REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 22 OF 2019

HARUN NDIRANGU NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. Y KHATAMBI (SRM)

DATED 4TH MARCH 2019 IN CRIMINAL CASE NO. 2568 OF 2017)

JUDGEMENT

1. The Appellant faced 3 counts of the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code. Particulars of the offence of the 1st Count are that on the 2nd day of September 2017 at Karunga area of Nakuru North Sub County within Nakuru County jointly with others not before court robbed Samuel Waweru Githinji of his cash Kshs. 20,000 and immediately before such time of robbery used physical violence to the said Samuel Waweru Githinji.

2. Particulars of the 2nd count of robbery with violence are that on 2nd September, 2017, at Karuga area within Nakuru County, the accused person jointly with others not before the court while armed with dangerous weapons namely an AK47 riffle, a Somali sword and knife robbed one Jane Mbuthia Murigi of her cash KSHS 50,000 and immediately before such time of robbery used physical violence on the said Jane Mbuthia.

3. Particulars of the 3rd court are that on 2nd September, 2017 at Karuga area, within Nakuru County, the accused person with others not before the court while armed with dangerous weapon namely an AK47 riffle, a Somali sword and knife robbed one Mbugua Njoroge of Kshs 32,000 and immediately before such time of robbery used physical violence on the said Mbugua Njoroge.

4. He faced a fourth count of grievous harm contrary to Section 234 of the Penal Code. Particulars of the offence being that on 2nd September 2017 at Karuga area within Nakuru County, the accused person jointly with others not before Court while armed with dangerous weapons namely an AK47 Riffle, a Somali sword and a knife did grievous harm to Peter Gitau Njau.

5. The Appellant pleaded not guilty to the charges and the case proceeded to full trial. The trial Court found the Appellant guilty of the 1st and 3rd count of the offence of **Robbery with Violence contrary to Section 296 (2)** and the 4th County of Causing grievous harm **Contrary to Section 234 of the Penal Code.** He was convicted of the said charges pursuant to **Section 215 of the Criminal Procedure Code.** The trial court found that the prosecution failed to prove its case beyond reasonable doubt on the 2nd count and the appellant was acquitted of the same.

6. The Appellant being dissatisfied with the conviction and sentence meted out on him filed a **Petition of Appeal on 13th March 2019** setting out the following grounds of appeal namely:

> **a) THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the identification parade did not conform to the provisions of section 46 of the police force standing orders**
>
> **b) THAT the learned trial magistrate erred in law and in fact by failing to find that the firearm presented as evidence was not found in the appellant's possession nor household.**
>
> **c) THAT the learned trial magistrate erred in law and fact by failing to find that it was the appellant's hospitalization that led to the inference that he was the suspected offender.**

d) THAT the learned trial magistrate erred in law and fact by failing to find that the prosecution had not proved its case beyond reasonable doubt.

e) THAT the learned trial magistrate erred in law and fact by relying on inconsistent pieces of evidence on identification and failing to observe that the evidence tendered by the prosecution pointed on the fact that the prevailing circumstances at the locus quo were absolutely difficult for a witness to make any significant and positive identification.

f) THAT the learned trial magistrate erred in law and fact by failing to appreciate that the credibility of the identification parade was utterly at stake as the same was conducted in total contravention of the procedural rules set out in the Police force standing orders pertaining to an identification parade.

g) THAT the learned trial magistrate erred in law and fact in basing the conviction on inconsistent and incredible evidence of possession of an alleged motor vehicle and the alleged recovery of the firearms without observing that the recovery was not proven beyond reasonable doubt as required in law.

h) THAT the learned trial magistrate erred in law and fact by failing to appreciate the glaring contradictions in the prosecution case and instead filled the gaping holes in the prosecution case by recording a set of unsubstantiated evidence and adopting it as facts with a predetermined mind-set of guilt of the appellant contrary to Section 163(1) (c) of the Evidence Act CAP 80 Laws of Kenya thus rendering a prejudice of justice.

