Later during the day PW2 talked with PW1 at 3.00pm while still at the funeral and at about 8.00pm, when PW1 told her they were enroute back. After 9.000pm she tried calling PW1 but his phone was off and it remained so until morning. At 6.00am she got a call from a man who told her to speak to a person. It was PW1 and he was screaming and told her that he had been robbed and thrown off the motor vehicle and left on the road. On 12.12.2015, she went to the police station and recorded her statement, while on 29.06.2016 she was again called to go to the police station at Norumoru and asked to identify the person who hired the motor vehicle from her husband. Earlier in her statement she had recorded that the person had a broken tooth and could remember his clothing too. At the identification parade, she picked out the appellant and identified him. The stolen motor vehicle was never recovered.

13. In cross examination PW2 stated that it was the appellant who hired their motor vehicle to take him to a burial with his colleagues. She saw him clearly at Nanyuki and was able to identify him at the identification parade. He was ½ meter away when she first saw him at the petrol station, but did not accompany them to Thika, she remained behind in Nanyuki to attend to her own errands. In her statement to the police she had recorded that she could identify one of the persons she had seen on 11.12.2015. She was able to identify him by the one short teeth and she had also described what he was wearing. On 29.06.2016, when she was called to attend the identification parade, she only went with her husband and they were not accompanied by any 3rd party nor was the appellant identified/shown to her before the parade was held. She did not see him before the parade, but eventually when it was held, she unhesitantly identified the appellant as she had seen him on 11.12.2015.

14. Further PW2 stated that she could not tell the exact number of persons in the parade but they were not more than 10 persons. The appellant was in the midst of the group but was not the first or last person. She had been directed to touch the person she saw and did exactly as told. In re-examination, PW2 reiterated that she had seen the appellant before and could identify him by his brown complexion and broken tooth.

15. PW3 Inspector Justus Njeru stated that he was then O/C Kajiado Police station but was previously attached to Narumoru Police station as staffing officer. On 29.06.2016 he was requested to perform an identification parade by the investigating officer who was investigating the offence of robbery with violence. He did place the parade members outside the police cell but within the building while considering their height and complexion In relation with the suspect. While arranging for the parade the witnesses who were to identify the suspect were at the OCS office. PW3 further testified that he asked the appellant if he had any friend who he could call to come participate in the parade and the appellant said he did not have any. Further he inquired from the appellant if he had any objection to the identification parade being carried out, the appellant did not and consented to participate in the parade.

16. The parade had seven members and the appellant was the 8th person in the parade. He told them to stand in a straight line. The appellant chose to stand between member 4 and 5. He then brought PW1 to identify any person in the parade as the person who robbed him. PW1 identified the appellant and touched him. The appellant remarked that "mimi simjui". PW3 stated that prior to parade, PW1 had not seen the appellant. PW2 also had a chance to identify the appellant. The appellant had changed position as was between the 5th and 6th persons lined up in the parade. PW2 identified the appellant by touching him. The appellant remarked that "mimi simjui, sijawahi kumuona sijamkosea"

17. The parade was freed from any interference or misunderstanding and he signed the parade forms on 29.06. 2016.Every time the suspect/appellant would answer to the questions asked/put forth to him, he would make him sign the identification parade form and further indicate/write his national identification number. The said Identification parade forms were produced as exhibit 4. PW3 identified the accused on the dock as the person identified during the parade. He had not known him before.

18. In cross examination PW3 confirmed that indeed he was the one who conducted the parade and his communication with the appellant during the parade was in Swahili. Further before the said parade was held, the appellant consented to participating in the parade, he explained to him the process and made him understand the procedure before the appellant signed the identification parade forms. PW3 reiterated that he made the suspect understand what parade audit significance was and also told the court that the investigating officer could not conduct the parade but could only identify the appellant at the police cells. It was therefore not true that the investigating officer is the one who conducted the parade but had identified the appellant as one of the persons to participate in the parade. The appellant was also asked if he had a relatives, friends or solicitor to call to participate in the identification parade but he answered that he had none.

19. PW3 further testified that police station was next to the main road and he was the one who called/asked people to come and participate in the parade. He chose them based on same height and complexion and conducted the parade in a manner it was to be done. PW1 identified the appellant while he stood between 4 and 5 person's on the parade line and by the time PW2 identified him he was standing between number 5 and 6 persons on the parade line. The identification parade had 8 persons, seven who were members of the public and the appellant was the 8th member. He could not comment on the evidence of other witnesses but confirmed there were 8 persons lined up in the identification parade

which was conducted on the 29.06.2016. Further he only came to know both PW1 and PW2 on the date of the identification parade and was not aware if PW1 had been within the station earlier that morning. Also PW1 and PW2 had nothing to do with entire detail or signing the identification parade forms and it was him who recorded all the information recorded therein. The identification parade forms were several and the appellant signed every time he was asked a question an answered the same.

20. In re-examination PW3 stated that he explained the purpose of the parade to the accused and he did not force him to sign the identification parade forms. Further the role of the investigation officer was to identify the suspect to him to enable him participate in the parade but he was the one who chose the remaining participants who were all of similar height, complexion and class of the suspect.

