REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.38, 39 & 40 OF 2019

(Appeal Originating from Nyahururu CM's Court Cr.No.535 of 2017 by: Hon. S. Mwangi – S.R.M.)

JOSEPH KIRAGU NG'ANG'A.....1ST APPELLANT

KENNETH GICHUKI MWANGI.....2ND APPELLANT

JOSEPH MUNYAKA NJUKI.....3RD APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

The three appellants, namely, **Joseph Kiragu Ng'ang'a**, **Kenneth Gichuki Mwangi** and **Joseph Munyaka Njuki** were on 27/4/2018 convicted for the offence of ***Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code.***

The particulars of the charge are that on 25/3/2017 at Nyamamithi Village, Subukia Sub County, Nakuru County, jointly with others not before the court, robbed Richard Mwangi Kamau of cash Kshs.100,000/= and immediately after such robbery, kidnapped him and hurdled him forcibly into a getaway motor vehicle Reg.No.KCE 953U Nissan Saloon and sped off towards Solai and abandoned him after the said robbery.

They were sentenced to death. The appellants being aggrieved by the whole judgment, filed individual appeal No.H.Cr.A.38/2018, 39/2019 and 40/2019 which were consolidated to proceed as Cr.A.38/2019.

The 1st and 2nd appellants were represented by Mr. Nderitu Komu Advocate, while the 3rd appellant was represented by Mr. Waichungo Advocate. Each of the appellants filed their grounds of appeal which I will condense into the following general grounds:

(1) That the charge was defective;

(2) That the charge sheet did not disclose an offence under Section 296(2) of the Penal Code;

(3) That there was no proof that the complainant had Kshs.100,000/=, that was capable of being stolen;

(4) That there was no proof of common intention by the appellants;

(5) That the first report to police did not have a description of the robbers;

(6) That there was no proper identification of the robbers and the identification parade was unreliable;

(7) That the prosecution witnesses were not creditworthy;

(8) That the prosecution evidence was fraught with inconsistencies;

(9) That the trial court failed to consider the appellant's defences;

(10) That the magistrate did not allow the appellants to mitigate;

(11) That the sentence is harsh and excessive.

The appellants therefore urge the court to quash the convictions, set aside the sentences and set them at liberty forthwith.

This is a first appeal and this court has a duty to examine all the evidence tendered before the trial court, analyze it and come to its own conclusions but bear in mind that this court neither saw nor heard the witnesses give their testimonies in the trial court which had the benefit of seeing and hearing the witnesses and was in a position to weigh their demeanor. I am guided by the decision in ***Kiilu v Republic (2005) KLR 174*** where the court said:

> i. ***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.***
>
> ii. ***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."***

The prosecution lined up a total of fourteen witnesses in support of their case.

PW1 Richard Mwangi Kamau, a resident of Nyama Mitui Farm, Subukia recalled that on 25/3/2017 about 9.00 a.m. while herding his cows with his son his son Ndirangu (PW2), a vehicle stopped outside his gate; two people came out. They entered his compound and introduced themselves as businessmen who needed to buy cattle as he used to sell cattle and goats. He had only one cow for sale. The person who talked to him was brown in complexion, huge, tall, wore a tie and was very smart. They negotiated the price of the cow and agreed at Kshs.20,000/=; that he offered the two men tea but they declined and enquired where else they could get cows to buy. The two people asked him to go to the vehicle to meet their boss and on arrival at the car, the huge man opened the rear door, held him by the trouser and forced PW1 into the vehicle; PW1 shouted asking where they were taking him; PW2 was nearby about 6 – 7 metres. The 1st appellant then went and sat next to him and the vehicle took off. The 3rd appellant was the driver and another who sat on his right side. They drove for about 2½ kms, the vehicle stopped, the 'huge' man came out. PW1 got out of the vehicle too and the 'huge' man searched his pockets and took the Kshs.100,000/= that was in his pocket and ordered him to go back into the vehicle. The driver was ordered to drive back to PW1's home. When near his home, the huge man ordered him to get out. PW1 was left at the roadside. PW1 also said that the huge man had been talking to somebody else on phone. He said that it is only the 'huge' man who talked to him and searched his pockets. PW1's statement was recorded at Subukia Police Station on the same day and he was called on a Sunday, told to identify the people who came to his home and he identified the 2nd appellant in the parade as the one who was with the 'huge' person and that he was injured. He also identified the 1st appellant in the 2nd parade. PW1 stated that nobody knew that he had the Kshs.100,000/= which he had got on Wednesday from sale of cattle. PW1 denied having been beaten when in the vehicle nor did he talk to those other people in the vehicle.

