Kamau v Republic (Criminal Appeal 24 of 2019)
[2023] KEHC 22426 (KLR) (21 September 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL 24 OF 2019

FROO OLEL, J

SEPTEMBER 21, 2023

BETWEEN

JOHN SAMUEL KAMAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Background

1. The Appellant was charged with the offence of Robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the 16th day of August 2017 at Kawa V Village in Mwea West Sub County, within Kirinyaga county, jointly with other not before court robbed Julius Wachira Mugo, cash Kshs. 25,000/=, a Keg Cylinder, Techno 726 Phone, two Keg pumps, three laptops, Acuma T.V Set, amplifier, 2 cartons of trigger wine, 40 bottles of beer, 20 packets of super match cigarette all valued at Kshs.180,000/= and immediately before and immediately after the time of Robbery used actual bodily violence to the said Julius Wachira Mugo.

2. On count II the Appellant was charged with handling stolen property contrary to section 322(2) of the Penal Code. The particulars of the offence were that on the 14th day of November 2017 at Kwa V Village. In Mwea West Sub County, within Kiringaga County jointly other than in the course of stealing dishonestly retained one amplifier knowing or having reason to believe it to be stolen goods valued at Kshs. 15,000/= the property of Julius Wachira Mugo.

3. The prosecution called six (6) witnesses in support of their case. The Appellant was placed on his defene and gave sworn evidence. The trial court upon considering the evidence presented found the appellant

guilty and sentenced him to serve 40 years imprisonment which conviction and sentence has given rise to this appeal. The ground of appeal raised were that;-

a. That the Learned trial Magistrate erred in law by failing to consider that PW6 failed to conduct identification parade yet he was arrested after 3 months.

b. That the learned trial Magistrate erred in law by failing to consider that PW6 and PW2 accepted the exhibit was removed from the station before the case was done and some modifications done (Cabinet was added).

c. That the learned trial Magistrate erred in law by failing to consider that neither PW 1, PW2 or PW6 was able to produce the serial Number of the said exhibit.

d. That the learned trail Magistrate erred in law by failing to consider the contradictions and inconsistencies in the case.

e. That the trial Magistrate erred in law and facts when he failed to consider my defence.

Evidence at Trial

4. PW1 Julius Wachira Mugo testified that he stays at Kwa V Village. On 16th August 2017 at about 3.00am he was sleeping behind his club/pub, when his door was violently hit and broken by a big stone. About 7 people entered his house and started to violently attack him. It was his evidence that he knew one person by name and would be able to identify four (4) other's physically. During the robbery process, he was physically assaulted and he agreed to give the robbers everything. The robbers took Kshs. 25,000/= which he had, which were sales proceeds for the day and also demanded club keys, where they proceeded and took other items. The one person amongst the Robbers that he knew was called "Njagira". After the Robbers left he checked his watch and noticed that it was at about 3.00am. The security lights were on and in his house the lights too were on.

5. PW1 further testified that his club is called River Side club and he had a record for the stock sheet for 14th August 2017 which showed his sales were Kshs. 25,860/=. The 860 was in coins. At the club the Robbers stole 2 Keg Pumps, one Keg Cylinder, 1 T.V set, 20 packets cigarettes and 4 packets of safari, his phone Techno T26, amplifier and speaker. He identified various Receipts as MFI 1-4. Due to injuries sustained he was treated at Kagio nursing home where he was admitted for two weeks due to injuries on his left ribs, chest and also injuries to the nose. PW1 further testified that he was able to identify the appellant by his walking style and hairstyle. He used to see him and had met him within Kwa V Village. Previously he had seen him being assaulted by a woman and later the appellant blamed him for the assault. The amplifier was recovered when the appellant tried to sell it.

6. In cross examination, PW1 stated that he saw seven (7) robbers on the day of the incident and was able to physically identify four (4) people and knew one by name. He had told the police that he was able to identify five (5) people and the one known to him was still at large. The total value of the stolen property was Kshs. 180,000/=. He was able to identify the appellant by his unique hairstyle and dressing. After the Robbery incident the appellant moved out of the Kwa V village and he was found at Sagana trying to sell PW1 amplifier. In Reexamination PW1 reiterated that he had identified the accused by his hairstyle and dressing. It was also the appellant who was found trying to sell the amplifier.

