REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CRIMINAL APPEAL NO. 71 OF 2016

JACKSON KIHARA GACHUHA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal against both conviction and sentence from the judgment of Hon. K Onesmus Senior Resident Magistrate's Court, Nyeri delivered on 5th September, 2016 in Criminal Case No. 2 of 2014)

JUDGMENT

FACTS

1. The appellant, **Jackson Kihara Gachuha,** was charged with the offence of Robbery with Violence contrary to **Section 296(2)** of the **Penal Code;** the particulars of the charge are that on the 30th day of December, 2013 at Wariruta area in Nyeri County, jointly with another while armed with dangerous weapons namely knives, robbed **ALPHAXAD MAHINDU KIRINGU** of a motor vehicle Reg.No.KBW 028W make Toyota Sienta station wagon valued at Kshs.760,000/- and at the time of such robbery threatened to use actual violence to the said **ALPHAXAD MAHINDU KIRINGU.**

2. *The prosecution called a total of six (6) witnesses in furtherance of its case; judgment was delivered on the 5/09/2016 when the appellant was found guilty, was convicted and sentenced to death; b*eing aggrieved with the conviction and sentence, the appellant, filed a Memorandum of Appeal on the 9th September, 2016 and listed the Grounds of Appeal as are hereunder summarized:

(i) The conviction was based on a doubtful and questionable identification by recognition; the Identification Parade was not conducted in accordance with the Police Force Standing Orders;

(ii) The evidence of **PW1** and **PW2** was contradictory and inconsistent and the trial court erred in relying on it;

(iii) The Charge was not adequately proved by the prosecution to the desired threshold;

(iv) The trial court rejected the appellant's sworn statement of defence which was not challenged by the prosecution.

3. At the hearing hereof the appellant was represented by Ms Amulabu who canvassed the appeal by written submissions and oral highlighting; whereas the State was represented by Prosecuting Counsel Mrs Gicheha who made oral submissions and conceded the appeal; hereunder are the appellant's submissions;

APPELLANTS SUBMISSIONS

4. **On the identification parade**; the appellant submitted that the identification parade was unscrupulory and was not conducted in a manner as provided in law; **PW1** never gave a detailed description of his assailant in his initial report; that there may have been possible communication on the appellants description to **PW1** by **PW3** and **PW4** prior to his attending the parade; that **PW1** went to the parade with a set mind that the appellant was already in the parade; during cross-examination his evidence was that he was able to identify the appellant for the second time; the case-law relied on was **Jackson Olouch & Another vs Republic (1984) eKLR** where it was held that it was dangerous to suggest to an identifying witness that the person to be identified was present in the parade;

5. **PW3**'s evidence was that he had received a call from a friend that the passenger he was carrying was suspected of having stolen a motor vehicle and was directed to stop at the next police check; **PW3** said he attended the Identification Parade and testified to the appellant being dark skinned which was in contradiction to the statement he had recorded in which he had indicated that the appellant was slender, was brown and of medium height and had an injury to his head; there was therefore a difference between what he testified in court and his statement; case referred to was **Kariuki Njiru & 7 others vs Republic (2001) eKLR** where it was held that the evidence on identification

must be scrutinized carefully and the description given in the initial report is factor that must be considered;

6. **PW4** also received a call that a vehicle had been stolen and he was told to be careful and he relayed the same message to **PW3**; both **PW3** and **PW4** received a calls but this informant was never called as a prosecution witness; and the Investigating Officer did not offer any evidence on efforts to trace this crucial witness; **PW1**, **PW3** and **PW4** provided no physical description or distinguishable feature to the police; case referred to **R vs Turnbull [1976]** where the holding was that an eye witness must give a description of his attackers at the earliest opportunity;

7. Counsel submitted that the evidence of the Investigating Officer (**PW6**) was hearsay and therefore could not be relied upon; that the source of his information was not called to testify; the prosecution evidence was inconsistent and rigged with malice and made in bad faith;

8. The Identification Parade Forms were not produced as exhibits to enable court to ascertain the manner in which it was conducted; as no Forms were produced it was not clear whether it took place; the conviction of the appellant could therefore not be based on this evidence of identification;