In cross examination by the 2nd appellant, PW1 admitted that they used to trade in cattle with him.

PW2, Stephen Ndirangu, the son of PW1 recalled 25/3/2017 when at home with PW1. As he left home, a vehicle Reg.No.KCE 953U arrived at their gate, two men alighted, entered the home and asked if the man who buys cows was there as they wanted to buy a cow. PW1 heard the people talk and went where they were and said he had only one cow left for sale. They saw the cow, negotiated the price and asked PW1 to go to the car to meet their boss. He described the two people as one being tall and slander, that is, 1st appellant while the other was huge, tall and wore a tie. PW2 did not go to the car and there was a live fence between them. He heard a struggle or argument at the car and heard somebody say that PW1 owed somebody money but PW1 denied.

He went outside the gate, found the father already in the vehicle and it drove off. Together with his mother, they went to report at the police station and on going back home found PW1 had returned and they went back to police station where he reported that he had been robbed of Kshs.100,000/=. PW2 identified all the appellants at police station because the 2 others stood outside the vehicle as two entered their home. He denied knowing that the 2nd appellant had ever done business with PW1. PW2 denied hearing the father scream but that neighbours who were passing by claimed to have seen PW1 being beaten.

PW3, PC Silas Chilumo of Solai Police Station, **PW4 PC Fidelis Mutuku**, **PW5 PC Linus Labat**, **PW6 APC Eric Onsare** and **PW8 PC Jackson Mutula**; **PW9 CPL Martin Binjire** were the officers who were tasked to go and intercept motor vehicle KCE 953U which was said to be coming from Kiboronjo and that it was involved in kidnapping and the occupants of the vehicle were armed. The police officers were issued with G3 riffles and 20 rounds of ammunition each, while the Administration Police Officers were armed with AK47s. They first blocked the road with stones; then boarded GKB 082J Land Cruiser towards the direction where the suspect motor vehicle was supposed to come from. They sited the vehicle about 50 metres from the opposite direction and they ordered the vehicle to stop and surrender; that the vehicle stopped and one occupant from the left side came out and started to shoot at them. They exchanged fire. The man who was armed with an AK47 riffle shot at the police as he ran into a nearby bush or forest. One of the occupants of the vehicle was injured on the leg and 3 surrendered. The 3rd appellant was identified as the driver of the vehicle. PW5 and 6 were injured in the shootout. PW3 searched the 2nd appellant and recovered Kshs.10,000/= from his pocket and an Itel phone. He fired two rounds of ammunition and some spent catridges were recovered at the scene.

PW4 on his part searched the 1st appellant and recovered handcuffs S/N.979QC, a police appointment card, ATM Card and that 1st appellant said he was a Police Officer based at Dadaab Administration Police Camp.

PW8 searched the 3rd appellant, who was the driver of the vehicle and found him with two phones, Fero and Lenovo. After that, the injured were taken to hospital and the suspect who had been injured in the shootout, died before he was treated.

PW7 Omar Abdi Haris is a Medical Officer based at Bahati Sub-County Hospital. He examined the two police officers injured in the shootout, PW5 Linus Labat and Eric Onsare PW6. He found that they had suffered injuries which he assessed as harm. After getting the history from the witnesses, he was of the view that the probable cause of the injury was gun shots. He produced the P3 forms in respect of the two.

PW10, Chief Inspector Moses Kilong of Subukia Police Station conducted an identification parade on 26/6/2017 involving the appellants. He said that he complied with parade Rules including telling the witnesses that the accused may or may not be on the parade and if there, he should touch him; that Stephen Ndirangu (PW2) identified by touching the 1st appellant but PW1 did not.

As for 2nd appellant, PW2 did not identify him but PW1 identified him. 3rd appellant had his wife present at the identification parade and PW2 identified him and the wife said that he was identified because he was dirty; that PW1 did not identify the 3rd appellant.

PW11, Florence Karimi an Assistant Superitendent of Police who works as a firearm examiner examined two AK47, (A1 & 2), three G3 rifles B1, B2 & 3, thirteen rounds of ammunition, ten fired catridges and one fired bullet G1. On 3/7/2017, she received G3 rifles marked B4, three rounds of ammunition and two test fired and one not fired.

She found that all the catridges were fired in the rifles before court except A1, A2, B1 – 4 which were fired in a different rifle which was not availed for examination. She also found that G1 was fired from AK47 but she could not determine which firearm. C1, C2 & C5 were also fired by a differed firearm that was not availed for examination.

PW12, Chief Inspector Musili Fredrick from Cybercrimes Forensic Unit at DCI HQs received mobile phones accompanied by an exhibit memo form from DCI Subukia requesting him to determine whether the exhibits contained any information connected with a robbery that took place on 25/3/2017. He did not get any information that linked the appellants to the said robbery case.

PW13, PC Edward Esanya of DCI Nyandarua North in Crime Scene Support Services was requested to take photographs of KCE 953U at Subukia Police Station. He took a total of 9 photographs of the vehicle. P.Ex.33 (a – i).

PW14, PC George Karani of DCI Subukia was the Investigating Officer in this case. He learnt that one Richard Mwangi (PW1) had been kidnapped by 5 people in a motor vehicle KCE 935U and a report made by his son Stephen Ndirangu (PW2). After the police intercepted the vehicle, Ip. Mwanje handed to him the three suspects and that one had been shot by police and had died on his way to hospital. He was given the exhibits that were recovered. He took the suspects to hospital because they were injured. He arranged for an identification parade where 1st appellant was identified by PW2, 2nd appellant was identified by PW1 and 3rd appellant was identified by PW2.

He also sent the recovered phones to Cybercrime for dissemination of information from the phones. The guns and ammunition recovered at the scene were taken to Ballistic expert who produced the report and exhibits in court.

As for the Cybercrime report, it was found that the 1st appellant talked to Kimotho by SMS and at 10.50 a.m., he tried to call the 1st appellant.

PW14 visited PW1's home who explained what transpired and how he was kidnapped and robbed by Kimotho (deceased described as the 'huge', tall man).

On further investigations, PW14 found that the subject vehicle was co-owned by 1st and 3rd appellants and was on loan; that the 1st appellant was indeed an Administration Police Officer from Dadaab but was on sick leave and on transfer to Kericho on 20/4/2017; that being on leave, 1st appellant was not authorized to carry handcuffs. He produced firearms movement book for 25/3/2017 for Solai Police Station.

According to PW14, the first report at White Rock Police Post was by PW2 who reported that 5 people had hijacked the father and the report did not indicate that the people were armed.

When called upon to defend himself, the 1st appellant, **Joseph Kiragu**, admitted that he was indeed an Administration Police officer from Dadaab and was on sick off. He recalled that on 24/3/2017, Kimotho, his friend (now deceased) asked him to escort him somewhere. They met on 25/3/2017 at 7.00 a.m.; they were joined by the 3rd appellant whom he did not know and then 2nd appellant whom he knew. Kimotho told them that a person owed him money and had switched off his phone. They were shown Mwiha's (PW1's) home, Kimotho and him got out of the vehicle and entered PW1's home, found PW1 and the son (PW2). Kimotho talked to PW1 and PW1 decided that they go and talk away. PW1 joined them in the car, they drove off and stopped somewhere where Kimotho and PW1 alighted, talked briefly, came back to the car and PW1 was dropped at his home. Kimotho informed them that he had been paid Kshs.50,000/= and PW1 had a balance which he would pay slowly.

They drove off towards Solai when they saw a police vehicle flashing lights about 100 metres away. They slowed down and shots were fired at them. They surrendered, came out of the vehicle and lay down. He denied that any of them had a gun nor did they shoot at anybody. The 1st appellant also stated that their vehicle was never sprayed with gun shots nor did he have any handcuffs on being searched; that his cash and phone were taken. They were assaulted by the police and arrested while Kimotho was fatally injured.