7. PW2 Elias Kamau Wanjiru testified that his work is to repair radios and TVs. On 14th November 2017 at about 3.00pm some customers came with a transformer which they wanted to sell to him. He requested them to avail their identity cards but they did not have the same. He looked at the amplifier and told his

colleague that he had previously repaired the amplifier and that it belonged to Julius (PW1). He was able to identify the transformer too as he had previously changed it for the owner (Julius). He did not have information by then that the item had been stolen. He called PW1 and inquired about the items being sold and that is when he was informed by PW1 that his club had been broken into by thieves and the transformer stolen amongst other items.

8. He later organized with PW1, who came with a receipt and they called the appellant who came back with the said transformer and PW1 identified the same. The appellant was arrested and PW 2 identified him as the person who brought the transformer to him and attempted to sell the same to him. In cross examination PW2 stated that he had serviced the transformer twice before and that is why he could identify it. Initially he did not buy the transformer, but after reporting to PW1, they called the appellant who came back with the transformer and was arrested.

9. PW3 Christine Gathoni Macharia, stated that she stays in Kwa V Village and was the area Assistant Chief on 14th November 2017 she took her TV to be repaired at Sagana. While at the repair shop some youth came with something carried in a polythene bag and told the technician that him they wanted to sell him the said item. PW2 asked the person to produce a receipt and in the meanwhile told her that he suspected the amplifier belonged to PW1, who was known to her. She gave PW2, PW1 phone number and he called him. PW1 told PW2 that his amplifier had been stolen after his club had been broken into. They followed the appellant and informed him that they had changed their mind and now wanted to buy amplifier, the appellant and his co accused gave different versions as to how they had acquired the amplifier and PW3 caused them to be arrested and were taken to the police station and later charged before court.

10. PW3 stated she personally saw the appellant and his co accused in the trial court negotiate to sell the said amplifier. Both the appellant and his co accused were persons known to her as they both came from her locality. The Appellants co accused was a neighbor's child, who had dropped out of school. PW3 identify the amplifier before court. In cross examination PW3 confirmed that the appellant tried to sell the stolen amplifier and it was later covered to avoid further damages to it.

11. PW4 Murimi Nahashon testified that he was a clinical officer based at Kangaru health center. He held a diploma in clinical medicine and surgery from KMTC Nyeri and had Six (6) years' experience. On 16th August 2017 PW1 was attended to at the Hospital and was given out outpatient No. 7315/17. His clothes had no blood stain and he presented a history of having been assaulted by a group of robbers at 3.00am using crude weapons. PW1 had tenderness on that chest wall, left lip tenderness, lower back tenderness and L4 spinal (lumber), upper limb left joint tenderness. The injuries were caused by a blunt object and he was given analgesics to manage the Pain. PW4 produced the P3 Form and treatment notes from Kegio Nursing Home as Exhibit 4 and 5.

12. PW5 Justa Muthoni testifies that on 16th August 2018 she was at Kwa 'V' Village and used to work for PW1 at his club and resided in one of the rear rooms behind the club. On the said date at 3.00am she heard screams, she peeped through the window from her room and saw a robber who demanded cash and phone from her. The said robber was armed with a machete. She handed over Kshs. 4,000/=and her itel phone to him, as the robber had threatened to kill her. She saw the robbers take away the Keg Cylinder, Keg Pump TV and amplifier. The properties were stolen from the club and PW1 house. The robbers were about seven (7) in number and she was able to see them because the security lights were on. She was able to identify two robbers, one of them being the appellant.

13. PW5 further testified that robbers inflicted injuries on PW1 who was hurt on his back and nose, which were swollen and also on the upper limb. During the robbery incident It was only her and PW1 who were present and the matter was reported at Sagana police station. Later she was called and informed

that some suspects were arrested while selling the amplifier. She could identify the appellant as he had stab wounds on his head and was the robber who demanded cash and phone from her. He was also a person she had seen before this incident and was at the club the previous evening before they closed business.

14. In cross examination PW 5 stated that she was staying in the rear rooms of the house and it was the appellant who demanded for cash and phone from her. In her statement to the police she had told the police she had identified Njagi by name but he did not give the appellant description. PW5 insisted that she had told the court the truth and the robber who took the cash and phone was the appellant. This happened while inside the room and the appellant was outside by the window and there were security lights on. The window did not have any cover and thus she was able to identify the appellant.