9. **Proof of the offence**; the key elements of Section 296(2) are the offender(s) are armed with dangerous weapons; are in the company of one or more other persons; the use or threat of personal violence immediately before or after the time of robbery; **PW1** never mentioned a knife or weapon in his evidence; neither did the prosecution produce any knives as exhibits; there was nothing to show use of actual violence nor was a P3Form produced as evidence to demonstrate that **PW1** was hurt by the robbers; there was no evidence of any other person who had been apprehended or charged nor was there any evidence adduced to corroborate the fact that there was another person; the case referred to was **Titus Wambua vs Republic (2016) eKLR** therein these ingredients for robbery with violence were set out and explained;

10. Counsel submitted that the ingredients of the offence were not satisfied;

11. **Proof beyond reasonable doubt**; **PW6** stated that he recovered a knife and phone from the scene but these were not produced as exhibits in court; the knife was not dusted for fingerprints to ascertain the owner; the mobile phone was not produced in court nor was any data on the phone produced; **PW1** stated that he received registered message and therefore data ought to have been extracted of the text message as to the time it was sent and its contents; the appellant relied on was **James Murigu Karamba vs Republic (2016) eKLR** where the judges were unanimous that a conviction should strictly be based on the evidence and not unsubstantiated theories; and in **Suleiman Kamau Nyambura vs Republic (2015) eKLR** it was held that it was necessary to support developed theories with evidence; that a theory must be canvassed in evidence by the parties;

12. **The appellants defence was disregarded**; this was disregarded on the grounds that he was found not to be a truthful witness; the trial court erred in drawing inferences from the evidence that did not flow reasonably and ethically.

13. The trial court failed to comply with Section 169 of the Criminal Procedure Code (CPC) in that it failed to date and sign the judgment; case cited **Francis Kimani Muthoko & Anor vs Republic (2008) eKLR;**

14. The trial court also failed to comply with the provisions of Section 200(3) of the CPC; that the trial court when taking over the trial did not seek the appellants input and he was not informed of his right to recall any witness who had testified earlier; this was a gross violation of the provisions of this section; cases relied on **Anthony Musee Matinge vs Republic (2012) eKLR** and **Bob Ayub vs Republic (2010) eKLR**; that both decisions are to the effect that compliance with the section is mandatory;

15. Counsel urged this court to re-assess and re-evaluate the evidence and to allow the appeal in its entirety; and prayed that the conviction be quashed and sentence be set aside.

RESPONDENT'S SUBMISSIONS

16. In response Prosecuting Counsel conceded that there was non-compliance with Section 169(1) of the CPC as the judgment was not dated or signed; the coram also was flawed as it did not indicate whether the appellant was present in court when the judgment was read; further the trial court also failed to comply with Section 200 of the CPC in that the record was not clear on whether the appellant was notified of his rights;

17. That these anomalies were not curable under the provisions of Section 382 of the CPC; and for those reasons conceded the appeal and invited this court to peruse the proceedings and arrive at its own conclusion.

ISSUES FOR DETERMINATION

18. After taking into consideration the forgoing submissions made by the appellant and those of the Counsel for the State, this court has framed the following issues for determination;

(i) Whether the appellant was positively identified; whether the Identification parade was proper or flawed;

(ii) Whether the offence of robbery with violence was proved to the desired threshold; whether to substitute the charge;

(iii) Whether to declare the judgment a nullity due to the trial court's failure to date it;

(iv) Whether the trial court failed to comply with Section 200(3) of the CPC;

(v) Whether the trial court disregarded the appellants statement of defence without giving good reasons;

ANALYSIS

19. This being the first appellate court it is incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Reference is made to the case of **Okeno vs Rep (1972) EA 32.**

Whether the appellant was positively identified; whether the Identification parade was proper or flawed;

20. The appellant contends that **PW1** never gave a detailed description of the assailant in the initial report; that failure to do so rendered the identification parade worthless; and also that the Identification Parade Forms were not produced as exhibits to enable the trial court to ascertain the manner in which it was conducted; and as no Forms were produced it was not clear whether it ever took place; and that the conviction of the appellant could therefore not be based on this evidence of identification;

