REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO. 26 OF 2017

JOSEPH MAINA WAMAITHA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with 2 counts of **Robbery with Violence contrary to Section 296(2) of the Penal Code.** The particulars on the first count are that on 29/02/2012 with others not in court while armed with a gun and pangas robbed **Hiram Wanyiri Ndehi** his motor cycle KMCJ ***N and mobile phone Nokia F369 at Ndindika Village within Laikipia County and at time of the robbery used actual violence on the said Hiran Wanyiri Ndehi.

2. The particulars in the second count are that on the 10/04/2012, at Nyakinyua Village Laikipia County jointly with others not before court being armed with a sword robbed **Joseph Kamau Mbuthia** Kshs.500/- and at the time of the robbery used actual violence against the said Joseph Kamau Mbuthia.

3. He pleaded not guilty and matter went into trial. The prosecution called 6 witnesses to prove its case.

4. PW1 Hiram Wanyiri testified that on 29/02/2012 got a motor cycle from Thiong'o while at Grand bills where a young man asked for lift. He was a stranger. This was at 8.00pm. there was light from Veranda besides a hotel where PW1 had placed it. The young man wore black trouser and jacket. He was slightly tall than PW1 and he said he was going to Zakariah's place who is PW1's neighbour.

5. PW1's brother came and the price for young to pay was agreed at Kshs.150/-. On the way accused asked for PW1's neighbour one Kibunja and at the junction he asked PW1 to stop so that he could go to Kibunja. Junction is at Ndindika and 18 Area. Suddenly PW1 was held by face from behind of motor cycle and he stopped.

6. Young man ordered him to lie down. The young man removed ignition key and 4 other people emerged from the thicket. There was moonlight. PW1 says he could see 50m away. One man was armed with a knife and he wanted motor bike. The young man moved bike aside and the 4 men took him into the bush.

7. He declined to lie down and thus was hit on right leg and he went down. A piece of his shirt was cut to be his mouth; hands and legs were also tied. One stayed for 30 minutes and left but returned shouting by then he had loosened rope. They fastened it and covered him with a sweater.

8. He tried to free himself from ropes and clothing on mouth and managed to scream. A neighbour and a family member called Kamau and Ndichu. He narrated to them what happened. The last time PW1 saw motor cycle was when the young man rode to Kinamba.

9. Police visited scene. PW1 recorded stamen and described young man as light skinned and taller than PW1. In the incident he lost Nokia F369 with line 0706******. 2 weeks later, young man was arrested and accused went to identify him visually.

10. In that parade 15 people were there and he identified accused. He requested accused to talk to him and he identified his voice as that of passenger who robbed him.

11. On cross – examination, PW1 stated when agreeing on price of ride it was 8.00pm and there was electricity light at the corridor.

12. At police station, he told police he could identify who robbed him though he was unknown to him(PW1) but could identify him visually. PW1 said accused had no special marks. He said he identified accused on parade by seeing him.

13. PW2 Joseph Kamau Mbuthia a boda boda rider operated KMCT***X on 10/04/2012 at Caltex Kinamba at 8.30pm a customer came and offered to pay Kshs.400/- for a ride to Wangwaci Area. There was electricity bulb at petrol station lighting area. The customer was with "dress code" and was shorter than PW2.

14. He was not very light or dark complexion. As they rode on they talked in Kikuyu Language. At Nyakinyua the customer sked PW2 to stop as he dropped his cap. Customer had no cap so he told him not to be "doggish". The customer held PW2 and slowed then sped. Customer alighted slowly and strangled PW2. The struggle ensued and phone fell. PW2 picked it and struggle continued.

15. He pushed customer and he hid and customer went to the bike. PW2 went home where customer had said was going then PW2 heard gunshot. PW2 called Francis Gicheru. He could hear somebody kick starting the bike. Later police motor vehicle approached scene. By then a helper had come. The motor cycle was seen by PW2 near a dam.

16. The Vodafone phone which customer dropped during struggle was with PW2 which he took to police. Same produced in court. The owner of phone was traced after a month. PW2 was called to pick him on parade. He identified him based on visual identification.

17. On cross – examination PW2 stated he didn't know accused before. He said the petrol station was lit.

18. PW3 John Githiongo Kigo gave PW2 his phone for him to report incident.

19. PW4 IP Bernard Kwarat Ag. DCIO Laikipia West testified that on 11/04/2012 investigated both incidences of robbery. He produced Vodafone handset which didn't even have pin number. He identified common caller Stephen Chege who admitted phone belonged to his brother. Chege is not a witness.

20. His brother the accused was traced. Identification parade was conducted and PW1 and PW2 identified accused. Accused was then charged with instant offence.

21. On cross – examination, PW4 denied taking accused photo Album but only ID, ATM Equity card, voters card and some other documents.

22. PW4's cross – examination by accused stated that no phones were recovered from accused's house. The motor cycle for PW2 was not stolen but thrown to nearby dam. The phone led PW4 to accused person.