The **2nd appellant Kenneth Gichuki Mwangi** was also called by Kimotho on 24/3/2017 and requested him to escort him somewhere on

25/3/2017. They met at Vineyard where he found Kimotho and 1st appellant. They were joined by Munyaka 3rd appellant. 1st appellant reiterated what the 1st appellant told the court. At PW1's house, the 2nd and 3rd appellant were left in the car while Kimotho and 1st appellant went into PW1's compound; that PW1 joined them in the car, they drove for a short while and Kimotho and PW1 came out, talked and they took PW1 back to his house where Kimotho went out had a conversation with PW1 again. Kimotho later informed them that he had been paid Kshs.50,000/=, promised Kshs.10,000/= and the balance was to be paid by installments.

As to the incident when they met police, the 2nd appellant reiterated what the 1st appellant stated and added that on being searched, the police took Kshs.10,000/= from him and they were assaulted by the police; that on the parade, PW1 identified him though they knew each other before. He said that no one shot at the police and the police framed them after they wrongly shot Kimotho.

The **3rd appellant, Joseph Munyaka** stated that Paul Kimotho, called him on 21/3/2017 and asked him to lend him his motor vehicle for personal use but he offered to drove it himself. At Vineyard, he found Kimotho, 1st appellant and 2nd appellant joined them. He reiterated what the 1st and 2nd appellants told the court happened on that day that led to their arrest and death of Kimotho. He said the officer who searched him took from his pocket Kshs.15,000/=, Kshs.3,900/= on the dashboard and 2 phones. He denied that there was a 5th person in their vehicle and no AK47 Rifle; that he only heard one shot and noticed Kimotho was injured; that when they left Solai, his vehicle was intact and it was driven ahead of the police vehicle but later, it was found to be full of bullet holes.

Mr. Nderitu counsel, for the 1st and 2nd respondents filed submissions which he highlighted. He stated that the trial court mixed up two incidents that occurred on that day. The incident at Kiboronjo and the incident at the scene of arrest; that the prosecution failed to call a crucial witness who took the appellants to PW1's home to shed light on their mission and failure to do so leads to the presumption that he may have given adverse evidence against the prosecution; Mr. Nderitu also said that PW1 and 2 gave contradictory evidence as the two men who entered PW1's home; that there were contradictions as to what happened at PW1's home; that PW1 never spoke to the appellants save to the huge man; the huge man did not beat or injure him and when the huge man stopped the vehicle, he went out with PW1 and it is the huge man who took his money; that the 1st and 2nd appellants did not take part in any robbery, if at all.

It was also counsel's submission that the prosecution did not avail any evidence to prove that PW1 had Kshs.100,000/= in his possession of which he was robbed; that PW1 claimed to be a businessman in cattle but no evidence that he handled such monies and there was no evidence that the appellants took part in taking the money from PW1.

Counsel also observed that the action of PW1 being forced into a vehicle, robbed, driven back to his home does not just add up.

Counsel also observed that the charge was defective in that it created two offences of kidnapping and robbery and yet the particulars of the charge did not support a charge under Section 296(2) of the Penal Code.

Mr. Waichungo, counsel for 3rd appellant also filed written submissions and associated himself with submissions of the 1st and 2nd appellants. He submitted that the testimonies of PW1 and 2 did not disclose an offence of Robbery with Violence and for the allegation that money was taken from PW1, the question is how they would have known that PW1 had money in his pocket, or that Kimotho had taken it?

He urged that this was an issue of a debt that Kimotho went to collect from PW1, police used excessive force and tried to cover their tracks.

Miss Rugut conceded the appeal in that the charge sheet disclosed two offences of kidnapping and robbery with violence and that it should have been amended; that at the time of conviction, it was not clear for what offence the appellants were convicted of; that Section 134 of the Criminal Procedure Code was not complied with.

I have now considered the evidence tendered in the trial court, the grounds of appeal and submissions by both counsel. Even though the State conceded the appeal, it is the duty of this court to evaluate the evidence and make its own determination.

All the counsel were of the view that the charge was defective in that it was duplex.