i) THAT the learned trial magistrate erred in points of law and fact by failing to appreciate the critical witnesses and consequentially failed to invoke the provisions of Section 150 of the Criminal Procedure Code.

j) THAT the learned trial magistrate erred in points of law and fact by failing to appreciate that the prosecution evidence presented in court by the prosecution hailed from a shoddy investigation conducted by the police who did not put their mind into the nitty gritty aspects of investigations contrary to the provisions of Section 24(e) and 51 of the National Police Service Act CAP 84 laws of Kenya hence rendering a prejudice.

k) THAT the learned trial magistrate erred in points of law and fact by failing to appreciate that the evidence adduced as a whole by the prosecution did not entirely discharge the prosecution burden of proving its case beyond any reasonable doubt as provided for by the law.

l) THAT the learned trial magistrate erred in points of law and fact by failing to consider the appellant's plausible defence without appreciating that the same was not rebutted or rather displaced by the prosecution pursuant to the provisions of section 309 of the Criminal Procedure Code.

7. The appellant prayed that this appeal may succeed in its entirety, conviction be quashed, sentence set aside and the appellants be set at liberty hence forth.

8. When the matter came up for hearing the parties were directed to file written submissions which they complied and the same are hereby summarised.

Appellant's submissions

9. The appellant submitted that the threshold that as set out in the case of **Kariuki Njiru & 7 others v Republic** on identification was not satisfied to any degree. The prosecution witness evidence portrays that they were ambushed by armed robbers, ordered to lay down and in a split of some minutes their cash boxes were emptied and the robbers vanished. The time difference between the 3 ordeals was 15 minutes, the prosecution failed to indicate the distance between the three shops and the easy of mobility between one shop to another. The sequence of the robbers was also not described.

10. The appellant submitted that the identifying witnesses did not have enough time with the perpetrators, hence could not give any viable information to the court relating to their identity. The witnesses did not indicate to the court their mental, physical and emotional state during and after the incident and whether the same affected their ability to observe and accurately remember the perpetrator despite indicating that they were ambushed and robed at gun point.

11. The court had recanted the evidence on identification of PW3 for the reason that the witness was in panic and the trial court did not however indicate why the other complainant could not have been in panic and yet they were gun pointed and ordered to lay down. The appellant thus submitted that the mental state of complainants was interfered and could not allow a positive identification. The appellant submitted that the witnesses failed to give any tangible description of the assailants to the police, like the distinctive features of any of the assailants that would help them remember if they got to see them again.

12. The appellant placed reliance in the cases of **Republic v Turnbull & others (1976) 3 ALL ER 549** and the Court of Appeal case of **Cleophas Otieno Wamunga v Republic Criminal Case No.177 of 2004 eKLR** and submitted that the evidence tendered by the two prosecution witnesses on identification was insufficient and incredible and could not warrant a safe conviction.

13. The appellant submitted that the said identification was not sufficient to place him in the alleged crime scene, the circumstances and conditions of the said visual identification were absolutely harsh and unconducive, the alleged identification did not meet the legal standards under **Section 165 of the Evidence Act.** Hence, the trial court acted *ultra vires* to already established principles of identification by admitting this questionable evidence and in the event rendered a miscarriage of justice to the appellant. Basically, what the appellant was

saying is that the identification was marred with irregularities as none of the rules of identification were followed. He urged this court to disregard it in its entirety.

14. The appellant submitted that the evidence on recovery of the alleged two firearms and motor vehicle was marred with contradictions as prosecution witnesses' evidence was contradictory and did not precisely show where the guns were recovered from and which gun was used to shoot and inflict injuries. The prosecution did not satisfy to any degree that there was any connection between the appellant and the alleged motor vehicle. The serial number of the recovered riffle and the one subject to ballistic examination were in contrast.

15. The appellant placed reliance in the case of **Augustine Njoroge v Republic Criminal Appeal No. 185 of 1982** where the Court of Appeal held "contradicted evidence is unreliable". However, the trial magistrate with a predetermined motive to convict the appellant failed to appreciate the glaring and grave contradictions which if appreciated could have rendered the prosecution case faint and unfounded.