15. PW6 PC Joseph Kisau testified that he was the investigating officer of this robbery incident and PW1 had narrated to him how the incident occurred and itemized, the various items stolen. PW1 further stated that during the incident the lights were on and he was able to identify two robbers. After robbing him they said robbers went to his club which was nearby and stole other items therefrom. PW5, was awoken by the commotion of the robbery and when she opened her window the robbers demanded cash and phone from her and robbed her of the same. PW6 recorded statements of PW1 and PW5 and referred PW1 to be treated at Sagana Sub County hospital where he was issued with a P3. Later the appellant was apprehended by PW3, while trying to sell the stolen amplifier. He produced it marked documents and items (MFI 1-MFI 7) as Exhibits 1(a) -(b) – 7

16. In cross examination PW6 confirmed that he recorded the witness statements of PW1 and PW5 and the appellant had been positively identified as one of the persons who was amongst the Robbers. He did visit the scene of the incident and saw the stone used to break the door but he did not carry it to court as an Exhibit, the clinical officer, PW 4 had also confirmed the extent of the PW1 Injuries. Further the amplifier which the appellant was trying to sell too had been positively identified by PW1 and he produced a receipt for the same. PW6 also confirmed that the amplifier was placed in a cabinet due to the fact that the spare parts were falling off and they had to cover it to avoid further damage. Before the appellant was arrested, he had not known him before.

17. The appellant was placed on his defence and gave sworn evidence. He stated that he was casual laborer and denied being amongst those who attacked the complainant. They had previously disagreed with the complainant and that is why he framed him on the charges before court. He denied stealing any item from PW1 and PW5. In cross examination he stated that he had a grudge with the complainant who knew him as he stayed 150 m away from the club and PW 1 had not identify him. The amplifier he had was not the one placed before court. He had bought his amplifier six (6) years earlier but did not have a receipt of the same. Its amplifier was locally assembled and was for his use in his House. He wanted to sell it to raise rent.

18. The trial Magistrate did consider the evidence adduced and found the appellant guilt of the offence of Robbery with violence and after considering the victim impact statement and the appellants mitigation proceeded to sentence the appellant to serve a jail term of 40 years imprisonment.

Appellants Submissions

19. The appellant filed his submissions on 18th January 2023 and stated that though he does not dispute the Robbery incident occurred, he was not amongst the persons who robbed the appellant. His Identification was doubtful as the source of light used to identify him (the security lights) were outside and could not reliably used to identify him from within the house. Further no identification parade was done and thus left a lot of doubt as to whether there was positive identification.

20. The appellant further submitted that It should also be noted that PW1 only identified one Njagi who was on the run and did not mention his name to the police as one of the people who attacked/ robbed him. The fact that PW1 purported to identify him three months later left a lot doubt as was an afterthought.

21. The appellant further submitted that PW5 too was in the same plot at the time of the robbery and did not mention him by name nor did she describe the physical appearance of her attackers to the police. She only mentioned that the appellant was in the scene after he had been arrested. This clearly showed that he had been framed up and considered together with his evidence of there having been a grudge between him and PW1 such evidence should not have been used to convict him.

22. Further concerning his arrest, he stated that he had bought his amplifier a long time ago from Nairobi. PW 6 had also contradicted the evidence of PW 1 and PW5 by stating that PW1 was able to identify two (2) Robbers, while PW1 had stated he was able to identify five (5) robbers. His house was 150m away from the pub and if he was amongst one of the robbers then PW1 and PW5 should have given his description to the police or even to his employer.

23. In conclusion the appellant state that there was uncertainty about his identification and PW 6 ought to have carried out a identification parade since his alleged identification by style of hair and dressing came as an afterthought. He urges the court to relook at the evidence afresh and set aside the conviction and sentence.

24. The Respondent did not file any submissions.

Analysis and Determination

25. 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.

26. Further this being first Appellate Court, the 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.

27. 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."