21. Under this head the issues are three-fold; the first report, visual identification and the identification parade; on the issue relating to the first report **PW1** it is noted that in his evidence he made no mention of having given the police the description of the appellant when he made the initial report;

22. In the case of **Nathan Kamau Mugwe Cr,Appeal No.63 of 2008 (unreported)** the Court of Appeal expressed itself by holding that the ideal position would be for the witness to give a first description of the assailant for the purposes of organizing the identification parade; and that an identification parade cannot be held to have been invalid merely because the witness had not previously given a description of the suspect;

23. This court is guided by the forgoing decision in that it would be wrong to reject an identification parade merely because the witnesses failed to give the police a description of the appellant; but the pertinent question is whether the witnesses **PW1**, **PW3** and **PW4** identification of the appellant was free from mistake or error; which then leads to the second sub-issue of visual identification; reference is made to the case of **Matianyi vs Republic [1986] KLR** where the Court of Appeal held that the evidence must carefully be tested on whether it was free from error; and it is therefore necessary to examine the conditions and circumstances of the visual identification and whether the trial court considered and tested it;

24. In this instance the incident is said to have taken place at about 10.30am during the day; **PW1** stated that the appellant had requested him to ferry him in the taxi to Nairobi at an agreed fare of Kshs.7000/-; the journey commenced and the appellant was seated in the front seat; after picking up another passenger he drove for approximately 2kms and became suspicious of his passengers; he tried to get out of the vehicle but was restrained by the appellant who was seated in the co-driver's seat; that the appellant then took the keys from him and after bundling **PW1** out of the motor vehicle the appellant then drove off with his accomplice; all this happened within a span of an hour;

25. He called his employer and narrated his harrowing experience; and later went to report the matter at Karatina Police Station but was referred to Nyeri Police Station; he was later summoned to attend an identification parade where he positively identified the appellant; **PW2** who was the employer of **PW1** and also the owner of the vehicle corroborated the evidence on the time of the incident and stated that **PW1** had called him at around 10.00am and after an hour **PW1** had called him again this time to tell him that the passengers had robbed him of the motor vehicle;

26. The trial court in its judgment was satisfied that this witness had spent ample time with the appellant to enable the witness to identify the appellant and it made the following observation;

> ***"…He and the accused had spent about an 1 hour together in the car."***

27. The evidence of **PW3** and **PW4** on visual identification was that on the 30/12/2013 at about 11.00am two customers approached them requesting to be driven to Nairobi; they agreed on a fare of Kshs.6000/-; **PW3** asked **PW4** who was his employer to accompany him on the journey to Nairobi; **PW4** observed that the appellant appeared sick and upon enquiring he was told that he had been involved in an accident at a place called Kanyama whilst proceeding to Nairobi; on the way **PW3** and **PW4** both testified that they received calls from a friend who informed them that the vehicle that had rolled at Kanyama had been stolen and that the person they were ferrying was a likely suspect; they were advised to stop at the next police check; the two drove on upto Central Police Station in Nairobi and explained everything to the police; at about 5.00pm they were released upon the police verifying the information on the stolen vehicle; it was the evidence of **PW4** that at all times during the journey to Nairobi the appellant was seated on the right side next to the driver;

28. Again the trial court in its judgment noted that the quality of light and that the witnesses had time to observe the appellant throughout the length of the journey so as to enable them to identify the appellant; the trial courts observation was that;

> ***"…….pw1, pw3 and pw4 had enough time to interact with the accused during daylight, the identification parade was only a mere procedure."***

29. Upon re-evaluating the evidence on record it is noted that **PW2**, **PW3** and **PW4** all the witnesses corroborated the evidence **PW1** and confirm that the incident happened during the day; the trial court also noted that the appellant at all times during the journey to Nairobi three prosecution witnesses spent a considerable length of time with the appellant and that they were able to interact and observe the appellant at length;

30. This court is satisfied with the trial court's finding on the quality of light; and that the conditions and circumstances for visual

identification are found to be favourable; this evidence was complimented by the identification parade; which then leads to the third leg which is whether the identification parade was properly conducted;