16. The appellant submitted that Section 143 of the Evidence Act does not relieve the prosecution of the responsibility to call critical witnesses to testify in court. The prosecution failed to call three critical witnesses and it is very sound to conclude that if such evidence was adduced it could have been adversarial to the prosecution case as was enunciated in the case of **Bukenya & Another v Uganda (1972) E.A 549**. The trial court erred therefore by failing to invoke the provisions of **Section 150 of the Evidence Act cap 80 laws of Kenya.**

17. The appellant submitted that the prosecution failed to prove their case beyond reasonable doubt. The investigations were also shoddily carried out hence the appellant cannot be said to have been safely convicted. The appellant submitted that his plausible evidence was not considered by the trial court. It urged this court to find that his defence was meritorious and required adequate consideration. If so considered it would have led to the acquittal of the appellant.

Respondents' submissions

18. The respondent submitted that all the ingredients of the offence of robbery were proved. PW1, PW2 AND PW3 statements confirmed that the appellant was in possession of a gun during the said robbery. PW7 the ballistic officer was able to ascertain that the guns were in working condition and actually one of the guns found in the appellant's possession while he was in Motor Vehicle Registration Number KBP 105R was in fact fired on the said date of robbery and two spent cartridges were found at the scene of the crime.

19. PW1, PW2 and PW3 further in their well corroborated testimonies stated that the appellant was accompanied by other individuals who were not apprehended and that pw4 was shot on the material day. In view of the above, the charges were proved beyond reasonable doubt by the prosecution. The appellant could not accurately account for how he ended up in possession of the motor vehicle and the gun and neither can he account for how the two cartridges were found at the scene were matched to the two weapons found in his possession. Therefore, his ground of appeal that his conviction was based on inconsistent and incredible evidence is baseless.

20. The respondent submitted that the appellant is in error by relying on the National Police force standing orders which was replaced by the National Police standing orders. The respondent submitted that all the laid down rules of identification under **Chapter 42 of the National Police Standing orders** were followed to the latter and the appellant's ground of appeal in relation to identification is unfounded.

21. The respondent submitted that the appellant in a bid to discredit the investigation alleged that the investigating officer had a grudge against him and that he assaulted him during his arrest. The same is merely speculative as the appellant has not been able to prove or at all. The respondent submitted that life imprisonment appropriately fits the crime and the same is lawful and justified. The sentence of a further 20 years for the charge of grievous harm is also lawful and justified.

22. PW4 has suffered serious injuries which he continues to nurse to this day due to the gunshot wound inflicted on him by the appellant. He suffered permanent disfigurement on his face and his life will never be the same due to the reckless actions of the appellant. The respondent urged the court to dismiss this appeal and uphold both conviction and sentence.

ANALYSIS AND DETERMINATION

23. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; 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 had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424."***

24. The prosecution called 10 witnesses in support of its case. **PW1 Mbugua Njoroge** a shop owner testified that on 2nd September 2017 at 7.10 pm he and his wife Gladys Wambui were at the shop serving customers when thugs came and ordered them to lie down. He stated that one individual had a white paper bag and the other had a gun. The two individuals went to the cash box and went away with cash. Pw1 pointed to the accused in court and stated that he is the one who had a gun. As they walked out of the shop, they found PW1 customer and chased him away. The lights were on, all three bulbs were on and pw1 stated that he was able to see the appellants face and that he can identify him.

25. PW1 testified that he had not seen the accused before the incident but he saw his face as he entered the shop. He also stated that he heard gunshots after the two thugs left and later learnt that a person had been shot dead. The robbery did not take more than 15 minutes. PW1

testified that AP officer went to his shop and interrogated him and he was later informed that some individuals had been arrested. He went to the police station and was able to identify the accused person from close to 9 to 10 people. PW1 stated that the two thugs had an AK 47 gun.