23. Safaricom assisted us with common caller card in phone found with accused that led them to trace accused. They went to safaricom to trace whose signal was then they got common caller and then traced suspect.

24. Accused never told witness the phone belonged to his uncle. PW4 arrested a person whom accused said was his uncle and he appeared on common caller to number which was later identified belonged to the accused person.

25. PW6 (5) sworn and states; **CIP Michael Otunga OCS Ng'arua a parade officer.** He collected 8 people with similar features of accused. Witness were 50m away. PW1 went to parade and touched accused at position 5. PW2 then went when accused was position 7. He touched accused on left shoulder. PW6 produced both parade forms.

26. On cross – examination, he stated that, the parade members were mixed complexion and middle age near accused height.

27. Accused applied and court agreed to recall PW1 and 2 for further cross – examination.

28. PW1 said his statement didn't say there was electricity anywhere. The descriptions are not in statement. He said he was not shown records by police.

29. PW2 was further cross – examined by accused. He said his statement does not mention electricity anywhere. The police did not go to the scene. He said he cannot recognize the phone well.

30. The prosecution closed case and accused was put on his defence.

31. Accused gave unsworn statement. He said he was arrested at home and was taken to police station and detained in cells. His uncle and a young man arrested were placed in cells. Later he was taken to CID and was questioned over a phone. He saw phone he had given to uncle since he had lost his.

32. He had grudge with uncle over land he wanted to sell without authority. Thus he got him arrested. Parade was conducted and he was picked. Later he was charged.

33. The trial court found accused guilty in 2 counts of Robbery with Violence and sentenced him to death in Count 1 and stayed Count 2.

34. Thus appellant filed instant appeal and set out various grounds of appeal which were repetitive and can be summarized as follows;

i. Whether the prosecution proved its case beyond reasonable doubt.

ii. Whether the identification met legal threshold in identification and conduct of parade.

iii. The forensic evidence was not adduced to connect him with phone allegedly collected at the scene of crime by pw2,

iv. The sentence of death meted out on him is excessive and harsh.

35. The parties agreed to canvass appeal via submissions which they filed and exchanged**.**

SUBMISSIONS:

BY APPELLANT

36. He submits that the trial court erred in law and fact by relying on single witness, when evidence of positive identification was questionable as observed in **Gerald Nderitu Ngare v Republic Cr. Appeal No. 32 of 1985, Abdulahi Bin Wendo of 1953 Judgment of East Africa**.

37. He contends that the integrity and credibility of PW1 and PW2 testimonies were questionable. He cites the Court of Appeal case of ***Ndung'u Kimani v Republic [1980 7283] KLR*** on credibility of a key witness which held that;

> **"a witness in criminal case upon whose evidence is proposed to be relied on, should not create impression in mind of the court that the is not straight forward person or do (or say) something that indicates he is a person of doubtful integrity and therefore incredible witness which makes it unsafe to accept his evidence."**

38. He faults the manner in which identification parade was conducted and relies on case of ***Njoroge Mwangi v Republic Cr. Appeal No. 55 of 2007*** which opined that, before and identification parade is conducted, a witness is asked to give description in form of writing and parade form availed in court to compare description given by the accused. In this case the complainants had not given the description of the accused hence there was no comparison also the same was omitted.

39. He submits that, the prosecution did not produce any physical or forensic evidence to link the him with commission of offences charged in that he was not found in possession of anything that could link him to the crime and that the manner in which the investigating officer linked the recovered phone in second incident to him was dubious, as all sim cards used in communication are registered using ID Number, the phone and the line (number) in question were not registered by the Appellant's name and ID.

40. Thus he contends that the court erred by admitting without evidence that the number belonged to Appellant as alleged by the investigating officer. The investigating officer could not prove that the calls from this line and phone were made by the Appellant.

41. He also submits that the death sentence is harsh and excessive and in any event mandatory aspect of death sentence has been outlawed by the supreme case of MURUATETU.

RESPONDENT'S SUBMISSIONS:

42. The prosecution submitted that it proved its case to the required standards. The conviction was sound and should not be interfered with.

43. PW1 was one of the complainants and he was able to identify the Appellant. That identification of the Appellant was proper and the environment was conducive and favourable for a proper identification.

44. The Appellant was identified through an identification parade that had been organized at Ng'arua Police Station. Witnesses were able to identify the Appellant and that the conditions at the time were favourable.

45. The police were able to trace the phone collected at scene of robbery to the accused.

46. The appellant confirms in his defence that the phone belonged to him. He stated on page 43, line 19 – 20 that ***"I was shown a phone which I had given to my uncle since he had lost his plus his ID."***

47. PW5 was the investigating officer and he corroborated the assertion of PW1 and PW2. He confirmed that there were electric bulbs at the petrol station. He stated that the light was sufficient to enable customers be served.

48. The identification parade was conducted by PW7 who conducted it in accordance to the laid down rules. Thus identification was proper. Furthermore, accused was contented and signed the identification parade forms.