31. The appellant's contention is that the Identification Parade Forms were not produced as exhibits to enable the trial court to ascertain the manner in which it was conducted; that as no Forms were produced it was not clear whether it ever took place; and that the conviction of the appellant could therefore not be based on this evidence of identification;

32. It is clear from the evidence on record that the appellant was apprehended by **PW3** and **PW4** on information received that he was involved in a robbery of a vehicle; they drove the appellant to Central Police Station where he was arrested and he was later handed over to **PW6** a police officer from CID Nyeri; **PW1**, **PW3** and **PW4** were invited to attend an identification parade; and **PW6's** evidence was that all the three prosecution witnesses were able to pick out and positively identified out the appellant;

33. What is interesting to note is that the Investigating Officer alluded to such a parade being conducted in his evidence but what is not clear is why the Identification Parade Forms were not tendered as evidence to enable the trial court and also this appellate court to interrogate the process as to whether it was conducted in compliance with provisions of the Forces Standing Order; also despite the non- production of the parade forms the trial court went on to make the following finding;

> ***"The non-production of identification parade forms cannot derail the course of justice as pw1, pw3 and pw4 had enough time to interact with accused during daylight to the identification parade was only a mere procedure."***

34. The trial court purported to justify why the identification parade forms were not relevant and cited Article 159(2) and stated as follows;

> ***"This resonates well with Article 159(2)(d) constitution of Kenya 2010 that justice may be administered without undue regard to procedural technicalities."***

35. The trial court may have not considered the purpose of the identification parade and the importance of production the documents in support; in that parades are meant to test the correctness of a witness' identification of a suspect;

36. Upon re-evaluating the evidence in respect of the identification parade and the absence of the supporting forms this court opines that it may never be known whether the same was conducted in accordance with the law; and indeed the value of the identification may have depreciated considerably but the question that lingers in this court's mind is that in the absence of such evidence on the parade is there other evidence that may satisfy the court that meets the threshold as to leave no doubt that the suspect was positively identified;

37. It is this court's considered view that in the absence of the Identification Parade Forms the trial court ought to have reverted back to the record on whether there was clear evidence of identification particularly the evidence of **PW3** which was corroborated with that of **PW4**; indeed there was a lot of evidence provided by these two witnesses as to the circumstances under which the appellant was identified and arrested; **PW6** also gave cogent evidence shedding light on the basis of the appellant's arrest;

38. Again upon revaluating the evidence of **PW3** and **PW4** their evidence was that the appellant looked unwell and upon inquiring from him the appellant told them that he had been involved in an accident at Kanyama; they received a call from a friend who warned them and they drove the appellant to the police station where he was arrested; in totality the evidence of **PW1**, **PW3** and **PW4** on identification was corroborated and tested on the conditions and circumstances all which were found to be favourable;

39. For those reasons there is no doubt in this court's mind and this court is satisfied that the appellant was positively identified; the conviction based on identification is found to be safe.

40. This ground of appeal is found to be lacking in merit and it is hereby disallowed;

Whether the offence of robbery with violence was proved to the desired threshold; whether to substitute the Charge;

41. The key ingredients of the offence of robbery with violence are that;

> (i) The offender is armed with any dangerous and offensive weapon or instrument; or
>
> (ii) The offender is in the company with one or more other person(s); or
>
> (iii) At or immediately after the time of the robbery the offender wounds, beats, strikes, or uses other personal violence to any person.

42. The appellant contends that the key ingredients were not satisfactorily proved; **PW1** never mentioned a knife or weapon in his evidence; neither did the prosecution produce any knives as exhibits; that there was nothing to show use of actual violence nor was a P3Form produced as evidence to demonstrate that **PW1** was hurt by the robbers; there was no evidence of any other person who had been apprehended or charged nor was there any evidence adduced to corroborate the fact that there was another person;

43. The trial court in its judgment elaborated on three ingredients and made the following findings; one the first ingredient the trial court found that this key element had not been proved and it stated;

" PW6 mentioned a knife he recovered in the car and PW1 did not mention the presence of a knife. I dismiss the same as this could have been for PW1 for his usage."

44. On the second and third ingredients the trial court made the following analysis;

" In this case he was jointly with another and used other personal violence against PW1 to achieve his ultimate goal."

45. In re-evaluating the evidence on record it reflects that **PW1** testified that the appellant approached him to hire the taxi at a fee to go to Nairobi; on the way they picked up a second person whom they proceeded with on the journey; this other person was with them until they bundled and threw out **PW1,** robbed him of his vehicle and sped off only to crash along the way;

46. The evidence of **PW3** was that he was approached by two people; one wanted to hire the vehicle to Nairobi; he over-heard the appellant instructing the other young man to go and take care of the rolled vehicle that had rolled at Kanyama; this evidence corroborates the evidence of **PW1** that there were two robbers at the time the incident occurred;

47. It is trite law that the prosecution only has to prove any one of the key ingredients and in this instant the trial court was satisfied that the appellant played a role in the robbery; there was corroborated evidence that he was in the company of one other person;

48. The charge sheet herein makes reference to the offenders being armed with dangerous weapons namely knives; and also states that at the time of such robbery threatened to use actual violence to **PW1**;

49. Robbery with violence entails the use of a weapon whether used or not; it also entails the use of threat, use of force or violence; the prosecution must prove that that the property was taken from the victim against his will and that fear or threat or violence was used; this is what aggravates a simple robbery to robbery with violence;

50. This court concurs that **PW1** never mentioned a knife or weapon in his evidence; neither did the prosecution produce any knives as exhibits; there was nothing to show use of actual violence nor was there a P3Form produced as evidence to demonstrate that **PW1** was hurt by the robbers; but is satisfied that the prosecution proved the offence of simple robbery to the desired threshold in that the appellant robbed **PW1** of the motor vehicle and that it was taken in **PW1's** presence and against his will;

51. This court is satisfied that the appellant was not only convicted on the evidence of identification but on evidence on a chain of events that led to his arrest; and finds that this is a suitable case for substitution of the offence from that of robbery with violence to that of simple robbery contrary to Section 296(1) of the Penal Code;

52. This ground of appeal is found to be partially meritorious; and calls for the substitution of the charge;

Whether to declare the judgment a nullity due to the trial court's failure to sign and date it;

53. The appellant submitted that the trial court failed to comply with Section 169(1) of the Criminal Procedure Code (CPC) in that it failed to date and sign the judgment; the section reads as follows;

"Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."

54. Upon thoroughly perusing the original court record of the trial court it is clear that the judgment was duly signed by the trial court; what is not clear is the date of delivery of judgment; again upon perusal of the court record it is noted that the trial court fixed a mention date for 5/09/2016 to confirm judgment; but what is not clear is whether this was the date when the judgment was delivered; the other flaw noted relates to the coram on the impugned date of delivery of the judgment; both the defence counsel and prosecuting counsel are noted on the record as being present and in attendance; there is also a letter on record from the appellant's counsel and addressed to court requesting for proceedings and it makes reference to the date of judgment being 5/09/2016; but the record is silent and does not indicate whether the appellant was present in court when the judgment was delivered;

55. In the case of **Alex Mule David vs Republic (2017) eKLR** the appellate court held that;

"However, even if the same was not complied with the court in MACHAKOS HCRA 96/2014, held that if the evidence on record is satisfactory that the accused committed the offence charged the conviction is to be upheld irrespective of non-compliance with Section 169 CPC by the trial court."

56. And in **Republic vs Sharif Mohammed Hija (2016) eKLR** the circumstances were similar to this instant appeal in that the impugned judgment was undated and it was not clear when it was delivered; on the effect of such non-compliance with Section 169(1) CPC the appellate court held:-

"My conclusion is that there is no miscarriage of justice if the non-conformance with Section 169 was remedied at this stage through a re-evaluation and reconsideration of the case. Given this court's duty as a first appellate court, these failures to comply with Section 169 of the CPC will need to be remedied in the judgment here. This is because our standard of review is de-

novo review. In other words, the technical failures of the judgment itself do not, in this particular case, vitiate the trial itself."