The charge reads as follows:

> **"Joseph Kiragu Nganga,**
>
> **Kenneth Gichuki Mwangi,**
>
> **Joseph Munyaka Nyuki**

Charge:

Robbery contrary to Section 295 as read with Section 296(2) of the Penal Code.

> ***On 25th day March, 2017 at Nyamamithi Village Subukia Sub-County, Nakuru County, jointly with others not before court, robbed Richard Mwangi Kamau of cash Kshs.100,000/= and immediately after such robbery kidnapped him and hijacked him forcefully into a get away motor vehicle Reg.No.KCE 953U Nissan Salvo and sped off towards Solai and abandoned him after the said robbery."***

Section 295 of the Penal Code describes the offence of robbery. Section 296(2) of the Penal Code on the other hand provides for both the offence and sentence for the offence of robbery with violence.

Section 295 of the Penal Code provides:

> ***"Any person who steals anything and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed as robbery."***

To establish an offence of robbery with violence under Section 296(2) of the Penal Code, the prosecution must prove:

> ***(1) That the offender was armed with a dangerous weapon; or***
>
> ***(2) That the offender was in company with one or more other persons; or***
>
> ***(3) That immediately before or after the time of the robbery, beats, strikes or uses other personal violence on the victim.***

The particulars of the charge in a charge of robbery with violence must disclose the above ingredients, that is, the robbers were more than one person, or were armed with offensive weapons or used violence on the victim before or after the robbery.

The rule of duplicity arises from provisions of Section 134 of the Criminal Procedure Code which states as follows:

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

A duplex charge is therefore one which charges more than one offence in the same count. In ***Cherere S/O Gukuli v Republic 1955 EA 478, the E.A.A***. said as follows:

"Where two or more offences are charged to the alternative in one count, the count is bad for duplicity contravening section 135(2) of the Criminal Procedure Code. The defect is not merely formal but substantial. When an accused is so charged, it cannot be said that he is not prejudiced because he does not know exactly with what he is charged and if he is convicted he does not know exactly of what he has been convicted."

In the case of ***Joseph Njuguna Mwaura & 2 others v Republic (2013) eKLR***, the five Bench decision of the Court of Appeal clarified the difference between an offence of robbery with violence and robbery under Section 295 of the Penal Code when it stated:

> ***"We reiterate what has been stated by other courts in various cases before us: The offence of robbery with violence ought to be charged under Section 296(2) of the Penal Code. This is the Section that provides the ingredients of the offence, which are either the offender is armed with a dangerous weapon, is in the company of others, or if he uses personal violence to any person. The offence of robbery with violence is totally different from the offence defined under Section 295 of the Penal Code, which provides that any person who steals anything and at or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under Section 295 and 296(2) as this would amount to a duplex charge."***

In ***Amos v DPP (1988) RTR 198,*** it was held that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed at countering so that there is no risk that the accused may be confused in what charge he may be meeting in the presentation of the charge which is mixed up and uncertain.

In the circumstances of this case, the charge was obviously duplex. The statement of the charge refers to two Sections, 295 and 292(2) of the Penal Code but only states that it is robbery. If it was an offence under Section 292(2), the statement of the charge would have read: ***"Robbery with violence contrary to Section 296(2) of the Penal Code."*** But that is not enough because the particulars of the charges which I have set out above are also mixed up. They read in part:

> ***"On 25th day of March, 2017 at Nyamamithi Village Subukia jointly with others not before court robbed 'Richard Mwangi Kamau of Kshs.100,000/= and immediately after which robbery, kidnapped him and hurdled him forcefully into a get away motor vehicle….."***

The particulars of an offence of robbery with violence were not fully stated. In addition, particular of another offence of kidnapping which the appellants were not charged with were included.

Section 137 of the Criminal Procedure Code provides how a charge should be framed. It provides:

> ***"(a) (i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;***

(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;

(iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required."

In ***BND v Republic (2017) eKLR***, Ngugi J. laid out the test to be followed in determining whether a charge sheet is defective. He said:

"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

29: The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective."

In the instant case the statement of the charge refers to an offence under Section 295 and 296(2) of the Penal Code. The particulars of the charge then allude to both an offence of robbery with violence and an offence of kidnapping which was in contravention of Section 137 of the Criminal Procedure Code.

In my view, the charge was duplex and defective and the appellants were prejudiced in that they could not know charge they faced, was it, robbery under Section 295 of the Penal Code, or Robbery with violence under Section 296(2) of the Penal Code or Kidnapping.

Whether the offence of robbery with violence was proved:

The court convicted the appellants on the charge of robbery with violence with Section 296(2) of the Penal Code.

PW1 testified that the two people who entered his compound, the huge man and 1st appellant enquired whether he could sell to them cows. He agreed to sell one and he went to the vehicle to negotiate the price but instead, he was forced to enter the car and the car was driven off. After a short while, the vehicle stopped and the 'huge' man came out, beckoned him out and while there, the 'huge' man took the money that was in his pocket. PW1 denied having known the 'huge' person before. His wife and son (PW2) did not know that PW1 had Kshs.100,000/=. The question is, how did the 'huge' man know that PW1 had Kshs.100,000/= in his pocket. The appellants' defence is that they accompanied Kimotho (referred to as the 'huge' man) to claim a debt from PW1. Indeed PW2 confirmed to having heard someone asking his father about a debt that he owed before the vehicle drove off.

The conduct of the appellants did not support the said allegation of a robbery or kidnapping. According to PW1, the people took him away, drove a short while, the 'huge' man beckoned him out of the vehicle, took his money and they took him back to his gate. They drove away slowly, not in speed. This conduct is not consistent with people who had just committed a robbery. I believe they would want to get away from the scene as fast as possible and not return there for fear of being caught.

Further to the above, the circumstances surrounding the alleged robbery raises eyebrows. PW1 said that when the two men entered his compound, they looked like bad people yet he offered them tea and even offered to go with them to their vehicle to discuss the cost of cows and take them where they could buy cows. PW2 was of a different view. PW1's testimony on the circumstances surrounding the alleged robbery are not consistent with a robbery.

In addition, PW1 was adamant that only the 'huge' man with a tie who was later shot dead by police talked to him all throughout this encounter. The others in the car (appellants) never spoke to him. Even when money was demanded from PW1, the three appellants were left in the car and there is totally no evidence that they knew what had transpired between PW1 and the 'huge' man outside the car.

I found PW1's conduct suspect. Until the 2nd appellant asked him in cross-examination, he never revealed that he had done business with the 2nd appellant and knew him well. PW1 even proposed to identify the 2nd appellant on a parade.

Proof of common intention:

The prosecution had a duty to establish common intention between the 'huge' man (Kimotho) and the appellants. Section 21 of the Penal Code provides what amounts to common intention, the Section reads as follows:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

In ***Dickson Mwangi Munene and another v Republic 314/2011 (2014) eKLR***, the court held:

"……where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object, by unlawful means and so act or express themselves as to reveal such intention.

It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence……."

In Republic v Tabulayenka s/o Kirya (1943) EACA 5, the court held that common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault."

The three appellant's explained how Kimotho invited each one of them to escort him somewhere. According to them, Kimotho was going to demand a debt from PW1. One wonders why Kimotho needed to marshal all these three grown men to escort him for such a transaction. As respects the 1st appellant, being a police officer, I believe Kimotho may have wanted to use his presence to intimidate the debtor, PW1, which was wrong but this court cannot even guess why the others were invited.

The said 'huge' (Kimotho) man who allegedly took money from PW1 was with the appellants in the same vehicle but there is not a scintilla of evidence to prove that they were part of a plan to rob PW1 or that the appellants were aware that the 'huge' man, Kimotho got money from PW1, if at all apart from what he told them.

The huge man was alone when he allegedly robbed PW1, he was not armed nor did he use or threaten to use any violence on PW1.

From the above analysis of the events at Kiboronjo, I find that there is no proof of common intention and there is doubt as to whether a robbery ever took place.