21. PW4 Inspector Benson Wafula testified that currently he was the O/C Crime at Njiru police station in Meru. On 26.06.2016 during morning hours he received a call from Narumoru police station through VHF radio. Sergeant Katwiri told him there was a suspect who had robbed a person and the suspect had run to hide in Njiru area where he was the Officer in charge crime. Sergeant Katwiri gave him the suspects name as well as that of his parents. The suspect father was called John Kithera Kithiri and he was a person known to him and worked at Mutheru Sub County hospital mortuary. Upon investigations he found out that the appellant had not been back home for a long time but was eventually spotted on 26.06.2016. while on patrol on the said date at about midnight PW4 and a team of officers went to the appellant's home and knocked his door which was opened by the appellant.

22. PW4 and his officers introduced themselves and asked the appellant to produce his national identity card which he did and he confirmed that the person arrested was Jeremiah Kithera. He asked the appellant to give him his mobile phone and he gave PW4 one black techno which was not working. Upon being pressed further, the appellant admitted he had another phone which he had left charging at a pharmacy at Njiru market. The appellant lead the police officers to his friend's house, he who owned the pharmacy at Raisa area. They introduced themselves and together they went and recovered the second techno phone. He thereafter placed the appellant in custody. PW4 identified the appellant as the person he arrested and marked the national identity card and two phones for identification.

23. In cross examination Pw4 stated that he was informed to look for the appellant on 26.06.2016 In the morning and was familiar with the father's name as he was a person he interacted with closely as he would take victims of emergency treatment to the hospital. He also got to know that the appellant was "son of Kithera" from information obtained from his informer on the ground. Further PW4 stated that he arrested appellant slightly after midnight early morning on 27.06.2016. The appellant had earlier resisted and refused to open the door but later opened it. Three officers entered his house and one stood guard outside. During the arrest the appellant father and sister woke up and were speaking to the police officer who remained outside the house. They also talked to them later after effecting the arrest. It was also the appellant who lead them to the house of pharmacy owner, who peeped through the window and eventually opened the door. The pharmacy owner confirmed that the appellant was his friend and he had left his phone charging at his shop.

24. PW4 on further cross examination stated that while outside the appellant's house monitoring the situation and before his arrest, he heard the appellant talking on phone but after arrest did not recover any working phone from the appellant and told the appellant that he was being arrested for being a suspect in a robbery with violence case. He did not tell the appellant of any specific phone he was looking for, as he was also not aware of the same. He had acted on information received by Sergeant Katwiri and also the appellant gave him his original identity card, though he also mentioned that there was a time he had lost his identity card in Bungoma. During arrest the appellant had also informed PW4 that he had been away because he works at Mastermind Tobacco which fact the witness could

not verify since his mandate was just to arrest the appellant. PW4 also stated that the appellant parents were tired of him and his habits. There was also a time he had assaulted his parents and ran away.

25. PW5 Seargent Boniface Kaswiri based at Narumoru police station was the investigating officer. On 12.12.2015, one Ian had reported that he had been robbed of his motor vehicle within Solio village. The OCS assigned him to investigate the said case. He went to the scene and recovered a cello tape which had been used to tie up the complainant. He thereafter took witness statements of the complainant and his wife. The complainant PW1 retrieved his cell and mpesa statement of his line 072xxxxxx. It showed that he had received Ksh.1,000/= through agent no.11606 Wacom Agents based at Nanyuki – Nyakio building and PW1 had been called by phone no.073xxxxxx which belonged to the client/ suspect who hired him and eventually robbed him.

26. PW5 stated that he gave this phone number to Criminal intelligence unit (CIU) who deal with phone tracking. They informed him that the phone number was being used by one Jermiah Kaimenyi who lived in Njiru area in Tigania. He forwarded the information given to Njiru police station together with the names of the suspect, and his parents on 29.06.2016. Inspector Wafula called him and informed him that he had arrested the suspect with the same names. He went to Njiru police station and re-arrested the suspect and also took the two phone recovered plus identity card. While at Narumoru police station he called PW1 to come and attend an identification parade. PW1 and PW2 positively identified the appellant, where after he charged the appellant with the offence of robbery. PW5 identified the accused as the person he had arrested and produced various items as exhibits.

27. In cross examination PW5 stated that PW1 did not know the person who robbed him, but could identify them since he saw them. PW1 has stated that he was robbed of his motor vehicle and other items and it was normal for complainant to forget the first report as a times they are still in shock. The incident had occurred 5km away from the police station. The investigation report was an outline and was brief. The witness statement was more comprehensive and contained more details. The stolen motor vehicle KBP 968C Toyota Probox was registered in the names of Lydia Kendi PW1 wife and the original logbook was in the bank and had been used to secure a loan. PW5 further stated that on the date of the parade PW1 had arrived between morning hours and midday. The complainant was not supposed to see the suspect and when PW1 came, he showed them where to wait outside the police station.

28. When they asked about the identification parade, PW5 stated that he did not know the specific time it was conducted and if the appellant had any issue regarding the identification parade he should have raised them during the parade. Further members of the parade could be drawn from the cells or outside the cells. PW5 further stated that he did not talk to the parade officer as he knew how to conduct the parade. He could also not answer questions pertaining to the parade as a matter of protocol the investigation officer does not participate in identification parade. After the parade is conducted, witnesses are supposed to record further statement, which he personally recorded. There was also no error in the supplementary witness statements where the parade was noted to have occurred on 26.06.2016 instead on 29.06.2016 that was an oversight as the parade was conducted on 29.06.2016. He further explained that they did not get the owner of Wedcom Agents as he was not situated within Nyakio building.