28. The appellant filed five (5) grounds of Appeal and the issues brought forth can be summarised;

a. Whether the prosecution discharged the burden of proof and if 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 of the appellant

c. Whether the trial magistrate erred in law and fact to accept a modified exhibit

d. Whether the trial Magistrate erred in law by failing to find that there were contradictions and inconsistencies in the evidence of the prosecution.

e. Whether the trial Magistrate failed to consider Appellant's defence.

Burden of Proof

29. 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."

30. 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 Appellant to the required legal standard.

31. 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."

32. 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."

33. 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."

34. 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.

35. It is not disputed that the complainant PW1 was on 16th August 2017 at about 3.00am violently attacked at his house in Kwa "V" village by a gang of robbers who, broke down his door using a heavy stone and violently robbed him of Ksh.25,000/=, Techno phone The said robbers then proceeded to his pub (Riverside) and proceeded to rob him of other items namely ; A keg cylinder , two keg pumps, three laptops, Acuma T.V set, Amplifier, 2 cartons of trigger wine, 40 bottles of beer, 20 packets of super match cigarettes all valued at Ksh.180,000/=.

36. During the said incident the robbers physically assaulted PW1 using blunt/crude objects and he sustained injuries on the chest, nose and back. He had pain and tenderness on the anterior chest wall,

tenderness on the lip, tenderness on the lower back, L4 of the spinal code (lumber) and upper left limb joint tenderness.PW 4 did confirm, these injuries and produced the P3 form and treatment notes as Exhibit 5 and 6.

37. PW5 who was PW1 employee at the Riverside pub confirmed this incident as she too was robbed of Ksh.4,000/= and Itel phone. She too confirmed that PW1 was injured though he was not bleeding and had a swollen back, nose and was injured on the upper limbs. The appellant in his written submissions before court also accepted this fact that indeed PW1 was attacked and robbed. He stated that; "I do not dispute that the complainant (PW1) was attacked, but the question of who attacked him needs to be answered."

38. The evidence adduced by the prosecution was thus more than sufficient to prove the ingredient of the offence of robbery with violence, to wit; The complainant was attacked be persons armed with any dangerous and offensive weapon or instrument; the robbers were in company with one or more person or persons and immediately before or immediately after the time of the robbery the robber's inflicted personal violence on PW1. The only question that remains unanswered is if the appellant was amongst the robbers and if indeed, he was properly identified.

    Whether, the learned trial magistrate, erred in both law and fact in his evaluation of the evidence as regards identification of the appellant.

39. The appellant submitted at length on the issue of identification and stated that both PW1 and PW5 did not mention him as being amongst the persons who robbed them nor did they give his description to the police in the first information or subsequent statements recorded. Though PW1 stated that he could identify five robbers that was doubtful as the lights that was available was the security lights which was outside. He was suddenly woken up and therefore it was doubtful in the circumstances if he had proper time to identify any of the persons who attacked him, other than the one he mentioned by name.

40. It was his further submissions that PW5 too never described the physical appearance of any of her attackers in her statement to the police and it was only after he was arrested did she testify that she had seen him at the crime scene. Under the circumstances, it would have been appropriate to conduct an identification parade, but that too was not done. It was thus clear that he was being framed up as he had a grudge between him and PW1.

41. PW1 evidence was that he was that on 16th August 2017, he attacked at 3.oo a.m as he slept in his house. He told the police that amongst the attackers, he knew one person, and could identify 4 others physically. In cross examination by the appellant he restated that above facts and further stated that he was able to identify the appellant due to his style of haircut and clothing. For three months after the incident, the appellant had moved away from Kwa V village and was arrested while trying to sell his stolen amplifier.

42. PW5 too testified that on the said 16th August 2018 at 3.00am or thereabouts she was in her room behind the club, when she heard screams, she woke up and peeped through the window only to be confronted by a robber who demanded for cash and her phone. The said robber was armed with a machete. She complied and gave him Ksh.4000/= and her Itel phone. She was inside her room and there was security light outside and was able to identify two robbers though they were about seven (7) robbers.

43. Amongst the robbers she was able to identify was the appellant as she had seen him at the club before she closed business on the said date. He had stab wounds on his head and was the one who demanded cash and money from her. She had seen him before the incident. In cross examination PW5 reiterated

that it was the appellant who demanded and took her cash and phone, and she had informed the police that she could identify him and knew one Njagi by name. When referred to her statement it only indicated that she could identify Njagi, she did not give the description of the appellant to the police. PW5 insisted that the security light was on and her window did not have any space so she was able to clearly identify the appellant.

