REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 19 OF 2019

JEREMIAH OWINO OTIENO..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(appeal from judgment, conviction and sentence dated 28th February 2019 in Criminal Case No. 584 of 2018 in the Principal Magistrate's Court at Siaya before Hon. T.M Olando SRM)

JUDGMENT VIA SKYPE

1. The appellant herein **JEREMIAH OWINO OTIENO** was charged with the offense of robbery with violence contrary to section 296(2) of the Penal Code and the particulars of the offence are that on the 2nd day of December 2017, at Komolo Sub location in Siaya Sub-county within Siaya County, jointly with others not before court while armed with dangerous or offensive weapons namely rungu and a knife robbed Jacinta Awino Odhiambo off cash Kshs. 28,500 and two mobile phones make Huawei and Itel and immediately before or immediately after the time of such robbery injured the said Jacinta Awino Odhiambo.

2. The appellant was arraigned before Hon. James Ong'ondo Principal Magistrate. He denied committing the offence. He was subsequently tried and *vide* the judgment delivered on 21st February 2019 by Hon. T.M Olando Senior Resident Magistrate, the appellant was convicted of the offence and subsequently sentenced on 28th February 2019 to serve 15 years' imprisonment.

3. Aggrieved by the conviction and sentence imposed on him, the Appellant lodged this appeal vide the petition dated 12.03.2019 and which was registered as HCCRA 17 of 2019. However, vide the orders of 28.01.2020 the said appeal was marked as withdrawn upon an application by counsel for the Appellant.

4. This is as a result of a subsequent petition herein dated 15.03.2019 (but filed on 14.03.2019) filed by the appellant's counsel Mr. Mugoye Advocate. In this petition, the appellant sets out the following grounds of appeal:

> ***1. That the learned magistrate erred in law and fact when the prosecution did not prove its case beyond reasonable doubt as required by law***
>
> ***2. The learned magistrate erred in law and fact by pronouncing judgment and sentencing against the appellant in total disregard of the fact that proper identification was not conducted which is in contravention of the Police Force Standing Orders***
>
> ***3. The learned magistrate erred in law and fact by convicting the appellant without considering that there was no positive identification, hence the prosecution's case was based on presumption inter alia;-***
>
> > ***a. That the learned magistrate failed to consider that the alleged identification was done in darkness hence the power to light was not established.***
> >
> > ***b. That the learned magistrate erred in law and in fact in convicting the appellant while relying on recognition evidence by PW1 who knows the appellant by seeing him sell meat through the counter whereas the same had not been supported by any description in an initial report by the police***
> >
> > ***c. That the alleged identification was doubtful since the complainant was walking back home in the company of PW5 who saw two men approach them but did not recognize or identify the Appellant as the one who attacked them***

4. The learned magistrate erred in law and fact by holding that the ingredients of a charge of robbery with violence contrary to section 296(2) of the Penal Code had been proved yet the evidence on record could not support the charge against the appellant inter alia

a. No exhibit recovered in connection with the alleged offence

b. No evidence of being armed with any dangerous or offensive weapon.

5. That the learned magistrate erred in law to convict the Appellant without considering that the investigations officer failed to investigate this case to requisite standards.

6. The court failed to take into consideration the defense of alibi raised by the appellant

7. The sentence meted out to the Appellant was illegal, excessive, harsh and unconstitutional.

5. The appellant prayed that the appeal be allowed, conviction quashed and the sentence set aside. It is this petition which counsel on record adopted when he withdrew the earlier appeal (HCCRA 17 of 2019). The appeal was canvassed by way of written submissions filed by the appellant's counsel while the prosecution made oral submissions.

SUBMISSONS

6. In his written submissions, the appellant's counsel summarized the facts of the trial court and the evidence therein and framed the following issues for determination:

1. Whether the learned trial magistrate erred in law and fact when the prosecution did not prove its case beyond reasonable doubt as required by law

2. Whether the learned trial magistrate erred in law and fact by pronouncing judgment and sentencing against the appellant in total disregard of the fact that proper identification was not conducted which is in contravention of the Police Force Standing Orders

3. Whether the learned trial magistrate erred in law and fact by convicting the appellant without considering that there was no positive identification, hence the prosecution's case was based on presumption.

4. Whether the learned trial magistrate erred in law and fact by holding that the ingredients of a charge of robbery with violence contrary to section 296(2) of the Penal Code had been proved yet the evidence on record could not support the charge against the appellant.

5. That the learned trial magistrate erred in law to convict the Appellant without considering that the investigations officer failed to investigate this case to requisite standards.

6. The court failed to take into consideration the defense of alibi raised by the appellant

7. The sentence meted out to the Appellant was illegal, excessive, harsh and unconstitutional.

7. On the issue as to **whether the learned trial magistrate erred in law and fact when the prosecution did not prove its case beyond reasonable doubt as required by law,** the appellant submitted that the right to be presumed innocent until found guilty is guaranteed under Article 50(2) of the Constitution and the state ought to prove otherwise. The locus classicus in **Woolmington –vs- DPP (1935)A.C 462** was cited to the effect that the legal burden of proof is always on the state. Counsel submitted that the prosecution witnesses were not trustworthy, were inconsistent and full of falsehoods and thus not credible as the scene was not identified; that there were inconsistencies between the testimonies of PW1 and PW5 as to the date of the offence, inconsistencies as to the weapon which injured PW1, that PW1 did not produce the treatment notes but a P3form which was a secondary document filled after treatment, that the knife which PW1stated that the appellant tried to attack the complainant with was never produced; the appellant was not properly identified by the prosecution witness; that no evidence to show the issue of the phone being stolen or the alleged money. It was therefore submitted that the prosecution failed to produce credible exhibits to tie the accused to the offence and thus did not establish the elements of the offence beyond reasonable doubts.

8. **On whether the learned trial magistrate erred in law and fact by pronouncing judgment and sentencing the appellant in total disregard of the fact that proper identification was not conducted which is in contravention of the Police Force Standing Orders**, it was submitted that there was no identification parade which was conducted and thus the appellant was mistakenly and/ or maliciously identified and sentenced for an offence he never committed.

9. **On whether the learned trial magistrate erred in law and fact by convicting the appellant without considering that there was no positive identification, hence the prosecution's case was based on presumption,** it was submitted that the learned trial magistrate failed to consider the fact that the alleged identification was done in darkness hence the power of light was not established as despite PW1 testifying as to having a torch, the power of light from the torch was not determined by the court. Further it was submitted that PW1 was in the company of PW5 but who did not recognize the identity of the appellant and which she would have done due to the fact that PW1 had a torch and if the torch was bright. The court was referred to the case of **Cleophas Otieno Wamunga –vs- Republic (Court of Appeal Criminal Appeal No. 20 of 1989)**, **Kiilu & Another –vs- Republic (2005) 1KLR** and **Titus Wambua –vs- Republic (2016) eKLR** to the effect that identification of an accused person must be properly done. As such, it was submitted that the trial court did not find evidence linking the

appellant to the offence.

10. **On whether the learned trial magistrate erred in law and fact by holding that the ingredients of a charge of robbery with violence contrary to section 296(2) of the Penal Code had been proved yet the evidence on record could not support the charge against the appellant,** the appellant submitted that prosecution did not prove the elements of the offence of robbery with violence as there was no evidence to show that the appellant had a dangerous weapon and at the time of the arrest the appellant was found in possession of a dangerous weapon. Further, that despite PW1 stating that she was attacked by two people, there was no explanation as to what happened to the second attacker.

11. **On whether the learned trial magistrate erred in law to convict the Appellant without considering that the investigations officer failed to investigate this case to requisite standards**, it was submitted that the case was poorly investigated and that none of the witnesses linked the appellant with the offence in question as the alleged scene was never specified by the Investigating officer in the charge sheet or even by the prosecution witnesses. Further, that there were contradictions on the date of the offence as testified by PW1 and PW5 and further that PW1 never produced initial treatment notes from Siaya Referral Hospital but only P3 form which is a secondary document filled after treatment. It was further submitted that the appellant was never properly identified by the prosecution witnesses and that PW1's phone was never produced or any evidence produced on the type of the phone or the fact that she was a licensed Mpesa dealer and or that she was in possession of the money which was allegedly stolen.

12. **On whether the court failed to take into consideration the defense of alibi raised by the appellant**, it was submitted that the appellant, DW2, DW3, DW4 and DW5 all testified that they were at home together with the appellant watching a football match and thereafter ate and went to bed but this evidence though corroborated, was not taken into consideration by the court.

13. It was therefore submitted that the evidence adduced did not meet a single ingredient of the offence to the threshold required and thus the appeal ought to pass.

14. In rebuttal, Mr. Okachi, Senior Principal Prosecution Counsel for the state opposed the appeal and submitted orally that the prosecution proved its case beyond reasonable doubt and that PW1 identified the appellant using a torch. Further, that she knew the appellant. Counsel further submitted that this evidence was corroborated by that of PW2 and PW3. He added that the offence was heinous and as such the sentence was lawful and lenient and that both the conviction and the sentence ought to be upheld.

15. The duty of this court as a 1st appellate court was set out by the court of Appeal in **Okeno v. Republic [1972] E.A. 32** and re-stated in **Kiilu and another vs. R (2005) 1 KLR 174** where it was held that:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] 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 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; 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, [1958] E.A. 424."[emphasis added]***

16. It is therefore the duty of this court to submit the evidence which was tendered before the trial court to fresh and exhaustive examination and to arrive at its own independent conclusion, after weighing the conflicting evidence if any, and to find out whether the prosecution has proved the offence of robbery with violence against the appellant. In doing so, this court must bear in mind the legal principle that the burden of proof always rests on the state and the same must be proved beyond any reasonable doubt. The ***locus classicus*** on this principle of burden of proof is **Woolmington –vs- DPP (1935)A.C 462** and **Miller Versus Minister of Pensions 1942 A C**.

17. Revisiting the evidence before the **trial court, PW1 Jacinta Awino Odhiambo** testified that on 2.12.2017, she was with one Angela while going home at around 7.30PM and she was carrying a child on her back and that she had a torch in her hand. That she noticed two people approaching and she used the torch to see the persons. That the appellant hit her hand with a metal bar and the other person used a metal bar to hit her on the head. That the appellant tried to stab her using a knife but PW1 got hold of the knife and it cut her on the hand. That the attackers then took her bag which had money and escaped and she went to the hospital and later to the police and reported the incident. She stated further that she knew the appellant even before that evening as she had seen him selling meat at the Centre. She stated that the bag taken from her had Kshs. 28,500 and airtime of Kshs. 2,000.

18. The witness reiterated that she was able to recognize the appellant and that it was the appellant who robbed her. That they took her two phones Huawei and Itel. At the Police Station she was issued with a P3 form which she identified in court as MFI-1.

19. In cross examination, PW1 stated that she was cut on the hand and she went to hospital before reporting to the police and further that when she woke up in the morning, she reported to the Assistant Chief and later went to the AP. That she gave the details to the Police who called the appellant and he was arrested. She further testified that there was no grudge between them which would have made her fix him.

20. **PW 2 George Odhiambo** testified that on 2.12.2017 at about 8.30pm he was on duty at Distinction Hotel when he received a phone call that he was needed at the gate and when he went there, he found his wife, PW1 who was bleeding. He took her to Siaya District Hospital and later to Siaya Police Station where she reported. PW2 was never cross examined.

21. **PW3 Joseph Ochieng** testified that on 2.12.2018, he was at home watching Television when he heard some noise and when he went out to find where the noise was coming from, he found a woman saying that she had been robbed and she was bleeding. That he offered first aid to the woman whom he had known before that day and took her to Siaya Referral Hospital and that he later went to the police and recorded

his statement. He testified that he did not see the people who robbed her.

22. In cross examination, he stated that he did not see the appellant at the scene and further that he could not go to the appellant's home at the time as the complainant was bleeding and he had to take her to the hospital first. That he knew that the appellant would be found and that was why he was not in a hurry to look for him.

23. He stated that he called a friend and told him to call the appellant that the witness had some work for the appellant and that the appellant went without being aware that the witness knew that he had stolen the money. He further stated that he had never heard of the appellant having robbed someone before.

24. **PW4 Sila Omondi Oluoch** testified that he worked at Siaya County Referral hospital and that he filled a P3 form for the complainant and signed on 4.12.2017. He stated the complainant who was treated on 2.12.2017 on allegations that she had had been assaulted on 2.12.2017 by someone known to her and who also took her things. That on examination, the complainant had injuries on the head, and a cut wound on her cheek which was tender and swollen. She had a cut wound on the right finger and was tender and swollen. She also had bruises on the left hand but there were no injuries on the legs. That he examined her after 2 days and assessed the injury to be harm, and that the probable weapon used to inflict the injuries on her was a sharp object. He produced the P3 form as PExt 1.

25. In cross examination, he stated that the complainant did not go with any weapon nor any object.

26. PW5 **Angela Mongira Bosire** testified that she was a business woman and recalled that on 21. 12.2015, she left her business together with her neighbor (PW1) to go home and that it was about 7.30PM and that on their way home they met two people and PW1 had a torch. That the people attacked them. That one of the attackers had a rungu and he wanted to hit PW5 but the witness raised her jerrican and the rungu hit the jerican. That she fell down because of the force and they stepped on the daughter. That she had a red wallet which they took and her phone was broken. That PW1's bag was also taken and PW1 had a torch. That it was about 7.30PM and it was getting dark. That she did not know the accused and she could not see the people well.

27. In cross examination, she stated that that it was PW1 who had the torch and she used it to see her and that she saw two people one tall and one short and further that she did not give his name in her statement.

28. PW 6 the Investigating officer testified that she took over the file from PC Cherono who had been transferred to Nairobi and that on 3.12.2017 she (PC Cherono) was in her office when the appellant was taken to her by Administration police from Ndeere and they said that the appellant had been identified by the complainant. That there was a report that she had been attacked while going home from her place of work. That she visited the scene and found a broken spotlight green in colour. The complainant had been treated and issued with a P3 form. That the appellant was then charged with the offence. The appellant did not cross examine the witness.

29. Placed on his defence the appellant testified on oath as DW1 and denied committing the offence.

30. **The Appellant also called Rosemary Atieno** who testified as DW2 and stated that she lived in Ligame and that she knew the appellant who was her son and that on 2,12,2017 they were at home with the accused who was watching football and they took supper and thereafter went to sleep and on the following day, he went on with his work. That later at about 1PM, someone called the father to the appellant and she picked the phone where the caller asked whether DW2 was the appellant's mother and DW2 gave the appellant the phone where the caller told the appellant that someone wanted to give him work at Ndeere. That the appellant later called her telling her that he had been arrested and was in a police station. That she went to the police station and was told that her son (appellant) had assaulted someone at night.

31. In cross examination, she testified that indeed on 2,12,2017, the appellant was in the house watching football and that he did not leave the whole day. That the appellant slept in the kitchen.

32. **John Otieno** testified as DW3 and stated that the appellant was his son and that he was arrested in 2017 and that he was at home the whole day and that the following day, somebody called the appellant and told him that there was some work in Ndeere and he went. That he later called and told Dw3 that he had been arrested and he was taken to the station. The witness was not cross examined.

33. **DW4 Lilian Otieno** testified and gave similar evidence as DW3 that the appellant was at home on 2.12.2017 and that she prepared supper and he was watching football. The following day, somebody called and said that he wanted the appellant to go to Ndeere. That she went to Ndeere with him and that someone called DW4 and took him to the AP camp and said that he had attacked someone on 2nd December 2017. This witness was not cross examined.

34. **DW 5 Klinvin Onyango** a minor aged 14 years testified that he was a pupil and he lived in Eldoret and that on 2.12.2017, he was with his uncle Jeremy (the appellant) listening to football and that they left and went to sleep. That the following day, they prepared charcoal and later he was called and told to go to Ndeere. He went and later he called the mother and said that he had been arrested and he was taken to Siaya Police station.

35. In cross examination, he testified they were listening to football and Manchester and Arsenal were playing. The defense closed their case.

36. The trial court upon analysis of the evidence and applying the law to the evidence found that the elements of the offence of robbery with violence had been proved and proceeded to convict the appellant and subsequently sentenced him to serve 15 years imprisonment.

DETERMINATION

37. Having considered the evidence before the trial court for the prosecution and the defence, the grounds of appeal, the submissions for and

against the appeal and the authorities relied on, in my humble view, the following issues flow for determination:

1. Whether the prosecution proved its case against the appellant beyond reasonable doubt and therefore whether the ingredients of the offence of robbery with violence were proved beyond reasonable doubt

2. Whether the appellant was positively identified at the time of commission of the alleged offence or whether an identification parade was necessary in the circumstances.

3. Whether the defense of alibi was available to the appellant

4. Whether the sentence meted out to the Appellant was illegal, excessive, harsh and unconstitutional.

5. Whether the appeal ought to succeed

40. On whether the prosecution proved its case against the appellant and or whether the ingredients of the offence of robbery with violence were proved, Section 296(2) of the Penal Code- Cap 63 of the Laws of Kenya provides that:

> ***"If the offender is armed with any dangerous or offensive weapon or instrument**, or is **in company with one or more other person or persons**, or **if, at or immediately before or immediately after the time of the robbery**, **he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

41. The above section is part of section 296 which provides for "punishment for robbery". That being the case, the section cannot be read as a stand-alone section but should be read together with section 295 which defines robbery. Section 295 defines robbery in the following terms:

> ***"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 robbery."***

42. In **Johana Ndungu vs. Republic CRA 116/199 the Court held:**

> ***"In order to appreciate properly as to what acts constitute an offence under Section 296 (2) of (the penal code) one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the aforedescribed ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the subsection:***
>
> > ***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."***

43. In **Anthony Mutua Nzuki v Republic[2018]eKLR** the High Court in Machakos G.V Odunga J in defining the offence of robbery with violence held at paragraph 38:

38.*"Therefore for the offence of robbery to be proved there must be evidence of theft by the person charged. A person cannot be guilty of the offence of robbery unless he is guilty of theft. The theft must however be accompanied by the use or threat of use of actual violence to a person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained. If all these ingredients are present and the offender was armed with any dangerous or offensive weapon or instrument, or was in company with one or more other person or persons, or at or immediately before or immediately after the time of the robbery, he wounded, beat, struck or used any other personal violence to any person, he would have committed robbery with violence and would be liable to be sentenced to death."*

44. From the above decisions, and statutory provisions, the essential elements of Robbery with Violence are: s**tealing** and **at the time of stealing, the offender** ***is armed with any dangerous or offensive weapon or instrument**; or **he is in company with one or more other person or persons**; or **at the time of stealing or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."***

45. The prosecution had a duty to prove the above elements to the required standards (that of beyond any reasonable doubt) as was set in **Woolmington –vs- DPP (supra).** In **Dima Denge Dima & Others v Republic [2013] eKLR** the Court of Appeal stated:

> ***"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."***

40. **Therefore, on whether there was stealing,** stealing is defined under section 268 of the Penal Code as:

> ***"A person who fraudulently and without claim of right takes anything capable of being stolen on fraudulent converts to use of any person, other than the general or special owner thereof any property, is said to steal that thing or property."***

41. *Thus the prosecution has to establish that there was* ***taking of anything capable of being stolen*** *and* ***the said taking being fraudulent and without claim of right*** *or* ***there was fraudulent conversion of to use of any person, other than the general or special owner thereof any property*** *(in this case the money and the phones) and further that* ***the person who did so was the appellant****.*

42. **The question then that must be answered is was the element of taking proved? And if so, was the thing allegedly taken capable of being stolen?** PW1 testified that on 2.12.2017she was with one Angela while going home at around 7.30PM and she was carrying a child on her back and that she had a torch in her hand and she noticed two people coming. It was her testimony that the appellant hit her hand with a metal bar and the other person used a metal bar to hit her on the head and they took her bag which had money and ran away and which bag (she testified) had Kshs. 28,500 and airtime which was Kshs. 2,000.

43. PW3 on his part testified that when he went to the scene (the place where the noise was coming from) and when he got there, he found a woman saying that she had been robbed and she was bleeding. PW5 (who was in the company of the complainant when they were going home) testified that (at the time of the attack) she had a red wallet which the attackers took and her phone was broken and that PW1's bag was also taken. However in his defense, the appellant denied having committed the offence. All his witnesses testified to the effect that he was at home on the material day (and thus corroborating the appellant's defense of alibi).

44. . The evidence by PW1 that the appellant (and his accomplice) took her bag and ran away was well corroborated by that of PW5 who testified to the effect that there was "stealing" of PW1's bag. It was that bag which PW1 testified had the money. However, on taking of the phones, I opine that the same was not proved as none of the witnesses including the complainant testified that her phone was taken, despite the same having been particularized in the charge sheet.

45. Considering the issue of ***taking***, my view is that the taking or stealing of the two phones stated in the charge sheet was not proved by any evidence tendered by the prosecution. There was however evidence by PW1 and PW5 that a bag belonging to the complainant was taken by the attackers who were two in number and who were armed with weapons. Assuming money was in the said bag, then money is something capable of being stolen.

46. On whether there was **the taking of something capable of being stolen (the money in the bag) done by the appellant?** As stated above, the prosecution must prove that that the accused (appellant herein) is the person who indeed took that thing capable of being stolen. This calls into question the issue of **identification of the appellant as the person who waylaid the complainant and robbed her using violence.**

47. PW1 testified (in relation to identification) that she on the material day she was going home at around **7.30PM** together with PW5 and she was carrying a child on her back and that she had a torch in her hand. That she noticed two people coming and she used the torch to see the persons and they were attacked or rather robbed by the two people (appellant and accomplice). She testified further that she was able to recognize the appellant and that it was the appellant who robbed her and that she knew the appellant even before that day as he she had seen him selling meat at the centre. In her cross examination, she testified that when she woke up in the morning (the following day), she reported to the Assistant Chief and later went to the AP and that she gave the details to the police who called the appellant and he was arrested.

48. PW5 testified that on the material day, she left her business together with her neighbor (PW1) to go home and that it was about 7.30PM and that on their way home they met two people and PW1 had a torch. That the two people they met on the way assaulted them and took away her red wallet and further that PW1's bag was taken. She testified that she did not know the appellant and that she could not see the people well. In her cross examination, she testified that it was PW1 who had the torch and she used it to see and that she saw two people one tall and one short.

49. In his submissions, the appellant's counsel submitted that there was no identification parade which was conducted and thus no proper identification of the appellant and further that the identification by PW1 was done in darkness hence the power of light was not established. Further, that despite PW1 testifying that she had torch, the power of light from the torch was not determined by the court. He further testified that PW1 was in the company of PW5, who, nonetheless, did not recognize or identify the appellant and which she would have done due to the fact that PW1 had a torch and if the torch was bright.

50. However, in rebuttal Mr. Okachi counsel for the Respondent submitted that the appellant was positively identified by the complainant using a torch and the appellant was familiar to her. Further it was submitted that this evidence was corroborated by that of PW2 and PW3.

51. From the above evidence it is clear that the alleged offence took place at 7.30pm when it was getting dark as stated by PW5 and that the complainant used a torch to identify the appellant. It is further clear from the above evidence that it was only the complainant (PW1) who was able to see the appellant at the time of the offence as PW5 testified that she was not able to identify the appellant. The question therefore that I must answer is whether, in the circumstances prevailing, the complainant's identification or recognition of their attackers was favourable and or watertight as to eliminate any possibility of any error or mistaken identity?

52. The Court of Appeal in ***Kiilu & another v Republic, (2005) 1 KLR 174***, held that:

> ***"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but***

this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."

40. The Court of Appeal in ***Karanja & another V Republic* (2004) 2 KLR 140, 147** *while deciding on the issue of proper identification held as follows:*

"The law as regards identification under difficult conditions is now well settled. In the case of Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989 at Kisumu, this Court states as follows:

"We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude(PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them…… What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification……"

41. In **Hassan Abdallah Mohammed v Republic [2017] Eklr**, Kimei J held that the circumstances of the case did not favour positive identification, citing the Court of Appeal decision in **Nzaro v. Republic (1991) KAR 212,** where it was held that "***evidence of identification by recognition at night must be absolutely watertight to justify conviction."***

42. The factors to be considered with respect to recognition (while dealing with the question of identification) were set out in **R vs Turnbull & Others (1976) 3 ALL ER 549. These factors were well recognized and applied by** Mumbi Ngugi J in **Leonard Kipkemoi v Republic [2018] eKLR**, where the learned judge held as follows (paragraph 46);-

"The factors to be considered with respect to recognition as set out in R vs Turnbull & Others (1976) 3 ALL ER 549 must always be borne in mind when a court is dealing with the question of identification. The court in that case stated as follows:

"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

40. From the above decisions, since it was only the complainant (PW1) who was able to see the appellant at the *time of the offence, the need for testing her evidence with the greatest care in respect of the identification cannot be ignored more so since the conditions favouring a correct identification were not obvious as 7.30pm is not daytime; and bearing in mind that evidence of visual identification in criminal cases can bring about a miscarriage of justice.*

41. *For that reason, the evidence by PW1 on her recognition of the appellant ought to be examined carefully and with caution before convicting, in order to minimize this danger that can lead to a miscarriage of justice. Thus in arriving at a correct decision, this court must apply the principles laid down in* ***R –vs- Turnbull & Others (supra)*** *and caution itself that evidence* of identification by recognition at night must be absolutely watertight to justify a conviction.

42. *As testified by* PW1 and PW5, the incident took place at 7.30pm. only PW1 stated that she saw and recognized the appellant by use of a torch which she had. There was no description of the intensity of the light illuminated by the said torch and or the length of time that PW1 did see or observe the appellant. Neither was there any evidence tendered as to which part of the body Pw1 saw using the torch, whether it was the face of the appellant or his clothing or manner of dressing, etc.

43. The evidence by PW1 was only to the effect that she had a torch and she saw two people coming. It is not clear whether she illuminated their faces or their body. It is obvious that one can illuminate something approaching him or her on the legs and be able to tell whether it's a human being or an animal and even know whether if it's a person, if he is alone or two or three or so! Further, the evidence by PW1 was that she was hit with a metal bar on her hand and then the appellant tried to stab her but she was able to catch the knife. Then they took her bag. It was not clear whether during all this time, she had her torch still on and further which part of the body she did illuminate so as to identify him. Her testimony that she had known the appellant before as he used to sell her meat was not proved. It is not known whether the appellant was a butcher and for how long the complainant had known him. Accordingly, I find the evidence of PW1 that she saw the appellant on that material night not foolproof and or watertight. The evidence of identification or recognition of the appellant by PW1 is shaky.

44. On the evidence adduced by the prosecution witnesses, iam unable to find that there was proof beyond reasonable doubt that the

appellant is the person who attacked her and took her money or the two phones stated in the charge sheet. I find that the appellant was not positively identified as no evidence of the said positive identification was tendered before the trial court. In my view, the circumstances of this case did not afford favourable accurate identification or recognition of the appellant.

45. Therefore, even without considering the other elements of the offence of robbery with violence under section *296 (2) of the Penal Code (i.e the appellant was armed with any dangerous or offensive weapon or instrument; or he was in company with one or more other person or persons; or at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to the complainant), the prosecution failed to prove the very first essential element and which was stealing. The prosecution also failed to prove the element of positive identification of the attacker.*

46. *In my humble view, therefore, the prosecution* did not prove its case against the appellant beyond reasonable doubt as required by law. It failed to prove all the ingredients of the offence of robbery with violence.

47. Accordingly, I find and hold that the trial court *erred in convicting the appellant with the offence of robbery with violence. On that ground alone, this appeal ought to be allowed.*

38. However, i shall briefly consider the other grounds of appeal below:

Whether the appellant was positively identified at the time of commission of the alleged offence or at the identification parade.

39. As analyzed above, the appellant was not properly identified by the complainant. The circumstances of this case did not afford favourable conditions for the positive and accurate identification of the appellant.

Whether the defense of alibi was available to the appellant.

40. It was a ground of appeal that the learned trial magistrate erred by convicting the appellant and in doing so failed to consider the defense of alibi as was raised by the appellant. In his submissions, the appellant submitted that the appellant, DW2, DW3, DW4 and DW5 all testified that they were at home together with the appellant watching football match and thereafter ate and went to bed but this evidence though corroborated was not taken into consideration by the trial court.

41. In his judgment, the learned trial magistrate in convicting the appellant held that the defense of alibi could not be available as the same was an afterthought.

42. As observed elsewhere in this judgment, it is trite law that the burden of proof always lie with the prosecution and the same never shifts to the defense even where the defense of alibi is raised late in the trial. The Court of Appeal in **Moses Nato Raphael v Republic [2015] eKLR** while deciding on the burden of proof vis aviz the defense of alibi held:

> ***"……We would like to emphasize however, that the burden of disproving the alibi is always on the shoulders of the prosecution.*** *See* ***Ssentale v. Uganda*** ***[1968] E.A. 365.*** *In* ***Victor Mwendwa Mulinge v. R,*** ***[2014] eKLR this Court stated the following on the issue of alibi:***
>
> > ***"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja v.R, [1983] KLR 501 … this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."***

43. In **Athuman Salim Athuman v Republic [2016] eKLR,** the Court of Appeal held:

> ***"The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. Way back in 1939 in R. V. SUKHA SINGH S/O WAZIR SINGH & OTHERS (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld the decision of the High Court in which it was stated:***
>
> > ***"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."***

44. The Supreme Court of Uganda, in ***FESTO ANDROA ASENUA V. UGANDA, CR. APP NO 1 OF 1998*** made a similar observation when it stated:

> ***"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to***

presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."

Although the appellant in this case put forth his alibi defence rather late in the trial, we cannot agree with counsel for the respondent that the alibi defence must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed in GANZI & 2 OTHERS V. REPUBLIC [2005] 1 KLR 52, this Court stated that where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence..."

45. With the above authorities in mind, it is clear that whether an alibi defence is raised early or late in the trial, it must be considered on its own merit. For that reason, I find and hold that the learned trial magistrate erred in failing to consider the appellant's defense of alibi on the grounds that it was an afterthought. He ought to have considered the same as against the prosecution evidence.

46. Weighing the said defense of alibi as was presented by the appellant during the trial and weighing the same against the prosecution evidence especially the fact that it was only PW1 who claimed to have identified the appellant under unfavourable circumstances as assessed above, in my humble view, the said alibi defence indeed raises doubts as to whether he appellant was at the scene of the crime or whether he was the one who stole from the complainant. That alibi was never displaced by the prosecution evidence.

Whether the sentence meted out to the Appellant was illegal, excessive, harsh and unconstitutional.

47. It was a ground of appeal by the appellant that the sentence meted out on the appellant was illegal, excessive, harsh and unconstitutional. However, the appellant did not submit on this ground in his submissions (which he filed and the court adopted as canvassing his appeal). The learned trial magistrate upon finding that the prosecution had proved the elements of the offence of robbery with violence, which as I have opined was in error, convicted the appellant to serve 15 years imprisonment. Section 296(2) of the Penal Code provides for a mandatory death sentence for the offence of robbery with violence. However, after the Supreme Court's decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR, Petition No. 15 of 2015, [where the court held that (in relation to section 204 of the Penal Code-murder):**

"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right…"]

48. The courts have subsequently adopted the principles espoused in the above decision of the Supreme Court and held that mandatory sentences are unconstitutional. Therefore, had the prosecution proved all the elements of robbery with violence against the appellant beyond reasonable doubt, the trial court having exercised its discretion in sentencing taking into account mitigations by the appellant, in my humble view, 15 years imprisonment was not excessive or unlawful. This would have been constitutional, lenient and lawful sentence and I would have upheld the same. However, as the prosecution failed to prove the guilt of the appellant beyond reasonable doubt and having so found, i hereby find and hold that the conviction of the appellant JEREMIAH OWINO OTIENO was unsafe and unsound. The same is hereby quashed and the sentence of 15 years' imprisonment set aside. Therefore, unless otherwise lawfully held, the appellant is hereby set at liberty forthwith.

49. Orders accordingly.

Dated, Signed and Delivered at Siaya this 5th Day of May, 2020 via skype due to Covid 19 situation.

R.E. ABURILI

JUDGE