57. In addressing the issue of non-compliance with Section 169(1) this court is persuaded with the holdings in the afore-going decisions and concurs that a technical failure of this nature does not vitiate the trial particularly if the evidence on record is sufficient to support the conviction for the offence the accused has been charged with;

58. This court is satisfied that there is satisfactory evidence on record on positive identification of the appellant that indeed supports the conviction; this court does not concur with the prosecuting counsel's submissions that this defect is not curable and reiterates that this technical flaw can be remedied in this judgment;

59. This ground of appeal is found lacking in merit and is disallowed;

Whether the trial court failed to comply with Section 200(3) of the CPC;

60. The appellant contends that the trial court failed to comply with the provisions of Section 200(3) of the CPC; in that when taking over the trial it did not seek the appellant's input and he was not informed of his right to recall any witness who had testified earlier; that this was a gross violation of the provisions of this section;

61. Section 200 (3) uses the words ***"shall inform"*** which makes it mandatory for the trial court to inform the accused person of his rights; the court record reads as follows;

> ***"Macharia holding brief for Muchiri for the accused. It is part-heard before Hon. Wekesa.***
>
> ***Section 200(3) CPC is hereby complied and the defence wish to proceed where the case had reached.***
>
> ***Proosecutor – one witness ready to proceed.***
>
> ***Court – placed aside to proceed.***
>
> ***Muchiri appearing for the accused.***
>
> ***Muchiri – ready to proceed."***

62. The record demonstrates that the trial court that took over the trial did not record verbatim that it had informed the appellant of his rights but alluded to having complied and the appellant who was represented by counsel is found to have reacted as recorded by the trial court; and after making the option informed the court that the appellant was ready to proceed; as for recalling of witnesses the record does not reflect any request of such nature being made by defence counsel and being denied by the trial court;

63. The mandatory duty of the court stops at informing appellant of his rights; and from the option recorded by the trial court and defence counsels response this court is satisfied that the trial court did not make any decision which may have prejudiced the appellant; and it is found to have complied with the provisions of Section 200(3) of the CPC;

64. This ground of appeal is found lacking in merit and is hereby disallowed;

Whether the trial court disregarded the appellant's statement of defence without giving good reasons;

65. The appellant's last ground of appeal is that the trial court disregarded his statement of defence on the grounds that his witness DW2 due to his demeanour when testifying was found not to be a truthful witness; the trial court was not convinced by the evidence of **DW2** and stated that there was no truth in it and that it ***'was not of substantial help to'*** the trial court; it dismissed this evidence on the grounds of demeanour and also held that the accused and the witness were persons who were not known to each other even closely;

66. In conclusion this court is satisfied that the appellant's defence when weighed against the prosecution case it does not displace the prosecution evidence on the robbery; and the evidence of **DW2** is at variance with that of the appellant in relation to the incident and on the hiring of the **PW1's** vehicle; that the trial court correctly found that **DW2's** evidence is of no substantial value and that it did not displace the prosecution's case;

67. This court is satisfied that the trial court considered the appellants statement of defence and gave good reasons for disregarding it; this ground of appeal is hereby disallowed;

FINDINGS

68. For the forgoing reasons this court makes the following findings;

(i) This court finds that the appellant was positively identified;

(ii) This court finds that this is a suitable case for substitution;

(iii) This court finds that failure to comply with Section 169(1) does not render the judgment a nullity; the date is found to be 5/09/2016 and is accordingly remedied;

(iv) The trial court is found to have complied with the provisions of Section 200(3) of the CPC; the subsequent proceedings were in order.

(v) The trial court gave good reasons for disregarding and rejecting the appellants statement of defence.

DETERMINATION

69. The conviction against the appellant for the offence of robbery with violence contrary to Section 296(2) of the Penal Code is hereby set aside; and substituted with a conviction for Robbery contrary to Section 296(1) of the Penal Code;

70. The sentence prescribed for the offence is fourteen (14) years but as the appellant was found to be a first offender; the death sentence is hereby set aside and substituted with a sentence of six (6) years with effect from the 5/09/2016;

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 9th day of May, 2019.

HON.A. MSHILA

JUDGE