44. 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.

45. 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.

46. 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)

47. 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."

48. 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."

49. The main trust of the appellants submissions with regard to identification was that, the witnesses in their first information and/or statement to the police did not stated they had identified him and more importantly they did not give the police his description and therefore their evidence was unreliable and doubtful. Further in the circumstances of this case it would have been ideal to have conducted an identification parade, which unfortunately was not carried out.

50. Though PW1 did not mention the appellant by name, he was clear in his statement to the police that he knew one of the robbers by name and could identify four others. PW5 on the other had had told the police that she was able to identify two of the robbers. But both PW1 and PW5 did not give description of the persons they could identify by appearance.

51. Be that as it may, after re-evaluating the evidence, given the circumstances under which PW1 was attacked there is a lot of doubt as to how he identified the appellant. PW1 confirmed that he was suddenly awoken from his sleep at 3.00am and swamped by robbers. With the only source of light being the security lights, which was outside the house. His identification of the attackers would have been doubtful as the house was not described in relation as to how much light from the security lights was able to permeate inside the house/room during the robbery and how long did he spend in the presence of the said robbers.

52. The evidence of PW5 though did corroborate PW1 evidence. She was inside her room and was robbed through her window which she described as did not have any space (to mean no burglar proof). The security light was on and while peeping out to see what was happening, she was confronted by the appellant who was armed with a machete and demanded for money and her phone. It is common knowledge that if one is inside a dark room and the other person, is standing outside the room and there is light outside, the chances of seeing him well and accurately identifying him are higher.

53. The PW5 s stated that " on 16.08.2018 I was at Kwa V in a club at 3.00am where I used to work while there the robbers came and I heard some screams. I was in my sleeping room. I peeped through the window and I saw a robber who demanded for cash and phone. He was armed with a matchete. I gave

him Ksh 4,000/= and itel phone as he threatened to kill me..... I was able to identify two robbers including the accused in court."

> " I was later informed that some suspects had been found selling the club amplifier. I had seen the accused at the club before I closed. He had stab wounds on his head. He is the one who demanded cash from me and phone. I had seen him before this incident."

54. There is no doubt that PW5 identification of the appellant was more reliable and accurate. The appellant was outside the house and clearly seen by PW5 who was inside the room, which was dark, while outside was illuminated by the security light. The appellant had earlier on, during the same evening been seen in the club before it was closed by PW5 who worked as a waitress therein and therefore it was easy for PW5 to recognise him as one of the robbers.

55. The appellant further had a special feature being the stab wounds on his head which distinguished him from the other robbers. In the circumstances of this case, though the conditions under which PW1 ability to observe and accurately identify the perpetrators of the robbery was doubtful I do find that PW5 properly recognised the appellant. There was ample light, he came with her close proximity and individually demanded for her phone and money, PW5 had unobstructed view of the appellant and he had special features being the stab wounds on his head.

56. The evidence of PW5 constituted positive identification of the appellant, which is evidence by a witness identifying a person previously unknown as someone he had seen prior to the relevant incident. The appellant in his defence also admitted that he stays at Kwa V village and resided about 150 meters from the Riverside club. The appellant did not deny PW5 allegation that he was previously a customer at the club and therefore I do find that under the given circumstance's the appellant was positively identified and the identification under the given circumstances was free from error and was safely used to convict him.

Whether the trial magistrate erred in law and fact to accept a modified exhibit

57. The appellant raised this ground of appeal and stated that the trial magistrate erred in law in failing to consider that PW6 and PW2 accepted that the exhibit was removed from the police station before the case was done and some modification's done. (Cabinet added).

58. Nothing on this appeal turns on this ground as PW2 and PW3 positively identified the appellant as the person who had possession of the amplifier and had intended to sell the same. PW2 evidence was that he used to repair the amplifier, which had a transformer and could easily identify the same. He contacted PW1, through PW3 the area administrator and they arrested the appellant .PW1 did identify the amplifier and had a receipt showing he had bought the same. Both the receipt serial No 1324081L and the amplifier were produced as Exhibits.