26. On cross examination, pw1 confirmed that he saw his assailants face as they spoke to him and demanded for money. He said that one of them had a brown jacket, the other had a beige jacket with greenish trousers. The person in possession of the gun wore a green hat.

27. **PW2 Samuel Waweru Githinji** a supermarket owner stated that he didn't know pw1 before they met for identification parade. He stated that on 2nd September 2017 at 6.55 pm he was in his shop when two men came to the shop. One person was tall with a beige jacket and the other was short. They asked who the owner of the shop was, and when PW2 identified himself, they said they had a letter for him, one of them opened his jacket, brought out a gun and demanded for money. He identified the accused in court as the one who had the gun. He then showed them the cash box and was ordered to lie down. The short individual took out a white paper bag and placed the money inside. He stated that he was alone in the shop and that the electricity lights were on and that helped him to identify his assailants. He lost Kshs. 20,000.

28. He identified the rifle in court as the one he saw in his shop. PW1 was called by the police on 5th October 2017 and in a parade of 10 people he was able to identify the accused person. He said he was able to identify the accused because he spoke to him. He identified him by touching. On cross-examination, PW2 stated that he didn't remember if one of the individuals had a bandage and that he was not told to identify person with bandage in the identification parade.

29. **PW3 Jane Mbuthia Murigi**, an Mpesa attendant testified that on 2nd September 2017 at 7.00pm, she had 3 customers; one customer went in and tried to open pw3's access door, one other person was left outside and the other individual leaned on the wall and he held a knife. She stated that she was with her brother-in law. The one who went in was unable to open the door and he then stepped back and commanded pw3 to open the door and they left the premise using back door.

30. Thereafter the door was knocked open, she screamed but no one came to her rescue. After 3 minutes she went to see what happened and she saw access door open and went to cash box where she found money missing. After reconciliation she noted Kshs. 50,000 was missing. She later learnt that a person had been shot and his neighbours had also been stolen from.

31. She testified that she saw the person who was outside her shop who was black in complexion. The person who leaned on the wall had a gun and wore a beige coat. The theft took 5 minutes and there were security lights on. She confirmed that she knew pw1 and PW2 as they were her neighbours. She later identified the appellant by touching from a group of 10 individuals. She confirmed on cross-examination that she didn't see anyone with a bandage during identification parade. He pointed at the appellant and stated that he is the one who attacked her.

32. **PW4 Peter Gitau Njau** testified that she was sent to the shop by his wife on 2nd September 2017 and as he walked there he heard people scream 'thugs'. He was then hit at the back of his head and fell on the ground. He was taken to the hospital. He had a gunshot wound that went through the front of his face and came out at the back of his head. He healed after 3 months. He stated that he doesn't know who hit him as it was dark. He admitted to knowing PW1, PW2 and PW3. He marked the P3 form dated 17th October 2017, treatment notes and receipts.

33. **PW5 No 235293, Inspector Bitech** testified that on 5th October 2017 he was requested by the investigating officer to carry out an identification parade. He arranged 8 people and the suspect in custody was taken to an unfinished house. Witnesses were locked at the station. The suspect was briefed, was informed of his rights, asked if he wanted representation but he declined. He understood and accepted to participate. The suspect after explanation took position 6. Each complainant came alone.

34. PW3 after being informed that there will be 9 people in the parade and that she could ask suspect to talk was given a go ahead to identify the suspect by touching him. The suspect stood between position 6 and 7. The complainant picked the suspect Ndirangu. The suspect was asked if he had any complaint about the identification but he answered in the negative.

35. The suspect was then taken to a different room and was asked to take another position but he insisted on the position between 6 and 7. PW1 came in and positively identified the suspect. PW2 also followed that same process and positively identified the suspect. The appellant was asked if he was contented and said that he was satisfied. He appended his thumb print. The officer in charge then prepared the identification parade form.