29. PW5 also stated that, he could not force all persons who interacted with PW1 the following morning after the robbery to become witnesses and he did not record the witness statement of the boda boda rider who took PW1 to the police station. As regards the recovered phones, the techno phone was not functioning, and the appellant had stated that the Nokia phone recovered belonged to a certain lady. The phone went off and the appellant did not have the phone pin. He thus did no further investigate that aspect. He relied on information received from CIU and they confirmed that the phone which

had been used to communicate with PW1 belonged to the appellant. He used the report to do follow up and trace the appellant. In re-examination PW5 stated that the first report was made on 12.12.2015 and PW1 also recorded his statement on the same date. In his witness statement, he gave the description of the robber and the names he was using.

30. The appellant was placed on his defence and opted to give sworn evidence. He testified that he was a Resident of Meru north Ukomu district and worked at Mastermind tobacco. On or about 12.12.2015 he was on leave and was at his in-laws at Koyani sub location, Kameru location. He also had farming interest in that area having planted miraa. He was there the whole December until January and his data from his phone number 0717947804 would confirm the same.

31. The appellant stated that it is his phone data which would have absolved him and provided him with an alibi to prove that indeed since he was hired at mastermind co ltd, he had never stepped a foot at Laikipia but unfortunately he was not given time to supply the same. In January 2016 he resumed work and was allocated work within Nairobi- Mlolongo and he would come home over the weekends. One night while at home he heard a knock at his gate and the person identified themselves as police officers. He opened for them and he was handcuffed and arrested. They told him they were looking for a phone (0739xxxxxx), but he told them he has never owned such a phone but the one he owned, he left it charging at the pharmacy. The policemen then searched the house but only recovered a techno phone which was not functional. The appellant stated that he was escorted to the police station and later to the house of his pharmacist friend "karis" where the policeman picked the 2nd phone. The phone was Nokia IME no.3572910xxxxxxxx which he had bought for Ksh.8,000/=.

32. The appellant further testified that he spent a night at Njiru police station till 27.06.2016 and was called by inspector Wafula and interrogated about the airtel line. The appellant stated that he had never used an airtel line. Initially there was a sim card he had owned but it got lost. He had given the investigating officer a copy of police abstract to prove the same but it was not returned to him. The investigating officer had informed him that the airtel line was registered using his identity card in Mt. Kenya Region and appellant insisted it was not him who registered the same.

33. On 28.06.2016, he was picked by the investigating officer who also questioned him about his whereabouts in relation to the Solio incident, but he stated that he had nothing to do with it and had never been to Nanyuki. He was driven to Nanyuki police station and later taken to Narumoru police station where he was allowed to call his relatives. The appellant lamented that he was in custody from 26th – 29th June 2016 and that violated his rights under Article 49(1)(d) of *the Constitution* of Kenya 2010.

34. It was also the appellant's contention that PW1 in his first report to the police had stated that he was attacked by persons he did not know and also said he could not identify the attackers. In the said report he also did not give description of the persons who attacked him, nor did he give the phone number of the client who called him (The report was produced as D exhibit 4) This was different from his statement where he now claimed the person who hired him had called him and they went to Thika to attend a funeral. He also faulted the identification parade and the fact that PW1 did not record a further statement after the identification parade was conducted.

35. The appellant pointed out that according to PW1 statement, he said that the parade had been conducted at 12.00pm – 12.30pm while PW2 stated it was conducted from 11.00am – 11.50am. On 29.06.2016 he had seen PW1 and PW2 at the police station while in the cells and asked about their counterpart (the 3rd person whom they were with). During the exercise he was identified by a person he had earlier seen and when he raised a query, he was shut down by the investigating officer. As regards his signature on the parade forms, the appellant stated that he signed the same without knowing what

it was and the forms were presented to him by the parade officer. The appellant also stated that the parade had occurred between 1400hours – 1600hours and not between 11.00am – 12.30pm as alleged by the witnesses. The investigating officer was not supposed conducted the parade. PW2 and PW3 had testified that he did and then left. The appellant stated that he was framed up in the parade.

36. The appellant further stated that while he did not doubt that PW1 was robbed, it was not him who robbed him. He faulted the data print out produced by the investigating officer as it showed the cell log, but it did not show the IME number. The investigating officer should also have investigated the other callers therein and produced the CIU report which they used to trace his location. He had never used an airtel line and have only used a Safaricom line. Previously he had lost his national identity card 3 times. The first time was in Bungoma in 2011, then in 2013 he lost his identity card at a car wash and again in 2014 he lost his identification card at Thongo when they were carjacked and robbed. The police abstract which he had to prove that he had lost his identify card in 2014 was taken by the police but he had a copy brought to him from home which he produced as (D-Exhibit 6)

37. In cross examination he stated that between 10th to 11th December 2015 he was in Kaweru village in Meru at his in-laws place but did not have a witness to confirm the same. He also did not have any leave forms "from Mastermind to confirm being on leave". As regards the document earlier produced to show that he worked at Mastermind tobacco (D-exhibit 1) they were for the year 2013. There was no document to prove that he was working there between 2014 – 2015. He also confirmed that he had lost his national identity card several times. The last instance being in 2014. He also did not have any photocopy of the identification cards previously lost. Finally, he also denied being with the complainant the whole day and insisted that the complainant was not telling court the truth.

38. The appellant was allowed to make oral submissions at the close of the case, the trial magistrate upon considering the entire evidence did find that the prosecution had proved their case beyond reasonable doubt and proceeded to convict the appellant and sentenced him to 30 years imprisonment.

39. The appellant did file his petition of appeal on 07.09.2018, which he subsequently amended on 18th January 2023 and raised for (4) grounds of appeal namely;

    a. That, the learned trial magistrate erred in both law and fact in failing to appreciate the fact that the alleged identification by recognition was highly compromised and a purely fabricated case for the complainant to be able to get compensation of their lost motor vehicle from the Insurance Company occasioning a prejudice.

    b. That the learned trial magistrate again erred in both law and fact in not again considering that the alleged identification parade done was irregular, unprocedural and did not meet the threshold of the provisions of Section 46 of the Force standing orders of the police of identification parades.

    c. That the learned trial magistrate further erred in both law and fact in failing to put into consideration the evidence of the lost identity card allegedly used to register the airtel mobile phone number used in the heist and which had been reported to the police immediately as lost and an abstract issued thereto which was produced in the evidence but not marked by the trial court occasioning to prejudice.

    d. That the learned trial magistrate erred in both law and fact in failing to appreciate that the instant matter was not proved to the required standards in law.

Appellant submissions

40. The appellant submitted that the whole case was premised on a flawed and made up case of identification by recognition which was embellished and choreographed. Both PW1 and PW2 could not have known the robbers and would not have taken keen interest on knowing their customer as nothing peculiar occurred to make them note or remember his appearance. On the first information report too PW1 did not give the police the description of the person who attacked him. This pointed to the conclusion that the identity could have been mistaken. Reliance was placed on Moses Munyiro Macheru vrs Republic CR Appl No.k63 of 1989, Boniface Maina Gichiu vrs Republci CR Appeal no.141 of 2000, Dinkerah Ramkrishan Pandya vrs Republic, Mohammed Bin allui versus Republic 1942 EACA 72, Michael Norman Mbachu Njoroge and anor versus Republic eKLR and Francis Kariuki Njiru and 7 others vrs Republic (2001)eKLR.

41. Secondly the appellant submitted that the identification parade as held was defective and was done contrary to the police force guidelines as to how it should be done. Further identification parade ought to have been carried out based on first incident report made at the police station where the description of the party ought to have been made. In absence of the description then the identification parade subsequently done would have immeasurable doubts in its veracity and accuracy. He was arrested and kept in custody for three days and thus he stood out as the person who was unkempt and very easy to notice from a parade of clean members of the public. The age, height and complexion of other persons in the parade too were not noted which was a major lacuna. His disfigured tooth was also a conspicuous mark and further rendered the parade unfair and the trial court ought not to have relied on its findings.

42. The appellant further submitted that it is likely that the compromised parade was made to help PW1 claim compensation from the insurance company and if a retrial was ordered, PW1 and PW2 would adduce different evidence all together to exoronorate him and this was a case of mistaken identity. Reliance was placed on the case of Lord Widgre CJ 1 Republic versus Turnbull (1976) 3 ALL ER 549, Queen versus Antony Henemaayer 2008 ONC 580, case study of Ronald Cotton in North Carolina Supreme court in 1985, Masaon versus Braith Waita, Patrick Muriuki Kinya and Anor versus Republic (2015) eKLR and James Murigu Karumba versus Republic 2016 EKLR.

43. On the issue of lost identity card, the appellant did submit that the trial magistrate selectively considered the evidence presented and disregarded vital evidence concerning airtel mobile no. 0739941280 which was registered using his past identity card. It was also not established where it was registered which evidence would have exonerated him. It was known to all and sundry that no criminal worth his salt would actually use his own identity card number to register a mobile telephone line, knowing too well that he could be traced and apprehended. The court too ignored his plea to have a report to show if the two mobile phones had been within the same vicinity/ area at any given time to aid the court in rendering a truthful verdict. This was not done to his detriment. Reliance again was placed on Ramson Ahmed versus Republic vol.22 at page 395. The evidence presented by the prosecution was barely adequate and the only inference the court could find was that the evidence not called would have been adverse to the prosecution case.

44. The appellant final submission was that the prosecution did not tender proof to the required standard and in this matter relied on mere speculation, suspicion and unverified evidence of the alleged airtel phone number which the prosecution irregularly juxeposed and choreographed to get pre-determined outcome for the single reason to allow PW1 an PW2 to get compensation for their lost or stolen motor vehicle. Kenyans had peculiar behaviour and could got to any length to ensure they get compensation irrespective of the obvious damages/loss caused to the appellant. In this case no investigation was made regarding the airtel phone, it was not proved that the mobile phone recovered used the airtel line, issue

of lost identity card was not considered. The court wrongly shifted the burden of proof on him, while it should was always be vested in the prosecution. In this case the prosecution relied on the defence to try and fill, up the gaps. Reliance was placed on Woolington versus DPP (1935)AC 462 and Republic versus Duggen 2016 NSSA 13 Supreme court of Nova Scotia and J.O.O versus Republic (2015) eKLR.

45. The appellant submitted that the doubts pointed out should be resolved in his favour and his conviction occasioned a terrible and irreparable impact on his innocent family. He remained the favourite child of law and therefore pleaded with the court to find that this appeal had merit, it be upheld and both conviction and sentence be quashed.

46. The Respondent did not file any submission in opposition to this appeal.

Analysis and Determination

47. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See Okeno-Vrs- Republic (1972) EA 32 & Pandya Vs. Republic (1975) EA 366.

48. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala-Vrs-R (1975) EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings should be supported in doing so, it should make allowance for the fact that the trial Court has made the advantage of hearing and seeing the witnesses.

49. In the case of Republic Vs Edward Kirui (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688 where the case of Bhagwan Singh Vs State of M. P. (2002)4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

50. The appellant initially filed six (6) grounds of Appeal, but reduced them to four (4) grounds in his Amended memorandum of appeal filed on 10th January 2023. The issues brought forth can be summarised as follows;

    a. Whether the offence of Robbery with Violence was proven against the Appellant to the required legal standard.

    b. Tied to the above is the question of whether, the learned trial magistrate, erred in both law and fact in his evaluation of the evidence as regards identification by recognition, which was highly compromised and also erred in relying on a compromised identification parade which did not meet the threshold as set out by provisions of section 46 of the Force standing orders.

    c. Defendant's Alibi.

Burden of Proof

51. It is trite law that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows;

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

52. The conceptual framework for burden of proof to be discharged by the prosecutor is beyond reasonable doubt. In Viscount Sankey LC in the case of H.L Woolmington Vs DPP {1935} A.C. 462 pp 481 did describe burden of proof in criminal matters as;

> " Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilt subject to what I have already said as to the defendant's insanity and subject also to any statutory exception. If at the end and on the whole of the case, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether {the offence was committed by him} the prosecution has not made out the case and the prisoner is entitled to be acquittal. No matter what the charge or where the trial, the principal that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Whether the offence of Robbery with Violence was proven against the two Appellants to the required legal standard.

53. The offence of Robbery with Violence is provided for under the Section 296(2) of the Penal Code, which states as follows:

> " 296. Punishment of robbery
>
> 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 or offensive 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."

54. The ingredients of this offence were aptly discussed by Cockar, C.J., Akiwumi & Shah, JJ.A. In the case of Johana Ndungu vs. Republic CRA. 116/1995, [1996] eKLR where the Court of Appeal in Mombasa stated as follows:-

> " In order to appreciate properly as to what acts constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is 'use of or threat to use' actual violence

against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore -described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved, will constitute the offence under the subsection:

(i). If the offender is armed with any dangerous or offensive weapon or instrument; or

(ii). If he is in company with one or more other person or persons; or

(iii). If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

55. What constitutes the offence of robbery with violence was also well captured in the case of Olouch vs Republic (1985)KLR where the Court of Appeal stated as follows:-

" ...Robbery with violence is committed in any of the following circumstances:

The offender is armed with any dangerous and offensive weapon or instrument; or

The offender is in company with one or more person or persons; or

At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."

56. In the case of Dima Denge Dima & Others vs Republic, Criminal Appeal No. 300 of 2007,it was stated that:

" ...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

57. PW1 narrated at length how the incidence occurred. He was a taxi driver plying between Meru and Nanyuki. His Motor vehicle was a Toyota Probox registration Number KBP 968 C, registered in the names of his wife (PW2). On 10.12.2015 he was enroute from Meru taking a customer to Nanyuki. At Kathe he stopped and meet the appellant and a lady, they said that they were going to Isiolo, PW1 agreed to drop them at Isiolo junction and he was paid the agreed fair. The customer whom he met was the appellant, who when dropped told PW1, that he would wish to hire him for a trip to Gatanga, where he was to attend a funeral.

58. The negotiated and agreed at a price of Ksh.4,500/= plus cost of fuel. They exchanged phone Numbers and agreed to go on the safari the following day on 11.12.2015. Later in the evening the appellant sent PW1 Kshs 1,000/= from an agent Number. The agent was TILL 111606 by the name Nyakio Building opposite Main stage Nanyuki. The following morning, PW1 and his wife PW2 left for Nanyuki and meet the appellant at the agreed point, Engen petrol station. His wife alighted and the appellant who was with his lady friend and another unidentified man entered the vehicle for their trip. The appellant informed PW1 that enroute back they would pick his brother at Kenol.

59. They were in Gatanga the whole day, and the appellant told PW1 that the deceased was his classmate. At 5.00pm they started their journey back. At Kenol they stopped to pick the appellant's brother. The appellant alighted and helped him load his luggage into the boot of the car. At Mwea junction the lady alighted and they carried another lady who alighted at Karatina. When they reached Wanga in Narumoru the appellant informed him that his brothers were to alight. As he branched towards soilo ranch, he was suddenly attacked by the passenger's he was carrying. The one behind him placed a knife

on his neck and they dragged him to the back seat, while one the robbers took control of the car. He was tied with a cellotape on the mouth, hands and legs and later dragged out of the motor vehicle and dumped at solio forest.

60. PW1 broke down while narrating what happened to him. He spent the night in the forest and could hear sounds of wild animals. In the morning he dragged himself towards the murrum road, and managed to stop a pick-up which was passing by. The pick-up driver freed his hands and also gave him a phone to call his wife. Soon thereafter another lady who was nearby called a motorcyclist who took him to Narumoru police station. PW1 stated that apart from the stolen car, the other items stolen were Ksh 3,000/=, his leather jacket, driver licence, ATM Card and ID card were all stolen.