59. PW6 did confirm to court that the cabinet was placed on the amplifier because the spare parts were falling off. This did not mean that the exhibit was modified. The amplifier and the attached transformer were placed before court and properly identified and admitted as exhibits. The modification was not done on the exhibits per say and placing them in a cabinet did not prejudice the appellant in any manner.

Whether the trial Magistrate erred in law by failing to find that there were contradictions and inconsistencies in the evidence of the prosecution.

60. The only ground raised in this regard is that the evidence of PW6 contradicted the evidence of PW1 and PW5. The investigating office (PW6) had stated that PW1 had told him he was able to identify two robbers, while PW1 had stated that he was able to identify five (5) robbers. It was his evidence that

he was staying some 150meters from the scene of the incident and PW1 should have been able to give his identity. The witnesses were thus not reliable and/or credible.

61. In Philip Nzaka Water-Vrs-Republic CA Criminal Appeal No. 29 of 2015 while relying in the decision of Dickson Elia Nsamba shapwater & Anor Vs- Republic CA App No. 92 of 2007 the Court of Appeal of Tanzania address the issue of discrepancies in evidence and conclude as follows

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out one sentence and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradiction are minor or whether they go to the root of the matter."

62. The question to be addressed is whether the contradiction mentioned are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. While defining contradictions, the court of Appeal of Nigeria in David Ojeabuo Vs Federal Republic of Nigeria stated that;

> "Now, contradictions mean lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

63. Further in Joseph Maina Mwangi vs Republic (2000) Eklr it was held that;

> "In any trial there are bound to be discrepancies. An appellate court in considering these discrepancies must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."

64. In the case of Twehangane Alfred vs Uganda (Cr.App.No.139 of 2001(2003) UGCA it was held that it is not every contradiction that warrants rejection of evidence. The court delivered itself thus:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

65. The inconsistencies pointed out by the appellant are minor, are not fundamental to cause any prejudice to the appellant. They did not point to deliberate untruthfulness and did not affect the main substance of the prosecution's case.

Whether the trial Magistrate failed to consider Appellant's defence.

66. This ground of appeal too has no basis as the trial magistrate at page 11 of his considered judgment did exhaustively consider the appellants defence and found as a fact that his defence did not in any manner shake and/or dislodge the evidence of PW1, PW2, PW4 and PW5. There was no basis for the appellants claim that he was framed up and he did not raise it as issue in cross examination of PW1.

67. The appellants claim for ownership of the amplifier was also not established, as the amplifier recovered and availed before court was sufficiently proved to belong to PW1. The only reason the appellant was arrested was that he attempted to sell the said amplifier to PW2 who identified it to belong to PW1. The trial magistrate thus concluded that no doubt had been created by the accused in his defence by way of cross examination and/or explanation as to displace the evidence adduced before court with respect to the aspect of robbery with violence and proceeded to convict him.

68. The appellant was convicted of the offence of Robbery with violence, and the trial court deferred sentencing to a different date and called for a victim impact statement and allowed the appellant to give his mitigation. The trial court considered the same and current jurisprudence on sentencing and the sentencing policy guidelines and proceeded to hand down a sentence of forty (40) years imprisonment.

Conclusion

69. Having considered all evidence present challenging conviction in this appeal is do find that this appeal is not merited and the same is dismissed.

70. The appellant did not file any ground of appeal challenging his sentence and this court will not consider the same. Be that as it may, this court notes that the judgment of the trial court did not specify if the period the appellant spent in custody will be considered as part of his sentence. Section 333(2) of the Criminal procedure code obligates the court to take into consideration the time already spent/ served in custody/ remand while sentencing. The appellant was arrested on 16.11. 2017 and convicted/ sentenced on 26.04 2019. This is a period of seventeen months.

71. The appellant has a right to equal treatment before the law and has a right to equal protection and equal benefit of the law as provided for under Article 27(1) of *the constitution* of Kenya 2010. I do exercise my discretion and direct that the period spent in custody will be included as part of his sentence. The sentence period shall therefore run as from 16.11.2017.

72. Right to Appeal 14 days.

73. Judgement accordingly

Judgement written, dated and signed at Machakos this 21st day of September, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 21st day of September, 2023.

In the presence of;

Appellant

.....for ODPP

.....Court Assistant