36. The witness testified that they ensured that the individuals in parade were of same stature, height, built etc. The witness pointed at the appellant person as the one who was identified in the identification parade. On cross-examination, PW5 confirmed that the accused didn't have a bandage on the face and hand cuffs at the identification parade.

37. **PW6 No 84028 PC Peter Keboyo** DCIO Nakuru North testified that he was in the office with P.C Kimwele, Cpl Kelya and DCIO Njenga when they received information that a suspect for robbery with violence had been identified. They were directed to Barabara Mpya where they proceeded to the area with Kelya and Kimwale. They found a vehicle registration no. KBP 105R Toyota Corolla grey in colour with two occupants, a man and lady. The vehicle had household items, utensils and clothing's. They ordered the occupants to alight and handcuffed the appellant. They had been informed that the appellant was dangerous.

38. They searched the appellant and the motor vehicle. He then removed a brief case black in colour, an AK47 gun, pistol wrapped in polythene paper with 15 rounds of ammunitions hidden under the bottom part of the motor vehicle. While conducting search, sergeant Makau arrived and took inventory of the scene. The inventory was signed by officers' PC Kimwele and PC Kimongo and the suspects Ndirangu Njoroge and Lucy Wangui Mwangi.

39. PW6 stated that he was investigating a robbery case by Livingstone Mbugua that occurred on 20th May 2017. He was allegedly attacked by three men one armed by an AK 47. His Cessna pistol B043844 was robbed off with 10 rounds of ammunition. The Cessna recovered was B043844 and it corresponds with the stolen pistol. The same was identified by the owner Livingstone Mbugua. Items recovered in this case

were handed over to the investigating officer. He marked Cessna Pistol Serial No. B043844 (pmfi 6), one round of ammunition (pmfi7). On cross-examination, he stated that the inventory stated that the motor vehicle search was done in the police station as opposed to the scene of arrest. He also declined having knowledge of any relationship between P.C Kimwele and the lady in company of the accused.

40. He further testified that they did not torture the lady and the appellant. He said that the appellant once requested to be taken to the hospital. He attempted to commit suicide and he sustained injury on the forehead which was bandaged. He stated that the appellant didn't have handcuffs on the day of identification.

41. **PW7 No 239844 CI Charles Wenyaa** attached to Ballistic section testified that he is a firearms examiner trained both in Kenya and abroad. He stated that the examination findings were done by his colleague Samuel Ndhiwa who was on annual leave. The exhibits which were being investigated were Cessna Pistol Serial No. BO43844 (Pexh a1), Pistol Magazine (Pexh a2), AK 47 Riffle serial No. 3513063(Pexh c), riffle magazine (B2), cartridge cases (C, D), round of ammunition (E), Rounds of ammunition marked (F1-F15).

42. Following the examination, it was concluded that Pexh A, B, E, F1-F15 are all capable of being fired and that they are firearms and ammunitions respectively as per the Fire Arm Act. Pexh a2 was a pistol magazine designed for one in Cessna Pistol like a1 and it was in good working order and Cessna 16 rounds were fully charged. Pexh 2 is a riffle magazine designed for use in AK 47 family riffle like Pexh B1. It carries 30 rounds when fully charged.

43. Pexh c & d were spent cartridge cases calibre 7.62 by 39mm. Comparative analysis was done for Pexh C & D in conjunction with cartridge cases fired in Pexh B1. Results were found to be sufficient machinery matching. Ejector markings enabled him to form an opinion that Pexh C & D were fired in Pexh B1. He did further analysis on Pexh C & D in conjunction with equivalent pending cartridge cases in the laboratory and found that the Pexh AK 47 was involved in other shooting incidences. There were 9 shooting incidences enumeration in findings.

44. **PW8 Dismus Ondiyo Patel** testified that he is a business man who hires motor vehicles. He testified that in August 19th at 10.am a man called Martin Mungori came and indicated he wanted to hire a motor vehicle KBB 105 R Toyota NZE. He took a photo of the individual, his identity and license. They agreed on Kshs. 3,000 which he paid the last payment on 1st October 2017. On 5th October 2017 he was called by Martin who informed him that his vehicle had been impounded. He said that his friend was found in possession of it with a rifle. He filed a report with the police and he was called the next day and was handed over the DL and the log book. He never met Martin after that. Martin had told him that the vehicle was with a colleague he worked with.

