REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 141 OF 2009

SAMSON MATENDE ONGUTE……..APPELLANT

VERSUS

REPUBLIC…….….RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 1005 of 2008 of the Senior Principal Magistrate's Court at Malindi – D.W. Nyambu, PM)

JUDGEMENT

1. The rehearing of this appeal is pursuant to the order of the Supreme Court in **Republic v Karisa Chengo & 2 others [2017] eKLR**.

2. The Appellant, Samson Matende Ongute, being aggrieved with the conviction for the offence of robbery with violence and the death sentence imposed has filed fresh grounds of appeal to wit: that the trial court erred in law and fact by failing to consider that PW1 was unable to identify his attackers and failed to give a description of the attackers to the police; that the prosecution did not produce an extract of the entry of the first report in the O.B.; that the identification parade was not carried out as per the law; that the investigations did not link him to the crime; that PW1 gave contradictory testimony; lastly that this court should find that the death sentence imposed on him by the trial court is excessive and unconstitutional.

3. For record purposes, the Appellant had been charged with two others. The 3rd accused Kevin Galacha was acquitted under Section 210 of the Criminal Procedure Code and the 1st accused Kevin Kipkemoi Sigei was acquitted at the conclusion of the trial under Section 215 of the Criminal Procedure Code.

4. The prosecution's case was that PW1, Bryan Warren Payne, a British citizen, was on 21st July, 2008 robbed at gun point by four men at his house. Two of the intruders wielded pistols. One of them wore a hood over his face. PW1 was at the time watching television by himself at the lounge which was an open space in the house while his girlfriend PW2 Selina Njeri was upstairs. The garden lights in the compound along the neighbouring fence were lit and so were the house lights. The security guard PW3 George Namaswa Simiyu was posted outside when PW1 suddenly heard an unusually loud and scary noise of persons. Peeping out he saw four men who made their way into the house and demanded money. One took out the wallet from his back pocket, another tried to carry the TV but it fell and he instead took the DSTV decorder. They then took off scaling the neighbour's fence. By that time PW1 had managed to activate the mobile alert tied to his neck and the security guards came followed by police who pursued the intruders with sniffer dogs. PW1 went and made a formal report of the robbery at Malindi Police Station.

5. Later at a police parade PW1 managed to pick out the leader of the gang who was the 2nd accused person at the trial and the Appellant herein. He identified him as the leader since on the material day he appeared to issue the orders. He also wielded a gun. PW1 was able to identify him at the parade made up of 6 or 8 men of various sizes for reasons that Appellant on that day had not worn a hood and there was sufficient light. A lit bulb hung at the lounge and having been robbed once before, PW1 paid attention to the faces of the intruders. He informed the court that the man he identified was a short stocky man and pointed out the Appellant in the dock. He further testified that at the time of reporting to the police he could not recall describing the intruders save to state that they were four and armed. He denied describing the men as being of Somali origin despite the report booked in the Occurrence Book by the police officer from the crime scene being read out to him which indicated that the intruders were four Ormas and that the complainant had indicated they were of Somali origin.

6. PW2 Selina Njeri confirmed that there was a robbery and the items that were stolen were never recovered. On the material date and time she was upstairs with the baby while her husband PW1 was at the lounge. She heard PW1 tell someone to stop and peeping through the window she saw armed men in the sitting room. She then heard a loud bang which she later learnt was the sound of the TV crashing and also heard one man being told to check for money upstairs and if they found none she was to be killed. She therefore activated the security alarm and then hid together with her child in the bathroom. PW2 also called the OCS using her mobile phone. Both the OCS and the sentry came over. PW2 further stated that she did not know the 1st accused person's name or how long he had lived as their neighbour nor did she know

the Appellant or the 3rd accused person and further that she did not see the intruders.

7. The guard on duty at PW1's house was one George Namaswa Simiyu. He testified as PW3. He also confirmed the robbery stating that on the material day just after he finished patrolling the compound four men jumped into the compound having scaled the neighbour's wall and gained entry into the house. One of them was armed with a panga, another was pointing a pistol at PW1 and the third one with a pistol stood in front of the house. The man with the panga searched PW1. The electricity lights were on and all the while PW3 remained in a hidden position where he could see them. PW3 further testified that none of the intruders were masked. PW3 testified that he had seen one of the intruders once before while going to work. The intruders wore black jackets. PW3 recorded his statement with the police. The following day on the way to work he spotted one of the intruders, being the 1st accused person, with another person breaking stones at an abandoned house. He informed his boss who called the police. PW3 stated that the 1st accused person wore the same clothes and had no cap on though in his statement he had stated that he had worn a black cap. PW3 explained that the 1st accused had a cap at the time of his arrest and not during robbery.