61. PW1 recorded his statement at Narumoru police station on the same day and later on 26.06.2016, he was called to attend an identification parade where he positively picked out the appellant by touching him as the person who robbed him. He was sure as he had been with him for a long period of time and had described his as being brown in complexion and one front tooth was shorter than the other.

62. PW2 also confirmed that indeed she owned the stolen suit motor vehicle KBP 968 C. On 11.12.2015, they left Meru early in the morning and she was dropped off at Engen petrol station as PW1 picked up the appellant and his two associates for the trip to Gatanga. Later she spoke to PW1 at around 3p.m and he confirmed that they were still at the burial. At 8.00pm they talked again and they were still on the road, but after 9.00pm she called his phone was off. PW1 did not return home on the said night.

63. The following morning at 6.00am she received a call from a stranger, who asked her to talk to someone who turned out to be her husband, PW1. He was hysterical and was screaming that he had been robbed and thrown off his motor vehicle. She talked to the stranger and asked him to assist PW1. Later on 12.12.2015 she wrote her statement to the police and on 29.06.2016 attended an identification parade, where she positively identified the appellant as the client she saw and Engen petrol station and who hired PW1 to take him to Gatanga.

64. From the evidence of PW1 and pw2, without much ado, it can be confirmed that indeed a robbery with violence incident did occurred on the night of 11.12.2015 into the morning of 12. 12. 2015, where PW1 was violently robbed of Motor vehicle K B P 968 C Toyota probox, Ksh.3,000/=, his leather jacket, drivers licence, ATM card and National Identity card. This robbery was carried out by a group of three (3) men, who were armed with a dangerous and offensive weapon, being the knife held on PW1 throat and in the process immediately before or immediately thereafter used personal violence to accomplish their mission.

65. The appellant too when he was put on his defence did acknowledge that PW1 was robbed. (see page 70 of the typed proceedings) , where he stated that; " I do not disagree that the complaint was robbed but I am not the one who committed this crime." All the elements of the offence were thus sufficiently proved the only question which is to be answered is whether it was the appellant who committed the offence and was he properly identified.

Was identification by recognition/ Identification Parade.

66. The appellant submitted that the evidence of recognition was flawed embellished and choreographed. PW1 had testified that he did tell the police that; "he was lured by people he did not know, but came too know when I offered them transport", his first report to the police too also captured unknown attackers and did not give their description. This points to the fact that the alleged identity was probably mistaken or more suggestive owing to pressure of compensation of their motor vehicle by the insurance company they had to identify somebody. This embellished their case as there is no way they would identify the appellant when they never gave his description in the first place.

67. PW1 testified that he was with the appellant for two consecutive days on 10.12.2015 and the whole day of 11.12. 2015 and has more than ample opportunity to see him at close range due to their aforestated interaction and the appellant had sat next to him during the journey to Gatanga. He described him as; "brown in colour and has a front tooth shorter. I could remember him well as I has spent the who pervious day with him. He was wearing blue jeans, white shirt, black jacket and white Cap."

68. PW1 was extensively cross examined by the appellant and he testified that when he reported to the police "he told them that he was hired by people he had not known, but whom I came to know when I offered them transport." He had first met the appellant on 11.12.2015 when taking him to Isiolo Junction and reported that he had been robbed by four persons, one of whom had hired his motor vehicle.

69. PW2 also in cross examination testified that she saw the appellant on 11.12.2015 at Engen petrol station, where she was dropped and the appellant and his two friends were picked for their onward journey to Gatanga. she stated that; " I was able to identify you as you came close to me whereas the rest of your colleagues were ½ meter away."

70. The investigating officer PW5 was clear in his evidence that the first information report and PW1 witness statement were both recorded on 12.12.2015. PW1 had said he was robbed by persons he didn't know, but if he saw them, he could identify them. This was captured in his statement. Further the PW1 gave a description of the appellant in his statement, thus even if the appellants description and items stolen were not mentioned on the first information report, that was normal as when the victim came to report the incident, he was still in shock and could not remember the stolen items. It was also to be noted that the first report is a brief outline and the statement contains more comprehensive details, and he used it as a basis of his investigation's.

71. As was held in Charles O. Maitanyi v Republic, it is necessary to test the evidence of a single witness respecting to identification, and, absence of collaboration should be treated with great care. In Kariuki Njiru & 7 others v Republic the court held that evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

72. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.

73. Further in evaluating the accuracy of identification testimony, the court should also consider such factors as: -

    a. What were the lighting conditions under which the witness made his/her observation?

    b. What was the distance between the witness and the perpetrator?

    c. Did the witness have an unobstructed view of the perpetrator?

d. Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

e. For what period of time did the witness actually observe the perpetrator?

f. During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

g. Did the witness have a particular reason to look at and remember the perpetrator?

h. Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

i. Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?

j. What was the mental, physical, and emotional state of the witness before, during, and after the observation?

k. To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator? (R Vs Turnbull & others (1976) 3 ALL ER 549)

74. Also in the said citation of (R Vs Turnbull & others (1976) 3 ALL ER 549) it was held that; " recognition maybe more reliable than identification of a stranger but even when the witness is purporting to recognise someone whom he knows, the jury should be remined that mistakes in recognition of close relatives and friends are sometimes made."

75. The trial court also in assessing the demeanour of a witness is expected to make a finding as to the integrity, honesty and truthfulness of such witnesses not his or her boldness or firmness. The Court of Appeal in Toroke v Republic had this to say: -

> " It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So, the error or mistake is still there whether it be a case of recognition or identification."