45. **PW 9 Dr. Karanja Elius** only confirmed the gun shot injuries of PW4 and produced the P3 and treatment notes.

46. **PW 10 No.41778, sergeant David Makau** the investigating officer in this case testified that he received a call from an informer on 3rd October 2017 that a suspect had packed his items in motor vehicle KBB 105 R green in colour. He then called Kimwele who rushed to the scene where the appellant was found in company of a lady. A search was conducted on the appellant and motor vehicle and he was called and informed that a gun had been recovered. He informed his colleague to take the accused to the station in order to prepare inventory. He listed the recovered items as an AK 47, Serial No. 11314 (Pexh 19) and the gun with 15 rounds of ammunition. He produced the magazine (pex16).

Issues for determination

47. I have carefully considered grounds in the petition of appeal, the evidence tendered before the trial Court, the findings and decision by the trial Magistrate and the submissions by both parties and the following issues fall for determination.

a) Whether the identification parade was lawfully conducted.

b) Whether the prosecution proved their case on the required standard of beyond reasonable doubt.

Whether the identification parade was lawfully conducted.

48. The appellant submitted that the witnesses failed to give any tangible description of the assailants to the police, like the distinctive features of any of the assailants that would help them remember them if they got to see them again.

49. In **Nathan Kamau Mugwe vs. Republic- Criminal Appeal No. 63 of 2008** this Court faced with a similar situation 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."

50. I agree with the findings in Nathan Kamau Mugwe's case. My view is that the failure by the complainants to give a description of the appellant before the identification parade should not vitiate the identification parade. In any event, the complainants gave a detailed account of the role played by the appellant in the said robberies. They also gave a description of what the suspects were wearing at the time of the robbery and that the appellant herein had a gun and the other suspect who was not in court had a white paper bag which they used to carry the money.

51. The appellant had submitted that the said identification was not sufficient to place him in the alleged crime scene as the circumstances and conditions of the said visual identification were absolutely harsh and unconducive and that the alleged identification did not meet the legal standards.

52. Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in **Wamunga v. Republic (1989) KLR 424 at 426** had this to say:

> ***"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

53. In **Nzaro v. Republic (1991) KAR 212**, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction.

54. This court is therefore duty bound to interrogate whether or not the circumstances in the case at hand were favourable for positive identification. The complainants confirmed that there were enough electricity lights in their shops where the robbery took place. The robbers also talked to the complainants in the process of robbing them. The complainants even mastered the colour of the clothes that the suspects were wearing. PW1 stated that he was able to see the accused person's faces because all his 3 bulbs were on. He said that he could identify him by his eyes and nose area. The complainants also told the court that the assailants had a gun and they identified the said gun in court. PW2 testified that he was able to identify the accused person because he spoke to him during the robbery and at the identification parade and he also testified that there were security lights at the time of the robbery. I am convinced that the said witnesses got a clear impression of the appellant during the incidents and were able to positively identify him from the identification parade.

55. In **David Mwita Wanja & 2 others vs. Republic [2007] eKLR** while emphasizing on the importance of a properly conducted identification parade the court expressed itself thus-

> "***The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA. There are a myriad other decision on various aspects of identification parades since then and we need only cite for emphasis Njihia vs. R [1986] KLR 422 where the court stated at page 424: -***
>
> ***"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."***

56. Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under **Section 5 of the Police Act Cap 5 Laws of Kenya** and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed.