In respect to the incident of shooting that resulted in Kimotho's death, PW3, 4, 5, 6. 7 & 9 all told the court how they were asked to arm themselves and go to intercept a vehicle KCE 953U Nissan in which there were armed people. Both PW1 and 2 testified that the people who went to PW1's home were not armed. The two men who entered PW1's compound and the two who were left in the car at the gate were unarmed. It is PW2 who made the first report to the police, that the father had been kidnapped. PW10 admitted that indeed the first report about the incident was made at White Rock Police Post by PW2. PW14 confirmed that PW1 never mentioned to him that the 'alleged' robbers were armed. Infact the first report made at White Rock did not give the description of the alleged assailants, or their number or that they were armed. The investigating officer, PW14 said that he got information that the alleged robbers being five in number and learned from the Deputy OCS that a chief of Lower Subukia had made another report. The DCIO, OCS and the said chief did not testify as witnesses to explain how they came by the report that those who robbed PW1 were armed and which prompted the policemen, PW3, 5, 5, 6 & 9 to arm themselves as they laid in wait for the vehicle in which the appellants were.

The appellants denied having been armed at all, a fact corroborated by PW1 and 2. I find that what happened at the scene of the shooting where the 'huge' man (Kimotho) was shot and injured to be questionable. Whereas PW3, 4, 5, 6, 7 & 8 were on the back of the Police land cruiser facing the suspect vehicle, it happened that PW5 was shot on the posterior or back side of the shoulder and neck and posterior ankle of same left arm. The question that left the court wondering is how PW5 got injuries to his back if indeed those in the suspect car were the ones shooting from the opposite side. If the shots were emanating from the opposite direction, injuries would have been expected to be the anterior or front side. Could it be that PW5 was glazed by a bullet from his fellow police officers on the same vehicle as they shot at the suspect vehicle?

The appellants have denied possessing a gun on that day. PW3, 4, 5, 6, 8 & 9 all had guns. According to them, the regular police had G3 rifles while the three Administration Police Officers had AK47 Rifles and the robber who allegedly escaped into the forest also had an AK47. The ballistic expert evidence (PW.12) was inconclusive. All the guns issued to the police needed to be examined but not all the AK47 Rifles issued to Administration Police were availed for examination. PW12 found that the exhibits C1, C2 and C5 were fired from a different AK47 and she was only issued with two AK47 but not three. What happened to the 3rd AK47 Rifle issued to the Administration Police Officers and why was it not availed for examination by PW12? PW12 admitted that there was a mix up as regards fired catridges from AK47 and G3 rifles and that exhibits were taken to them on 3/2/2017 and 3/7/2017 raising questions why the delay in submitting them for examination. PW13 totally contradicted himself as to how many rounds of ammunition were issued to CPL Binjire (PW9) and APC Kipkurui. In his evidence in chief, he said that Binjire fired one round from S.N.590 122 96 and APC Kipkurui fired 9 rounds from S/N.590109-81. However in cross examination, PW14 stated that the AK47 Rifles were never used by Binjire and Kipkurui but that was never indicated in their records.

The evidence surrounding the ammunition issued to the police officers and those expended is also so inconsistent and unclear that it can only lead to the conclusion that the police were trying to conceal the truth, and whether all the ammunition recovered at the scene were fired from their AK47 rifles or not. It is also questionable whether indeed there was another AK47 that somebody ran away with. The appellants maintained that they were 4 in the vehicle and indeed PW1 & 2 saw four people at Kiboronjo. It therefore remains a mystery what happened at the scene of the shooting and it is also questionable whether it was all a police cover up.

The upshot is that, I find that the evidence on record did not support a charge of robbery with violence. Robbery with violence is a very serious offence for which one is liable to be sentenced to death upon conviction. The court should be satisfied that the charge is clear and there is ample, quality and credible evidence in support thereof, before entering a conviction. In this case, apart from the charge being a total mix up and very defective so that the appellants may not have known how to prepare for their defences, there is no sufficient evidence to support the charge of robbery with violence for which they were convicted. The conviction is unsafe and is hereby quashed. The sentence meted on the appellants is hereby set aside and they are set at liberty forthwith unless otherwise lawfully held.

Dated, **Signed** and **Delivered** at ***NYAHURURU*** this ***12th*** day of ***May, 2020***.

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mwangangi – Prosecution Counsel

Mr. Nderitu Komu for 1st and 2nd appellants

Mr. Nderitu -Holding brief for Mr. Waichungo for 3rd appellant

Soi – Court Assistant

All appellants present (Zoom)