49. As for the sentence the same can be varied in compliance with the Murwatetu case. The circumstances however should be considered. The Appellant robbed twice and in one instance he was in possession of a knife and in the other instance he had a gun.

ISSUES ANALYSIS AND DETERMINATION

50. After going through the proceedings, and the record, I find the issues are; **whether the prosecution proved the case beyond reasonable doubt? Was sentence excessive and illegal?**

51.This being a first appellate court, this court is obliged to analyze and evaluate afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See ***Okeno vs. Republic [1972] EA 32*** where the Court of Appeal set out the duties of a first appellate court as follows:

52. Similarly, in ***Kiilu & Another vs. Republic [2005]1 KLR 174,*** the Court of Appeal stated thus;

> **"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.**
>
> **2. It is not the function 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; 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."**

53. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and the evidence having given allowance to the fact that this court did not see the demeanor of witnesses.

54. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit.

55. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it***. See Pandya vs. R [1957] EA. 336 and Coghlan vs. Cumberland (3) [1898] 1 Ch. 704*.**

56. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of ***Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634***, thus:

> **"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:**
>
> **'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinize and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial)."**

57. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC** (as he then was) said:

> **"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."**

58. The appellant submitted that the complainants pw1 and PW2 never recorded in their statements nor in their first report in the OBs that there was electricity as source of light where they picked their passenger nor give descriptions of the passenger whom they picked and allegedly attacked them on the way.

59. I perused the evidence of the pw1 and PW2 in cross-examinations on the statements they recorded with police and I confirm the same position.

60. Each of pw1 and PW2 allegedly picked appellant in separate moments and time and he allegedly attacked each of them separately. Thus their identification in the different incidents is what is called single witness visual identifications. So in subsequent parades what descriptions were they looking for on the members of the parades?

61. The two witnesses said that the appellant was unknown to them. Then the question is, was evidence on identification water tight? Were parades conducted herein valid?

62. On the validity or otherwise of an identification parade, I rehearse the pronouncement in **John Mwangi Kamau v. Republic (2014) e** KLR where the Court of Appeal held as follows:

> **"15. Identification parades are meant to test the correctness of a witness's identification of a suspect…… A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."**

63. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure" In ***Nathan Kamau Mugwe –vs- Republic- Criminal Appeal No. 63 of 2008*** this Court faced with a similar situation expressed itself as follows: -

"As to the compliant 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."

17. Based on the foregoing, we are of the considered view that the failure to give the description did not invalidate the identification parade. We find the issue that falls for our consideration is the weight to be attached to the said identification evidence."

64. On the issue of whether the identification parade was properly conducted I can do no better than to reproduce this Court's observations in ***David Mwita Wanja& 2 others –vs- Republic- Criminal Appeal No. 117 of 2005***:

"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 29.

65. There are myriad of other decisions on various aspects of identification parades since then and I need only cite for emphasis ***Njihia v Republic [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."

66. 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. 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;"

67. The parade forms only indicate that the pw1 and pw2 identified appellant by touching him. No reason for identifying nor was appellant told to speak as they claimed to have heard his voice. These gaps and short comings lessens the value of the identification parades conducted.

68. Taking to account that the visual identifications are denigrated for none availability of evidence as to the source of light when witnesses saw the attacker, the entire identifications evidence cannot be taken as watertight and thus not adequate to warrant a conviction thus the first count in the charge sheet fails.

69. In addition to count two, the alleged element connecting appellant to the offence is the electronic/forensic evidence tendered by the IO. The testimony was that, the communication via a phone recovered at the scene of attack of pw2 linked the appellant with the offence.

70. The court agrees with the appellant complaint that, the manner in which the investigating officer linked the recovered phone in second incident to the Appellant was doubtful, as all the sim cards used in communication are supposed to be registered using ID Numbers, and so, are the phone and the line (number) in question.

71. Thus they were supposed to be established in whose names they were registered to establish their link with the owner/s.

72. The court erred by admitting without evidence that the number belonged to Appellant as alleged by the investigating officer. The investigating officer could not prove that he calls from this line and phone were made by the Appellant.

73. Such prove would be in the mode of prove of electronic records of the service provider safaricom who told IO about the phone having been used to communicate. In the case of in ***Samwel Kazungu Kambi vs Nelly Ilongo & 2 Others [2017] eKLR*** where the court said:

> **"Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities"**

74. However, no evidence from service provider Safaricom was obtained and produced to confirm there was such evidence via aforesaid mode prescribed by the law. No prove of ownership of the phone was established. The person alleged found in possession of the phone one Chege was not called to testify.

75. The evidence of communication and ownership remained hearsay and in admissible. Thus the prosecution never proved their case beyond reasonable doubt also in count 2.

76. Thus court finds unsafe to confirm conviction and therefore makes the following orders;

> **i. The convictions in both counts are set quashed and sentence set aside and the court orders appellant to be released forthwith unless otherwise lawfully held.**

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 5TH DAY OF OCTOBER, 2021

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CHARLES KARIUKI

JUDGE