57. As far as is relevant to this case, **Standing Order 6(iv) (d)** and **(n)** state as follows:

> ***"6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -***
>
> ***(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;***
>
> ***(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"***

58. PW5 Inspector Bitech who carried the identification parade gave a blow by blow account on what transpired in the identification parade. He arranged 8 people and the suspect in custody was taken to an unfinished house. Witnesses were locked at the station. The suspect was briefed, was informed of his rights, asked if he wanted representation but he declined, he understood and accepted to participate. PW3 after being informed that there will be 9 people in the parade and that she could ask suspect to talk, she was given a go ahead to identify the suspect by touching him. The suspect was asked if he had any complaint about the identification but he answered in the negative.

59. The suspect was then taken to a different room and was asked to take another position but he insisted on the position between 6 and 7. Pw1 came in and positively identified the suspect. PW2 also followed that same process and positively identified the suspect. The accused was asked if he was contented and said that he was satisfied. He appended his thumb print. The officer in charge then prepared the identification parade form.

60. The witness testified that they ensured that the individuals in parade were of same stature, height, built etc. On cross-examination, pw5 confirmed that the accused didn't have a bandage on the face and hand cuffs at the identification parade.

61. The appellant did not object to the manner in which the parade was conducted. In view of the above disposition on how an identification parade ought to be conducted, I find that the parade was properly conducted.

Whether the prosecution proved their case on the required standard of beyond reasonable doubt.

62. To sustain a conviction on a charge of robbery with violence under **Section 296 (2) of the Penal Code** the prosecution is required to prove beyond reasonable doubt the ingredients of the offence of robbery with violence. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of **OLUOCH –VS – REPUBLIC [1985] KLR** where it was held:

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

> ***a) The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> ***b) The offender is in company with one or more person or persons; or***
>
> ***c) 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 ……" [our own emphasis].***

63. 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.

64. In **Dima Denge Dima & Others vs. Republic Criminal Appeal No. 300 of 2007** it was stated thus:

> ***"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."***

65. In **Criminal Appeal No 116 of 1995 Johana Ndungu vs Republic [1996] eKLR**, the Court of appeal had this to say about the elements of the offence of Robbery with Violence:

> ***"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 before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:***
>
> > ***1. If the offender is armed with any dangerous or offensive weapon or instrument, or***
> >
> > ***2. If he is in company with one or more other person or persons, or***
> >
> > ***3. 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.***
>
> ***Analysing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in S.295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.***
>
> ***In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances.***
>
> ***With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately***

before or immediately after the time of robbery the offender wounds, beats strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly."

66. PW1 and PW2 testified that two people approached their shop, they stated that the suspects had a gun and forced them to lie down. PW1 testified to the effect that he heard gun shots and later realized that Peter Gitau had been shot. Pw4 also testified that he was walking to the shop when he was hit from the back of his head. It was later realized at the hospital that he had sustained a gun shot. It is therefore clear that the robbery was carried out by more than one person, and the said persons (suspects) had in their possession dangerous weapons and they also used violence on their victims.

67. PW10 the investigating officer testified that at the time of the arrest a search was conducted on the accused and the motor vehicle which was found in his possession, a Cessna pistol and an AK 47 were recovered from the said motor vehicle. PW7 a ballistic officer confirmed that the two machines were capable of being fired and that the two spent cartridges were from the AK 47 rifle and that they were fired at the time of the robbery. PW2 also found that the AK 47 had been used in other shooting incidences.

68. The appellant has submitted that the serial number of the recovered riffle and the one subject to ballistic examination were in contrast. I have gone through the report of the examining officer and I have noted the AK 47 Rifle bears serial number 3513063 on body receiver and other numbers on various parts. The serial number 11314 was the serial number of the AK 47's bolt head and its carrier. Thus, there was no inconsistency in this testimony.

69. From the foregoing evidence, the prosecution therefore proved all the ingredients of robbery with violence and it was safe for the trial court to conclude as such.

70. In the premises, this court finds that it was the appellant and his group of robbers who attacked robbed and injured the complainants. It is worthy also to note that already the appellant was on the police wanted list.

71. The appeal is not meritorious and the same is hereby dismissed.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 4TH DAY OF OCTOBER 2021.

H K CHEMITEI

JUDGE