Mwangi v Republic (Criminal Appeal E034 of 2021)
[2023] KEHC 19874 (KLR) (12 July 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E034 OF 2021

AK NDUNG'U, J

JULY 12, 2023

BETWEEN

JAMES GATU MWANGI ALIAS CHRISTOPHER MUNENE NJOGU ALIAS SAMUEL ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant, James Gatu Mwangi alias Christopher Munene Njogu alias Samuel was convicted after trial of three counts of robbery with violence (Count I, II and III), contrary to section 296(2) of the *Penal Code*, abduction with intent to confine contrary to section 259 as read with section 256 of the *Penal Code* (count IV) and demanding properties with menaces contrary to section 302 of the *Penal Code* (count V). For count I, II and III, he was sentenced to twenty (20) years imprisonment for each count. For count IV and V, he was sentenced to 1 ½ years imprisonment. The sentences were ordered to run concurrently.

2. The particulars for Count I were that on June 3, 2018 at Tigithi river bank in Naromoru, Kieni east sub-county within Nyeri County, while armed with a dangerous weapon namely a knife, robbed off Kelvin Nguru Muriithi one mobile phone make Itel black in colour, one black wallet containing an Airtel line and one black and red 8GB flash disk all valued at Kshs1,950/- and at the said robbery threatened to use personal violence on the said Kelvin Nguru.

3. The particulars for Count II were that on the same date and place while armed with a dangerous weapon namely a knife, robbed off Timothy Njung'e one black solar radio, one red Maasai leso, one pair of black earphones, two mobile phones batteries and one black bag all valued at Kshs 2,650/- and at the said robbery threatened to use personal violence to the said Timothy Njung'e.

4. The particulars for Count III were that on the same date and place while armed with a dangerous weapon namely a knife, robbed off Christopher Mwangi one blue-white striped marvin and one red-blue jacket and at the said robbery threatened to use personal violence to the said Christopher Mwangi.

5. The particulars for Count IV were that on the same date and place, with intent to cause SKK, a child aged 16 years to be secretly and wrongfully confined, abducted the said SKK.

6. The particulars for Count V were that on diverse dates between 3rd and 6th June, 2018 at unknown place within the Republic of Kenya, jointly with others not before court, with menaces to harm SKK, a young person aged 16 years, demanded Kshs 10,000/- from Cyrus King'ori Macharia with intent to steal.

7. The Appellant was dissatisfied with the convictions and the sentences hence his appeal to this court against both. The Appellant filed his appeal in person. He filed amended grounds of appeal challenging the convictions and the sentences on the following grounds;

    1. The learned magistrate erred finding that the Appellant was positively identified notwithstanding that the prevailing conditions at the scene of crime were not favourable for positive identification.

    2. The learned magistrate erred by failing to note that the identification parade did not pass the test of the Judge's rules.

    3. The learned magistrate erred failing to note that the identification was wanting as the identifying witnesses had not given prior description of the Appellant before the parade.

    4. The learned magistrate erred convicting the Appellant on a duplex charge.

8. The appeal was canvassed by way of written submissions. Briefly, the Appellant submitted that he was not properly identified by PW1, PW2 and PW3, since the description given was vague, their first report did not contain the description of their attacker and that the victims were in shock and in fear which would have hindered positive identification. That identification parade was not properly conducted since PW8 confirmed to the court that he used the same members three times during the identification of the Appellant, PW8 stated that the parade members were not identical to the Appellant but closely resembled the Appellant, that identification parade should have been preceded by description of the suspect which was not the case here as there was no description that was given save that the assailant was a young man. That in the absence of a description given during the first report, the subsequent identification parade is not sufficient as it is trite law that an identification parade is said to be properly conducted where a witness had given a description of the attacker to the police and his alleged identification is tested by identification parade, that failure to observe the forgoing renders the subsequent identification to be dock identification which adds little value to the prosecution's case. He relied on the case of *Ajode v Republic* (2004)eKLR to emphasis on the issue of first description to be given to the police.