76. The prosecution evidence present herein was solid. PW1 spent long hours with the appellant and described him to the police by the cloths he was wearing, his complexion and the special feature which he had, being the broken front tooth. PW2 also briefly saw the appellant at close range on 11.12.2015 in the morning at Engen petrol station and also noted his special feature as the broken front tooth.

77. PW2 evidence corroborated PW1 evidence and more importantly PW1 had interacted with the appellant for a whole day at close proximity both in the car on 10.12. 2015 and 11.12.2015 and at the funeral in Gatanga. PW1 was in a normal mental state and obviously had unobstructed view of the appellant. PW1 also gave details of the appellants description in his statement made to the police immediately after the robbery on 12.12.2015, which went further to demonstrate that the appellant was properly identified by way of recognition and it was proper and sound for the trial court to so hold. The trial court also held that he was a truthful and reliable witness, which fact was not proven otherwise.

Identification Parade.

78. The appellant submitted that the identification parade was a legal and procedural mistake and ought not to have been conducted or even relied upon by court. A parade ought to have been based on the first information report details which was not the case before the trial court. Section 6(v) of the police standing orders and specifically clauses (c), (d) and (n) were violated as PW1 evidence was explicit that he gave the police his assailants description after the parade, yet such description ought to have been given prior in the first information report. The appellant also alleged that PW1 had testified that he had seen the appellant a few days prior to the identification.

79. The identification parade as held also was flawed as he was ragged having been in the police cells for long, yet the other participant's in the parade were clean and easy to notice. Further the appellant submitted that he had a disfigurement on his tooth, which a critical factor was not considered, while conducting the parade. Finally, the court did not consider that the identification parade sole aim was to enable the victims secure compensation from their car insurer and if the matter went for retrial, the victims would adduce a different evidence to exonerate him.

80. The identification parade was conducted on 29.06.2016 by PW3 Inspector Justus Njeru on request of the investigating officer. He did place the parade members outside the police cell but within the building while considering their height and complexion In relation with the suspect. While arranging for the parade the witnesses who were to identify the suspect were at the OCS office. PW3 further testified that he asked the appellant if he had any friend who he could call to come participate in the parade and the appellant said he did not have any. Further he inquired from the appellant if he had any objection to the identification parade being carried out, the appellant did not have any and consented to participate in the parade.

81. The parade had seven members and the appellant was the 8th person in the parade. He told them to stand in a straight line. The appellant chose to stand between member 4 and 5 in the parade. He then brought PW1 to identify any person in the parade as the person who robbed him. PW1 identified the appellant and touched him. The appellant remarked that "mimi simjui". PW3 stated that prior to parade, PW1 had not seen the appellant. PW2 also had a chance to identify the appellant. The appellant had changed position as was between the 5th and 6th persons lined up in the parade. PW2 identified the appellant by touching him. The appellant remarked that "mimi simjui, sijawahi kumuona sijamkosea".

82. The parade was freed from any interference or misunderstanding and he signed the parade forms on 29.06. 2016. Every time the suspect/appellant would answer to the questions asked/put forth to him, he would make him sign the identification parade form and further indicate/write his national identification number. The said Identiifcation parade form was produced as exhibit 4 and PW3 identified the accused on the dock as the person identified during the parade. He had not known him before.

83. The procedures governing police identification parades are provided for in the Police Force Standing Orders pursuant to the *National Police Service Act*.[i] These procedures were explained in R v Mwango s/o Manaa and Ssentale v Uganda.The rules include: -

    a. The accused has the right to have an advocate or friend present at the parade;

    b. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;

c. Witnesses should be shown the parade separately and should not discuss the parade among themselves;

d. The number of suspects in the parade should be eight (or 10 in the case of two suspects);

e. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;

f. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and

g. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

84. Identification of a suspect in any criminal offence is always a pivotal question and whenever it arises, the trial court has to satisfy itself, before convicting. The evidence must be such that threshold set by the rules and decided case law has been met. The evidence must leave no doubt that the suspect was positively identified. If the police force standing orders in respect of conduct of identification parades are flouted, the value of the evidence of identification depreciates considerably. In Ajode v Republic the Court of Appeal held that before an identification parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.

85. A cautionary rule with particular application to identification evidence was formulated by Dowling. In the much-cited case R v Shekele.It is worth repeating:-

> "Questions of identification are always difficult. That is why such extreme care is always exercised in the holding of identification parades - to prevent the slightest hint reaching the witness of the identity of the suspect. An acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identifications. People often resemble each other. Strangers are sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence. Witnesses should be asked by what features, marks, or indications they identify the person whom they claim to recognise. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement, unexplored, untested and un-investigated, leaves the door wide open for the possibility of mistake. Where the accused is an ignorant native who is unrepresented by counsel or attorney and who is therefore unable himself to probe the evidence of identification and where the prosecutor has not done so, the court should undertake this task, as otherwise grave injustice may be done."

86. The evidence of PW3 as to how he conducted the parade meets the high threshold set by the police standing force as to how a proper parade must be conducted and to cap it all the appellant signed all the parade forms which were produced in evidence as Exhibit P4. The issues raised by the appellant in his submissions were an afterthought and had he any genuine grievousness as to how the parade was conducted, he would have refused to sign the identification parade forms. He was not coerced or forced to sign the same. The appellant's theory that the victims were using the identification parade to get an accused and therefore to justify insurance compensation had no basis.

87. This court thus finds that the appellant was not only properly identified as the perpetrator by way of recognition, he was further properly identified again by PW1 and PW2 in the identification parade conducted on 29.06.2015. His submissions that the parade must be conducted based on first information report has no basis in law. (see Douglas Kinyua Njeri Vs Republic (2015) eklr) relied on by the trial magistrate in her judgment.

Appellant's Alibi Defence

88. The appellant submitted that no evidence was presented tying him to Airtel Mobile No 0739941280. The police did not investigate that line. As at the date of the incident, he was at his in laws place in Meru North in Meru County, Koyangi sub location. He was on leave and worked on his miraa farm until he resumed work in January 2016. As at that time (In December) his in laws had travelled to Roysambu in Nairobi for December Holidays. His phone Number was 0717947804 and had never visited Laikipia. He had never owned Airtel phone Number 0739941230 and confirmed that he had lost his national identity card on three occasions and for the last identity card lost in 2104, he had given the police the police abstract which was not returned to him.

89. The appellant also submitted that there was a lacuna in the investigations as the phone data and IEM number was not investigated to ascertain whether there was at any time that the gadget (mobile phones) had ever been to the alleged scene either using the alleged Airtel line or even his registered Safaricom line. This too was ignored despite his persistent and constant call for the same to be done and data be provided to the court. The same could have easily ascertained to court that he was not in the vicinity of the alleged scene and help the court render a truthful verdict.

90. In the court of Appeal case of Erick Otieno Meda Vs Republic (2019) Eklr the court stated that the critical issues to consider regarding a defence of alibi was that;

    a. An alibi needs to be corroborated by other witnesses', and not just a mere regurgitation of the events from the accused's point of view.

    b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross examination of the trial.

    c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

    d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond reasonable doubt so as to allow the alibi to fail.

91. The appellant alibi defence was not corroborated in any manner. The appellants own evidence and in cross examination stated that his in laws and wife were in Nairobi for December holidays and he was alone in his farm at Kaweru village. The payslip produced that he works at Mastermind tobacco (k) ltd, also were for the year 2013. There was no payslip of December 2015 – June 2016 to indeed prove that he was a worker in the said Tobacco firm.

92. The alibi raised that he was at his in-law place in Kaweru village, too was not introduced early in the proceeding's and it came as an afterthought raised during the defence case. It did not displace the evidence placed before court by the prosecution regarding his participation in the robbery on 11.12.2015, where PW1 was robbed of the car and his personal belongs.

93. As regards the phone data, that was called for, the proceedings show that 11.04.2017 , the appellant sought for and was issued with summons to call the liaison officer from Safaricom to produce some

phone data in needed. On 18th January 2018 the court ordered that witness summons be affected by the court process server on the liaison officer.

94. On 25th April 2028, the appellant informed court he had been served with a letter from Safaricom dated 05.04.2018 but disputed its veracity. In the said letter Safaricom informed court that they could not supply data requested for as they only store data for 90 days and therefore he could not be supply data for a period from 1st December 2015 to 31st December 2015. The prosecution opposed the appellant's application for further adjournment and stated that the appellant had been granted enough time to get the evidence he needed to help him prosecute his case. If the appellant wanted more time, he should be granted the last adjournment. The trial court made a ruling and held that the letter provided was self-explanatory and Safaricom could not produce what they did not have. The appellant was then directed to proceed and conduct his defence case.

95. The appellant thus was not denied a chance to call for or use the data he sought. The trial court took one year 11.04.2017 to 28.04.2018 to resolve this issue from issuance of the summons to liaison officer Safaricom to the ruling on veracity of the letter from Safaricom where it was clearly stated that the data sort was not available.PW5 the investigating officer also testified that PW1 gave him the phone Number 0739941280 as the phone number used by the suspect. The evidence was not that it was registered in his name, which fact the appellant was trying to disapprove. PW5 produced the Safaricom printout of PW1 phone number 0724988603 and it indicated the times when the said phone number 0739941280 communicated with PW1 phone.

96. The criminal intelligence unit (CIU) was given the phone number to track and they tracked it to the appellant in Njiru area of Tigania where he was arrested. The issue who was the registered owner of the said phone number became secondary to the investigation as the appellant was arrested and positively identified as one of the assailants who robbed PW1.Nothing on this appeal thus turns on the registered owner of the said phone once positive identification was confirmed.

Disposition

97. Having analysed all the evidence tendered and all the grounds of appeal raised by the appellant against his conviction this court holds that;

    a. The appeal as against conviction is not merited and the same is dismissed.

    b. The appellant did not appeal as against the sentence. Before sentencing, the trial court noted the current jurisprudence on mandatory sentences, the judicial sentencing policy and the appellant's mitigation. The appellant was sent to serve thirty (30) years in prison. The same is upheld save that the appellant was in custody for a period of two years, two month (30.06.2016 to 10.08.2018) during trial. Pursuant to provisions of section 333(2) of the criminal procedure code I do direct that this period be included in his sentence which will run from the date of his conviction 10.08.2018

    c. Right of Appeal 14 days.

98. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF JULY 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 19th day of July 2023

In the presence of;

Appellant

.....For O.D.P.P

.....Court Assistant