8. The police parade was organised by PW4 Inspector Peter Mwawa. It was conducted on 25th July, 2008 and the Appellant was amongst the eight members of the parade. He informed the suspect of the purpose of the parade who declined to have a friend or lawyer present. The witness was called over and he identified the Appellant by touching him. PW4 enquired from the suspect if he was satisfied and he indicated that he was by signing the identification parade form. PW4 informed the court that the members of the parade ought to be 8 to 13 in number and of similar stature to the suspect.

9. PW5 the arresting officer Police Constable David Koros on 23rd July, 2008 obtained information that a suspect of the robbery had been spotted. Together with Sgt. Mohamed they went and found the Appellant and the 3rd accused in their hideout which was a house near the complainant's house. They searched the place but found no stolen property.

10. The investigating officer, PW6 Corporal David Mwangi visited the scene of the incident on 22nd July, 2008. One suspect was arrested having being identified by the guard at PW1's house and the other two were apprehended on 23rd July, 2008. They denied committing the offence but admitted being in the same compound with the 1st accused person during the time of the robbery. The Appellant was identified at the identification parade and no weapons or stolen items were recovered. PW6 denied that PW1 had stated that the Appellant looked like a Somali. That his statement was that the Appellant was short and stout and in PW6's assertion a description is relative and is made in comparison to something else. He informed the court that PW1 was robbed by three robbers.

11. In his defence the Appellant who testified as DW2 stated that he was asleep on 23rd July, 2008 when police arrested him. They beat him up demanding that he produces a gun and searched his house. On 24th July, 2008 while at the police station a person of European descent came to the station and he was called to the report office. About 30 minutes thereafter he was taken to a parade without first being told about it. The same person of European descent came and touched him. He stated that he was ordered to join a parade of policemen and he was the only civilian. He further testified that PW1 had informed the police that the intruders were of Somali origin which he was not and that he did not resemble one and in fact PW1 stated at the parade that he saw a well-built man. He further stated that neither PW1 nor PW2 had seen him before. He therefore asserted that his arrest was without basis.

12. The trial court in reaching its finding warned itself on the dangers of convicting based on the identification evidence of a single witness. It also noted that though no violence was used there was the threat to use actual violence. The trial court found the Appellant guilty and sentenced him to death.

13. In his submissions, the Appellant asserted that the trial court came to an unjust finding when it believed that he had been properly identified at the scene of the crime. He relied on the finding in **Juma Rashid, Mombasa HCCRA No. 32 of 1995** where the court held that the evidence of identification by the complainant and another witness coupled with that of the identification parade was unsafe for reasons that there was no detail of description of the accused given by the witness.

14. It was the Appellant's case that in the instant case PW1 admitted that he did not give a description of the robbers to the police however the investigations diary indicates that the description given was that of persons of Orma or Somali origin. PW1 also did not know how the Appellant was arrested. The Appellant relied on the Court of Appeal decision of **Joseph Ngumbao Nzaro v Rep *[1982] 2* KAR 212** for the proposition that a witness ought to be asked to give a description of the suspect to ascertain and confirm the identity of the suspect. He also relied on the finding in the case of Juma Ngundia v Republic [1982-1988] KLR that the identification at trial was unsatisfactory as no description had been given earlier on.

15. The Appellant also submitted that the conditions were unfavourable for a positive identification since the attack occurred at night, it was sudden and terrifying, the attackers were strangers to the victims, the circumstances of his arrest were not well established and PW1 never recognised any of the attackers nor gave a description of them.

16. It was further submitted that as the informer who tipped off the police was not called as a witness the Appellant was denied his fundamental right to cross-examine him. He referred to the decision of **Edward S/O Msenga v Regina 1942 E.A.C.A 553** where the appellant had been denied the opportunity to cross-examine the other accused person and the court found it a denial of his right hence fatal to the conviction.

17. In addition it was submitted that as no description was given prior to the identification parade, the parade served no purpose. He buttressed this point with the finding in **Silas Ngari & another v Rep,** Mombasa HCCRA Nos. 278 & 279 OF 2006. He further submitted that a mistake can occur as was held in the case of Alphonce Musa v Rep HCCRA No. 308 of 1992.

18. The Appellant further submitted that his defence was reasonable and truthful and ought to have been considered. He further urged this court to consider Articles 27(1) and 48 of the Constitution in considering the evidence and allow the appeal.

19. In his final point the Appellant submitted that as per the Supreme Court decision of ***Francis Karioko Muruatetu & another v Republic [2017] eKLR*** this court considers his mitigation that he was a first offender and has been in custody since his arrest on 22nd July, 2008. Still on the point of mitigation, the Appellant also relies on the Court of Appeal decision of **Mulamba Ali Mabanda v Rep, Criminal Appeal No. 12 of 2013**.