9. On duplicity of the charge, he submitted that it is wrong to charge the offence of robbery with violence under section 295 and 296(2) of the *Penal Code* as this would amount to duplicity of the charge. That both sections provide for different scenarios and if they are lumped up together, it could create confusion in the mind of the accused person. Reliance was placed on the case of *Joseph Njuguna Mwaura & 2 others v Republic* (2013)eKLR.

10. On the sentence, he submitted that the sentence of 20 years imprisonment was manifestly harsh and excessive in the circumstances of the case as the value of the things stolen was minute.

11. The Respondent's counsel opposed the appeal. The counsel submitted that the issue of duplex charge was first raised during this appeal and was not raised during trial. Reliance was placed on the court of appeal decision in *Japheth Mwambire Mbitha v R* (2019) eKLR where the court rejected to make a determination on the defective charge since it was not raised during trial and during first appeal. Further, the charge sheet was not duplex since section 295 is the definition section which defines robbery whereas section 296 provides for punishment. That the evidence on record was sufficient to prove the offence of robbery with violence. On identity, the counsel submitted that the offence was committed during daytime and the Appellant spent a considerable time with PW1, PW2 and PW3. That PW4 spent two days with the Appellant hence, PW4 could not have been mistaken on identity of the Appellant. Furthermore, the ID parade was compliant with all the rules as PW8 testified.

12. Counsel submitted that the ingredients of the offence of abduction and demanding money with menace were proved to the required standard. That the Appellant abducted PW4 and confined her in a lodging and had openly stated that he needed the cash to release PW4 hence, completing the offence of demanding money by menace. It was submitted that the prosecution evidence was consistent and the Appellant did not submit on inconsistencies on the prosecution's case. That the Appellant's alibi defence was first raised during defence case and he did not put it forth during the prosecution's case hence, it was an afterthought.

13. On the sentence, counsel submitted that the same was lenient considering the fact that the Appellant was sentenced to 20 years imprisonment for the three counts of robbery which were to run concurrently whereas the prescribed sentence is death. That the Appellant was sentenced to 1 year imprisonment for the offence of abduction and 1 ½ years for the offence of obtaining money by menace which sentences were to run concurrently. It is submitted that the said sentences were lenient since section 259 provides for 7 years imprisonment for the offence of abduction and 10 years imprisonment for the offence of obtaining money by menace as provided under section 302 of the *Code*.

14. That is the summary of submissions filed by the respective parties herein. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.

15. I have perused and considered the evidence as recorded before the trial court. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

16. I have had due regard to the Appellant's submissions and the learned submissions by counsel for the Respondent. I have established the issues for determination as follows;

    i) Whether the charge sheet was defective.

    ii) Whether the Appellant was positively identified.

    iii) Whether the charges were proved to the required standard.

Whether the charge sheet was defective.

17. It was the Appellant's argument that Count I, II and III were defective for he was charged with robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. I have perused the charge sheet and it is true that the Appellant was charged with 'robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*'. The question is whether the charge sheet was defective. I find the answer in the Court of Appeal decision

in *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR where the court discussed in detail the effect of duplicity. The court stated as follows;

> " This issue has been dealt with by this Court before in Simon Materu Munialu V Republic [2007] eKLR (Criminal Appeal 302 of 2005). This Court was confronted with the issue whether a charge sheet citing only section 296 (2) of the Penal Code was sufficient. This Court in that appeal considered the submission that section 295 of the Penal Code creates the offence of robbery, but held that:
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> '...the ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion.
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> .....
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> We agree that this is the correct proposition of the law. Indeed, as pointed out in Joseph Onyango Owuor& Cliff Ochieng Oduor v R (Supra) the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.
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> The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge."

18. From the foregoing Court of Appeal decisions, the instant charge is duplex. Is the duplicity fatal? I am guided and find a ready answer to this question in the decision of the Court of Appeal in *Paul Katana Njuguna v Republic* [2016] eKLR where the Court observed:

> " We have considered the law on duplicity in charges as expounded in case law and academic treatises and find an interesting trend which seems to have emerged... The Court cited with approval the case of Cherere s/o Gakuli -v- R. [1955] 622 EACA, where the predecessor of this Court reviewed the cases on the subject of the effect of a charge which is found to be duplex and concluded that "The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the

application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity"... In that case, the court held that the appellant was left in no doubt from the time when the first prosecution witness testified, as to the case which he had to meet and he could not, therefore, be said to have been prejudiced in any way.

Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the Penal Code. We observe that the offence under Section 295 and 296 (2) were not framed in the alternative. So, following the decision in Cherere s/o Gakuli -v- R (supra) Laban Koti -v- R. (supra) and Dickson Muchino Mahero v R. (supra), the defect in the charge herein is not necessarily fatal.

We appreciate that Section 296 (2) of the Penal Code creates the offence of robbery with violence or aggravated robbery. In our view, the offence of robbery must first be demonstrated before proceeding to demonstrate the ingredients provided in Section 296 (2) of the Penal Code. As a corollary to this proposition, an accused person facing those charges would in defence seek to demonstrate that no offence of robbery was committed and that the ingredients alleged under Section 296 (2) were absent or were not demonstrated by the prosecution.

In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective.

19. In this case, the Appellant understood the charges against him, he participated in the hearing by cross examining the witnesses and mounted a defence at the close of the prosecution case. He raised no complaint before the trial court and, in the circumstances, I find that there was no miscarriage or failure of justice on the ground that the charge was duplex.

Whether the Appellant was positively identified

20. The evidence before the trial court was as follows. PW1, Kevin Nguro Muriithi testified that in company of PW2, PW3 and PW4, they went to river Thigithi where they sat on stones. It was about 3:00pm. Somebody emerged and warned them that some people had been killed there. They started putting on their shoes when the said person removed the knife from his trouser belt and ordered them to surrender their valuables after leading them to a bushy place. The assailant took his black Aitel phone, black wallet with his father's Lawrence Muriithi Visa card and 8GB USB. He also took Timothy's Maasai leso and his jacket and Christopher's jacket. He ordered them to wait and at 6:00pm, he asked them to leave. The assailant also left but he left with Silvia, PW4. He testified that he went to report the matter to the police station and

left Timothy and Christopher who wanted to follow on Silvia. He identified the Appellant as the person who robbed them.

21. He testified that he was contacted by the police after two days and he was able to identify the Appellant at an ID parade by touching his shoulders. He stated that he was able to identify him since they stayed with him for about an hour. He stated that his wallet was recovered which contained his father's Equity and Barclays Bank Visa Cards which he identified in court.

22. On cross examination, he testified that the Appellant was alone and that they did not scream and feared running away since the Appellant was armed with a knife. The knife was black in colour. He testified that he reported to the police that the assailant was dark and medium height. He stated that he was able to identify the Appellant because he had seen him well and that he was still wearing the same clothes he wore on the material time. On further cross examination by the Appellant, he testified that he described the Appellant's appearance and dressing to the police.

23. PW2, Timothy Njue Gatuma gave the same account of event as PW1. He testified that they were by the riverside when somebody emerged and warned them about the place. He however removed a knife and ordered them to sit down. He further ordered them to surrender their belongings. He surrendered his two phones, masaai shuka and his jacket. He testified that he was able to see the assailant well since it was daytime and spent a considerable time with him and at around 6:00pm, he released them. PW1 went to report the matter and he was left with Christopher waiting for Silvia. He stated that he later identified the Appellant at an ID parade by touching his shoulder. He was placed at the middle amongst other people. He identified his Masaai kikoi, his pocket radio-MP3, earphones, phone batteries, black bag, black jacket and brown cream marvin. He identified the Appellant in court as the person who robbed them.

24. On cross examination, he testified that the Appellant was alone and that they could not scream since he was armed and he left with Silvia who was at his mercy. He stated that he saw the Appellant's face very well and that he stood in the middle of others during the ID parade.

25. PW3, Christopher Mwangi also testified that they were by the river when the Appellant appeared, warned them about the place and thereafter drew a knife and led them to a bushy area where he ordered them to surrender what they had. He kept them waiting there for a while and at 6:00pm, he ordered them to leave. The Appellant whom he identified in court left with Silvia. PW1, left to report the matter but he and PW2 decided to follow the Appellant and Silvia but hey could not trace them. He identified his blue jacket and white blue marvin that the Appellant stole from him. He also identified the knife in court. He testified that they could not run since the Appellant was armed. He stated that he was contacted by the police after two days and he identified the Appellant in an ID parade by touching him on the chest. That he had seen the Appellant quite well on the material time since they spent like two hours together.

26. On cross examination, he testified that the scene was in a bush and no member of the public passed by. He stated that he saw the Appellant very well and that he was a dark person.

27. PW4 Silvia Kawiganu Koori testified that on the material day, she was with PW1, PW2 and PW3 by the river when the Appellant whom she identified in court appeared and warned them about the place. Shortly thereafter, he removed a knife and led them to a bush and proceeded to rob her friends of their belongings. They stayed there for long as Appellant said he was waiting for some people. At about 6:00pm he released her friends but he left with her. When they got to the road, they boarded a motorcycle and later a matatu. He led her to Nanyuki town and at night, he took her to a room which had a bed. She slept on the bed and the Appellant kissed

her as he lay over her. They stayed there even the following day. The Appellant asked for her parent's number and she gave out her uncle's phone number and the Appellant demanded money from her uncle which he sent. She stated that she noticed that they were at Stage Bar Lodging Room 11 when the Appellant led her outside. The Appellant was later contacted that his father was in Nanyuki Teaching and Referral Hospital. They proceeded to the hospital but the Appellant was arrested.

28. On cross examination, she denied knowing the Appellant and denied having ever communicated with him. She denied ever telling the Appellant that she was a hairdresser and that she never gave the Appellant her sister's phone number. She stated that the Appellant never bought her a Tecno phone. She stated that they stayed at room 11 for two nights and that they used to pass time at the railways during the day but never sought help from anyone.

29. On further cross examination she maintained that she never communicated with the Appellant before. She testified that she used the Appellant's phone to communicate with her mother, uncle and her friend during the time she was with the Appellant. That she could not talk much as the Appellant guided her on what to say.

30. PW5 Irene Wangechi was PW4's mother, she testified that she received a call from Silvia who informed her that she was in trouble. She had called using a strange number. Shortly, he received a call from someone demanding Kshs 10,000/- who informed her that he was with her daughter. She reported to the police. She did not send the money but her brother Silas did.

31. On further cross examination, she testified that she had never bought a phone for PW4 and that she communicated with PW4 through PW10, her brother's number. She confirmed that her phone number was 0711xxxxxx and she contacted Silvia (PW4) according to entry in Pexhibit 28. She stated that Silvia contacted her through a number she had not memorized.

32. PW6 Eunice Wairimu Mwangi was the receptionist at Stage Bar and Lodging. She testified that on 04/06/2018, she received a customer by the name Christopher Munene Njogu. He produced his ID card No 25xxxxxx and he gave out his phone number 0721xxxxxx. He was accompanied by a lady. He booked a room, paid for it and was issued with a receipt. He was given room No 25. She identified the receipt and the Appellant whom she identified as Christopher. She testified that the room was well lit and the Appellant was close to her when they spoke. She testified that the Appellant left on the following day.

33. PW7 was the Clinical Officer who examined the complainant to verify whether she was defiled or not.

34. PW8 Inspector Francis Wambui was the one who conducted the ID parade. He testified that the witnesses were kept away from the suspect. That the parade members looked almost similar with the Appellant with similar height, colour and their age. The Appellant chose position 7. Timothy was the 1st witness and he was able to identify the Appellant by touching. The Appellant asked the witness where he had seen him and Timothy responded by the river within Naromoru at 3:00pm to 6:50pm. The 2nd witness was Christopher Mwangi. The Appellant had changed the position and was placed between 9 and 10. The witness identified the Appellant by touching. The Appellant asked the witness what he had done and the witness stated that he was asked to remove his jacket and put it inside a bag. The witness also gave the alleged time of the offence. The 3rd witness Kevin Mburu also identified the Appellant by touching. The Appellant had changed the position. He asked the witness what he had done on the material time and the witness stated that the Appellant was armed with a knife. He gave

the time as between 5:00pm and 6:50pm. He testified that the Appellant was satisfied with the parade. He produced the parade form as Pexhibit16.

35. On cross examination, he testified that he was not the Investigating Officer. He stated that the parade members closely resembled the Appellant.

36. PW9 Mary Kanana was another receptionist at Stage Bar and Lodging in Nanyuki. She testified that on 05/06/2018, the Appellant booked a room with them. She collected his details according to the ID he presented with the name of Christopher Munene Njogu. At the time he was alone and he booked room 14. She identified the receipt book, the receptionist book and the ID card. She testified that she was able to identify the Appellant as the reception area was well lit with electricity lighting.

37. PW10 Silas Kinyuri Macharia testified that he received a call from his niece, PW4 who requested him to tell her mother to contact her. He heard PW4 saying that she had been kidnapped. He contacted the number again and a male voice spoke. He demanded to know where PW4 was and the person demanded Kshs 10,000/- so as to release PW4. He sent the money to a number that he was given but the recipient was Lucy Wairimu. The Assailant demanded for a reversal to be done. He sent another Kshs 2,000/- to another number with the name of Boniface Mwangi but who reversed the money. He testified that the person had said that he will release PW4 after receiving the money. The next day, he contacted the person who retorted that he had reversed the money. He sent Kshs 1000 using another number which had no name. At around midday, he sent another Kshs 1000/- to another number. He testified that the Appellant was arrested at Nanyuki Teaching and Referral Hospital and he identified PW4. He identified the Mpesa statement showing the money transaction.

38. On cross examination, he testified that he was not aware of any relationship between the Appellant and PW4.

39. PW11 Pc Wakaba a Cybercrime Unit Officer testified that he received an exhibit memo from PC Ouka and attached to the memo were phones marked as A1-C1. His findings were that on 04/06/2018 there was a call that was made between C1 and A1. C1 had accused photo. A1 was for PW10.

40. On cross examination, he testified that C1 did not reflect receipt of any money. That the report further revealed that A1 had transferred Kshs 1000/- to Esther Macharia, Kshs 10000 from Ivy Wairimu Kimani, another Kshs 2000/- and Kshs 1000/-

41. PW12 was the Liaison Officer from Safaricom and confirmed what PW11 told the court. He produced the Safaricom data showing the transactions as highlighted by PW11 as Pexhibit27.

42. PW13 was the Investigating Officer. He testified that on June 3, 2018, Kevin, PW1 reported that he and his friends were accosted by the Appellant who was armed with a dagger. He further reported that the Appellant went away with PW4. He testified that he was contacted by PW10 who reported that PW4 had contacted him and informed him that the suspect was demanding for money. Kshs 10,000/- was sent to 0758xxxxxx Lucy Wanjiku Kimani as the suspect had demanded but the money was however reversed. The suspect ordered PW10 to send Kshs 2000/- to 0799xxxxxx, Boniface Mwangi however the same was reversed. The suspect was to release PW4 after sending the said amount. Boniface Mwangi was traced within Nanyuki and he was arrested. He informed the police that his brother had borrowed him the phone number. Through Boniface and his sister, they led the police to Likii and they were informed that the Appellant had not been seen there for about a week and that he was in Nairobi. Through their

other sister in Nairobi, they were able to trick the Appellant by telling him that his father had an accident and was admitted at Nanyuki Teaching and Referral Hospital. The Appellant went to the said hospital accompanied by PW4 and he was arrested by the police who had passed themselves as workers. The Appellant had asked the police where his father was admitted and he gave out his name and he was arrested.

43. Upon being searched, they recovered a wallet with treatments notes for Samuel Mwangi Pexhibit28(a), medical transfer form Pexhibit28(b) and ID card in the name of Christopher Munene Pexhibit18. PW4 informed them that she had been kept at stage view lodging and bar within Nanyuki town. They proceeded to the hotel where the workers recognized the Appellant and PW4. They also recovered a receipt dated June 4, 2018 Pexhibit 17(a), a receipt dated June 5, 2018 Pexhibit 17(b), the cash sale receipt book Pexhibit 15 (a) & (b). He stated that they revisited the scene and recovered a wallet Pexhibit1(a), Equity Bank and Barclays Bank cards Pexhibit 1(b) & (c) respectively, black solar radio Pexhibit3, Maasai leso Pexhibit 2, black earphones Pexhibit4, two phone batteries Pexhibit 5a-b, black bag Pexhibit6, blue-white marvin Pexhibit10, a brown marvin Pexhibit8, white sweater Pexhibit7, red-blue jacket Pexhibit9 which the complainants identified as their belongings. He also produced the knife which the complainants identified as Pexhibit11. He testified that the knife was recovered from the said hotel together with other properties. He stated that the room where recovery was made had not been interfered with.

44. On cross examination, he testified that PW1 gave the description of the assailant as a young man whom he could identify given another chance. He stated that he visited the scene of crime which was by the river and that there were no homes nearby. That they recovered the complainant's properties from room number 14 and the exhibits were inside Pexhibit6 while the clothes were on the bed.

45. The Appellant in his sworn defence testified that he was a shop attendant at Thika and on May 19, 2018 while ferrying salon goods to Nanyuki and while at Marua, two ladies sat next to him and inquired about the products. They exchanged contacts and on June 6, 2018, he met with the said lady. She borrowed his phone and left but later on the same day, she returned his phone. Shortly, he was contacted by his sister who informed him that his father was in hospital. He proceeded to the hospital accompanied by the said lady but he was arrested. He denied committing the offences. He faulted the ID parade claiming that the correct procedure was not followed since he had already met the people who identified him and that the cybercrime report was a sham. He stated that at the time of his arrest, he had nothing but his phone and money.

46. On cross examination, he testified that the lady whom he gave his number to was Silvia Karungaru, PW4 and that he did not know where the exhibits that were produced by the prosecution came from.

47. That was the totality of the evidence before the trial court.

48. As to whether the Appellant was properly identified, the Appellant in his submissions challenged the identification by PW1, PW2 and PW3. He also challenged the identification parade. His contention was that the circumstances surrounding his identification were not favourable since the victims were in shock and in fear and this would have hindered a positive identification.

49. On identification parade, he argued that the same was not properly conducted since PW8 stated that he used the same members three times during the identification of the Appellant, PW8 stated that the parade members were not identical to the Appellant but closely resembled

the Appellant, that identification parade should have been preceded by description of the suspect which was not the case here as there was no description that was given save that the assailant was a young man, that in the absence of a description given during the first report, the subsequent identification parade is not sufficient as it is trite law that an identification parade is said to be properly conducted where a witness had given a description of the attacker to the police and his alleged identification is tested by identification parade.

50. In *R v Turnbull* [1976] 3 ALL ER 549, it was stated by the Lord Chief Justice of England and Wales as follows:

> " First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make sure reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed (sic) between the original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance"(emphasis added).

51. Applying the above tests in our instant case, the circumstances surrounding identification were that the incident took place in broad day light being from 3:00pm to 6:00pm as witnesses testified. Further, the complainants spent a considerable time with the Appellant, he kept them waiting for about an hour before releasing them. This means that PW1, PW2 and PW3 had a lasting impression on the Appellant. The three complainants were also able to identify the Appellant at the ID parade conducted by PW8, two days after the robbery. Two days was a short time and the lapse of time was not long enough for the eye witnesses to have forgotten how their assailant looked like. Furthermore, the evidence against the Appellant was not just that of visual identification. There was other independent evidence implicating the Appellant with the offence. There was the evidence of PW4, PW6 and 9. After robbing PW1, 2 and 3, the Appellant abducted PW4 who was in company of PW1, 2 and 3 and kept her at Nanyuki Stage View Lodging and bar. He checked in the said lodging as Christopher Munene Njogu and presented the ID. When he was arrested, the ID in the name of Christopher Munene Njogu was recovered from him. PW6 and 9 identified the Appellant as the person who had booked the rooms. The Investigating Officer, PW13 produced the receipts the Appellant had been issued with.

52. The Appellant was arrested in company of PW4 whom he had abducted. Further, the recoveries of the stolen items was made in a room that he had booked of which the complainants identified. Given the above circumstances, it therefore follows that the Appellant

was properly identified and even if he had not been identified other evidence abounds linking him to the offence. The chain of events was so well corroborative of the witnesses' testimony.

53. As to the ID parade, the same was regular since the Appellant was placed amongst more than eight members as PW8 testified and according to the parade form, Pexhibit16. The witnesses were in a different room while the parade was being prepared; none of the witnesses met the Appellant before the parade; each witness was called alone to identify the assailant; the Appellant changed his position in the parade when each of the witness identified him; the parade members closely resembled the Appellant; the Appellant never objected to the manner the parade was conducted and that he even asked each witness a question and they gave a response; the Appellant had a representative, Boniface Mwangi who was his brother whom he had requested to be present during the parade. Based on the foregoing, it is my view that identification parade was properly conducted. Each of the witness identified the Appellant as the assailant. It is therefore my considered view that identification evidence was positive and free from error.

54. The Appellant complained that same members of the parade were used for the identification by the three witnesses. This does not hold water since the evidence reveals that he changed position during identification. Furthermore, there is nothing to show that the witnesses met after identifying the Appellant.

55. As to the Appellant's contention that no description was given to the police when the matter was reported, this is not the case since PW1 testified that he reported to the police that the assailant was dark and medium height. On further cross examination by the Appellant, he testified that he described the Appellant's appearance and dressing to the police. PW13, the investigating officer testified on cross examination that PW1 gave description of the assailant as a young man whom he could identify given another chance. Furthermore, failure to give a description cannot vitiate a conviction as was held in the case of Nathan Kamau Mugwe v. Republic- Criminal Appeal No 63 of 2008 where the court expressed itself thus: -

> " As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in Gabriel?s case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness „should? be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.
>
> In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not

given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

Whether the charges were proved to the required standard.

56. As seen earlier, the Appellant was charged with three counts of robbery with violence, abduction with intent to confine contrary to section 259 as read with section 256 of the *Penal Code* (Count IV) and demanding properties with menaces contrary to section 302 of the *Penal Code* (count V).

57. As for Count IV and V, the Appellant did not challenge the conviction on those two counts. He only challenged the conviction for counts of robbery with violence. Section 296(2) of the *Penal Code* provides as follows;

> " 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."

58. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of *Oluoch v Republic* [1985] KLR where it was held:

> " Robbery with violence is committed in any of the following circumstances:
>
> 1. The offender is armed with any dangerous and offensive weapon or instrument; or
> 2. The offender is in company with one or more person or persons; or
> 3. 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 ....."

59. The use of the word or in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the *Penal Code*. The prosecution duty was therefore to establish any of the above ingredients and to show the court that the Appellant robbed the complainants.

60. It is in evidence that the Appellant was armed with a knife as all complainants testified. The knife was recovered together with the complainants' stolen items and was produced as Pexhibit11. It was identified by the complainants as the knife the Appellant had used. Based on the fact that he was armed, it therefore follows that the offence under section 296(2) of the *Penal Code* was complete.

61. For Count IV, the Appellant was charged with abduction with intent to confine contrary to section 259 as read with section 256 of the *Penal Code*. Section 259 provides that;

> " Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years."

62. Section 256 on the other hand defines the term abduction as follows;

> " Any person who by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person."

63. The court in *Hamisi Ngala v Republic* [2017] eKLR set the elements of the said offence as;

> " Appreciably, kidnapping connotes the taking of a person forcibly and illegally detaining such person with the intention of extorting ransom from others to secure the release of such kidnapped person. The ingredients of kidnapping can be one or a combination of more than one of the following:-
>
> 1. The person must have been taken forcibly and without their will;
> 2. Such person must have been illegally detained in a secret place;
> 3. Such person must be held captive or hostage;
> 4. The person who has detained such person must have the intention of confining the abducted person secretly, illegally and wrongly;
> 5. The person who has detained such person must want to extort monies from others to secure the release of the detained person."

64. The evidence on record reveals that after robbing PW1, 2 and 3, the Appellant left with PW4. From the evidence on record, the Appellant was not known to PW4. He stayed with her for two days and even demanded money from PW5, PW4's mother for her release. He took PW4 in a place where her mother and uncle were not aware of. PW10 sent money as he was directed by the Appellant to secure the release of PW4. From the foregoing, the offence of abduction was proved to the required standard.

65. As to the offence of demanding property by menaces, section 302 of the *Penal Code* provides;

> " Any person who, with intent to steal any valuable thing, demands it from any person with menaces or force is guilty of felony and is liable to imprisonment for ten years."

66. The ingredients of the offence were discussed in the case of *Kimuri v Republic* [1990] eKLR where the court held that;

> " It is clear from the definition that the offence is complete when a demand is made. Whether payment is made or not is immaterial. Further there must be a use of menace, threat or force capable of arousing fear. Finally, only the person who demands with menaces commits the offence."

67. The Appellant demanded money for the release of PW4. The money was sent to the numbers that the Appellant directed PW10 to send to. This was confirmed by PW11 and 12. PW12 produced the Safaricom data highlighting money transactions as Pexhibit27. Kshs 2,000/- was even sent to the Appellant's brother Boniface Mwangi who reversed the amount. The demand and even the act of PW10 sending the money as instructed by the Appellant completed the offence of demanding property by menaces.

68. From the foregoing, it follows therefore that the charges were proved to the required standard.

69. As to sentences, the Appellant was sentenced to 20 years imprisonment in each Count I, II and III. For Count IV and V, he was sentenced to 1 ½ years imprisonment for each count. The sentences were to run concurrently. The Appellant submitted that the sentences were manifestly harsh and excessive given the fact that the stolen items were not valuable.

70. The offence under section 296(2) provides for death sentence however the trial court while applying the principles in Muruatetu case sentenced the Appellant to 20 years imprisonment. I find no reason to interfere with this sentence and the Appellant should indeed consider himself lucky for getting away with a lenient sentence. Am minded that it is within the province of this court to enhance the sentence but since the state is content with the sentence meted out I leave it at that. Count IV and V carries a sentence of 7 years and 10 years respectively. The Appellant was however sentenced to 1 ½ years which was lenient in the circumstances of this case. Again, from the foregoing, I do not see the reason to interfere with the sentences meted by the trial court.

63. With the result that the appeal herein fails on all fronts. The same is hereby dismissed.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 12TH DAY OF JULY 2023

A.K. NDUNG'U

JUDGE