20. The Respondent represented by the Director of Public Prosecutions submitted that the conviction was safe and that the trial court aptly warned itself of the dangers of convicting based on identification by a single witness. Section 143 of the Evidence Act was invoked to bring out the point that no particular number of witnesses is required to prove a fact. It was further submitted that the description of the Appellant was given in the statement and particulars of the charge and in any case the initial report did not exonerate the Appellant of the charges as the complainant testified that he was not the one who gave the description. The State submitted that the identification parade was properly carried out as per the Force Standing Orders. In addition, it was submitted that the mere fact that the stolen items were not recovered does not exonerate the Appellant as he was properly identified at the scene and his defence having been considered did not shake the prosecution's case. On sentencing it was submitted that as per Section 296(2) of the Penal Code the death sentence is the stipulated sentence for the offence of robbery with violence.

21. This being a first appeal the onus of this court is to reconsider, re-*analyse and re-evaluate the evidence which was before the trial court and reach its own conclusions - see* ***Okeno v R [1972] EA. 32*** and John Mwangi Kamau v Republic [2014] eKLR.

22. *Further, i*t must be put in mind that this court in its appellate jurisdiction ought not to interfere with the finding of facts by the trial court that had the advantage of observing the demeanour of the witnesses *unless a finding of fact was based on no evidence or on a misapprehension of the evidence or the trial court acted on the wrong principles* - see ***Chemagong v Republic [1984] KLR 611*** *and* ***Gunga Baya & another v Republic [2015] eKLR.***

23. *The issues arising are on the identification of the Appellant and the sentence.*

24. *It is clear from the record that the conviction rested on identification by a single witness. Only PW1 testified that he identified the Appellant. The trial court warned itself of the dangers of convicting on identification by a single witness.*

25. *In* Roria v Republic (1967) EA 583 at page 584 *it was held that:*

> "A conviction resting entirely on identity invariably causes a degree of uneasiness…That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

26. The Court of Appeal in Marikus Oduor Otieno & another v Republic [2012] eKLR was guided by the Court of Appeal decision in Cleopas ***O. Wamunga v Republic, Criminal Appeal No. 20 of 1989*** *where it was held that:*

> **"Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger."**

27. *PW1 testified that the lighting was sufficient and that he was close enough to see the Appellant who was not hooded. PW5, the investigating officer, indicated that as per the investigation diary the description given to the police officer who first arrived at the scene was that the intruders were of Orma or Somali origin. PW1 denied ever giving such a description. PW3 did not state that he ever gave the police a description when they initially arrived at the scene. It came out during trial that the Appellant was not of Orma or Somali origin nor did he have their likeness so as to allow for such a description.*

28. The court in the English case of **R.v Turnbull [1976] 3 All ER 549** gave guidelines on the questions a trial court needs to ask itself before arriving on a conviction based on the identification of the accused. The questions are:

> **"How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way as for example by passing traffic or a press of people? Had the witness even 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?"***

29. The contents of the investigation diary were not recanted by their maker and it indicates that the robbers were of Orma or Somali origin. The Appellant is neither of these nor does his appearance as per the evidence. Hence, in my view, there was material discrepancy between the description of the Appellant given to the police by the witnesses when first seen by them and his actual appearance. The trial court ought to have posed the pen midair right there and considered if there was a mistake made in the identification. The Court of Appeal in **Marikus Oduor Otieno & Another v Republic [2012] eKLR** followed the finding in **Joseph Ngumbao Nzaro v Republic [1982] 2 KAR 212** where the Court of Appeal held that:

> ***"It is possible for a witness to believe genuinely that he had been attacked by someone he knows very well and yet be mistaken. So the possibility of error or mistake is always there whether the case be of recognition or identification……"***

30. The trial court also considered that the Appellant was positively identified at the identification parade. In his defence the Appellant indicated that the witness was present when he was called out to the report office. In light of the contradictions on the identification of the

Appellant it is possible that the Appellant's claim is true.

31. The Appellant's claim that failure to give his description prior to the parade vitiates the evidence is however without merit. In **Patrick Kimanthi v Republic [2018] eKLR** the Court of Appeal held that failure to give a description of the accused before the identification parade did not vitiate the identification parade. In the instant case, however, a description was given that did not fit the profile of the Appellant. If PW1 did not give the description to the police then who did it? We cannot tell.

32. A general overview of the identification of the Appellant leaves room for doubt. Indeed PW3 who had said he clearly saw the robbers was quick to tell the Appellant during cross-examination that he had never seen him. The only identification that remained was dock identification which without prior proper identification is of no use. In **Ajode v Republic [2004] 2 KLR 81** it was held that:

> ***"It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. It is also trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade (see case of Gabriel Kamau Njoroge v Republic [1982 – 88] 1 KAR 1134)."***

33. Looking at the evidence in its entirety, I am left with doubt as to whether PW1 correctly identified the Appellant as one of the robbers. I will resolve my anxiety in favour of the Appellant. I give him the benefit of doubt. His appeal succeeds. His conviction is quashed and the death sentence set aside. He is thus set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 14th day of February, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT