



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL 125 OF 2017

(Appeal from Judgment of B. Ochieng, CM in Criminal Case No. 72 of 2015 Kakamega on 12/10/17)

CHRISTOPHER NDUSI KHALUMBA.....1ST APPELLANT

MOSES KHA.....2ND APPELLANT

KELVIN SHITAMBASI.....3RD APPELLANT

FELIX KHATENYERA MUHANDA.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. The Appellants herein were vide Kakamega CMCCR no 72 of 2015. charged with the offence of Robbery with Violence Contrary to Section 295 as read with 296 (2) of the Penal Code. The particulars being that on the 25TH November 2014 at Emukhaya village, shiunzu sub location, Butso south in Kakamega County, while armed with crude weapons namely pangas, rungas and stones jointly with others not before court robbed **ALLAN MUKOTO SITIMA** of a laptop make Lenovo, three suits worth Kshs. 90,000/=, two travelling bags containing assorted garments, a wallet containing Kshs. 7,000/=, one mobile phone make L.G. Model LP 950 valued at Kshs. 50,000/=, one mobile phone make Samsung valued at Kshs. 5000/= and one envelope containing cash Kshs. 40,000/= and during the time of such robbery used actual violence to the said **ALLAN MUKOTO SITIMA**.

2. The Appellants were also charged on Count II with the offence of Robbery Contrary to Section 295 as read with 296 of the Penal Code. The particulars being that on the 25TH November 2014 at Emukhaya village, Shiunzu sub location, Butso South in Kakamega County, while armed with crude weapons namely pangas, rungas and stones jointly with others not before court robbed **SAPIENTIA ALICE SITIMA** of cash Kshs. 50,000/= and during the time of such robbery used actual violence to the said **SAPIENTIA ALICE SITIMA**.

3. They were also charged in Count III with the offence of Robbery with Violence Contrary to Section 295 as read with 296 (2) of the Penal Code .The particulars being that on the 25th November 2014 at Emukhaya village, shiunzu sub location, Butso south in Kakamega County, while armed with crude weapons namely pangas, rungas and stones jointly with others not before court robbed **PATIENCE SITIMA** of her mobile phone make Samsung model number GT-B3210 IMEI NO. 357797039852240 valued at Kshs. 11,000/= and during the time of such robbery used actual violence to the said **PATIENCE SITIMA**.

4. The 4th Appellant faced an alternative charge of handling stolen property contrary to section 322 (2) of the Penal code, particulars being that on the 20th December 2014 at southland area within Nairobi county, otherwise than in the course of stealing, dishonestly undertook the retention of mobile phone make Samsung model number GT-B3210 IMEI NO .357797039852240 knowing or having reason to believe it to be stolen or unlawfully obtained.

5. The Trial Magistrate, convicted them on the three counts of robbery with violence and sentenced them to death.

The Appeal

6. Being dissatisfied with the conviction and sentence, each of the Appellants filed appeals. The appeals raise the following grounds of appeal.

- 1) That the trial magistrate grossly erred in law and in fact in holding a trial that did not meet the threshold of a fair trial as contemplated under Article 50 (2)(g), (h) and (j).
- 2) That the trial magistrate erred in law in convicting the Appellants on the basis of an incurably defective charge sheet contrary to section 134 of the Criminal Procedure Code.
- 3) That the Trial Magistrate grossly erred in law and facts in failing to observe the provisions of Section 200 (4) of the criminal procedure code
- 4) That the trial magistrate grossly erred in law and in fact in placing inordinate weight on the evidence of identification parades which were not preceded by consistent and accurate description and that the same failed to meet the standards set under chapter 46 of the police force standing orders.
- 5) That the Trial Magistrate grossly erred in law and in fact in finding the evidence on identification as truthful and free from error and doubt without observing that the circumstances at the scene were not conducive for any positive identification.
- 6) That the trial Magistrate grossly erred in law and fact in convicting on the basis of doubtful, inconsistent and fabricated evidence that lacked corroboration.

Duty of the Court

7. The duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. See **OKENO VS REPUBLIC [1972] EA 32.**

8. In **KIILU & ANOTHER VS. REPUBLIC [2005]1 KLR 174,** the Court of Appeal stated thus:

“1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

9. The same was reiterated in the case of **DAVID NJUGUNA WAIRIMU V – REPUBLIC [2010] eKLR** where the court of appeal stated:

“The duty of the first appellate court is to analyze the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

10. The main issue for determination before this Court is whether the conviction is sustainable on the strength of the evidence adduced in the trial court.

The Evidence and Submissions

The Prosecution Case

11. The prosecution called 14 witnesses.

Pw1, **Allan Mukoto Sitima** testified that on the 25.11.2014 during his father’s funeral at about 8.00-9.00 pm while he was at the back of his house, a group of 5 men armed with pangas, rungas and other crude weapons approached the back door of the house. On demanding to know who they were, they accosted him using the weapons demanding that he produces his gun.

12. He testified that he raised an alarm and his family members rushed to his rescue giving him the opportunity to escape to the house. However, the 4th Appellant knocked him down causing him to surrender. He stated that the house had a florescent lighting on and that he could see his assailants. So was the compound which had security lights.

13. PW1 testified that he saw the 4th Appellant standing next to him while the 3rd Appellant carried his travelling bags from his room and went out through the back door. He further testified that he was bleeding profusely from the injuries and that as his assailants ran away he rushed to the washroom to clean his wounds and that was when he heard gun shots from the police who had come to their rescue. He was later rushed to the Kakamega county Hospital where he was treated of the injuries and later referred to Nairobi hospital for specialized treatment. The incident was reported at Kakamega police station where he attended two identification parades where he was able to identify the 3rd and 4th Appellants and another was carried out at Pangani Police station where he identified the 1st Appellant. He confirmed that on

the night of the attack he was able to clearly see the 1st, 4th, 6th, 7th and 8th accused (the appellants herein).

14. During cross examination he confirmed that he did not give the description of his assailants to the police in his initial report due to his medical state courtesy of the injuries he had sustained. He confirmed that he identified the 2nd and 4th Appellant in the identification parade.

15. PW2 testified that on the date of the alleged incident, she was in the house attending to her child when she heard screams and a voice demanding that she opens the door. She stated that she opened the door and saw the 1st appellant holding a metal bar and panga, the 4th Appellant holding a stone and torch while the 3rd Appellant held a rifle. They later led her to the living room where she saw other assailants and she was asked to show them her mother's house. She testified that she was slapped by one of the assailants and that they demanded for her phone which she gave them being Samsung 3125 phone and then they left.

16. In cross examination, she confirmed that she gave a general description of her assailants in her initial report.

17. Evidence was also led by pw 14 that the phone was traced and it was being used by lines registered in the names of the 2nd and 4th Appellant.

18. PW3 **Sepentia Alice Sitima** testified that on the night of the incident she was watching TV with her family when she heard Pw1's screams. She stated that she went to check and saw the Appellants in the company of others armed with a panga and metal bar. She stated that they rushed and hid in her bedroom but the assailants followed them and the 1st Appellant with another assailant demanded for cash and she gave them Ksh 50,000/=.

19. She further testified that she participated in several identification parade where she identified the appellants as their assailants.

20. PW4 **Ken Mukavane** testified that he saw the 1st and the 3rd Appellants and others frog matching PW1 to the house. He stated that they were armed and that he could see them as the house was well light with florescent bulbs. He also participated in several identification parades where she identified the appellants as their assailants. His evidence was similar to that of PW12.

21. PW 7 **Patrick Mambiri** a senior clinical officer at Kakamega county hospital confirmed that Pw1 was admitted at the facility on 25.11.2014 in critical condition. He stated that he had several cuts on the head, left upper eye and neck. He classified the injuries as grievous harm. He produced to evidence copies of the treatment notes and P3 Form as P exhibit 5,6 and 7.

22. PW 10 and 13 the investigating officers in the case gave an account of the Appellants' arrests and the crime scene. They further stated that the Appellants were positively identified during identification parades and that none of the stolen items were recovered.

The defence Case

23. The Appellants all denied their involvement in the robbery. They all gave an account of their arrest save for the 3rd Appellant who stated that he was admitted at Kakamega County hospital on the date of the alleged robbery and produced to evidence a case summary document to support his alibi.

The alibi was rebutted by the prosecution who produced evidence Pexhibit 36 and 37 to show that the 3rd Appellant was not admitted at the facility as alleged and that the said case summary was not authentic.

Submissions

24. The appeal proceeded by way of submissions. The Appellants contend that they were convicted on a defective charge sheet because count II and count III omitted the word "Violence" and thus became nonexistent charges. They further submitted that the identification was not proper and clear as the complainants did not give a description of their attackers to the police in their initial report and that the identification parades were flawed. The Appellants attacked the manner in which the trial was led with regard to the fact that the trial was conducted by three magistrates and that the trial magistrate did not comply with the provisions of section 200 of the Criminal Procedure Code. They also submitted that the prosecution evidence had inconsistencies and that a conviction was not safe.

25. The Appellants made no submissions with regard to violation of their constitutional rights as envisaged under Article 50 (2) g, h and j of the constitution.

26. The state opposed the appeal. They submitted that the defects on the charge sheet were minor and that the particulars of the charge supported the offence of robbery with violence and that the same was curable. They relied on the cases of **Peter Mutiso Mbuvi vs Republic 2017 eKLR**, **BND vs Republic 2017 eKLR** and **Joseph Mwanuye vs Republic 2012 eKLR**.

27. They further submitted that the identification was clear and proper and that the 8 identification parades they conducted were in accordance with the law. They also stated that the alleged inconsistencies were so minor and immaterial to warrant the conviction to be set aside. They relied on the case of **Peter Ngure Mwagi vs Republic 2014 eKLR**.

Issues for Determination

28. Upon a careful reconsideration and evaluation of the evidence on record, and taking into account all the submissions made by all the Appellants and the respondent and further upon careful consideration of the law, the following issues arise for determination; -

- a) Whether Appellants' rights as envisaged under article 50 (2), (g), (h) and (j) of the constitution were contravened and consequences of such contravention if any.
- b) Whether the charge sheet was defective and whether the same is curable.
- c) Whether the trial magistrate did not comply with the provisions of Section 200 of the criminal procedure Code and the consequences thereto.
- d) Whether the Appellants were identified.
- e) Whether the prosecution evidence was contradictory.
- f) Whether the prosecution proved the case against the appellant beyond any reasonable doubt.

a) Whether Appellants rights as envisaged under article 50 (2), (g), (h) and (j) of the constitution were contravened and consequences of such contravention if any.

29. Article 50 of the Constitution provides as hereunder:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

.....

(g) To choose, and be represented by, an

advocate, and to be informed of this right promptly;

(h) To have an advocate assigned to the

accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) To remain silent, and not to testify during the proceedings;

(j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

In JOSEPH KIEMA PHILIP V REPUBLIC [2019] eKLR the court observed that:

“The right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before the law. This fundamental right is recognized in a myriad of states due to its importance in ensuring that the process is just, credible and transparent. Thus legal representation is a cardinal principle of fair trial. The criminal justice system in Kenya places the right to fair trial at a much higher pedestal, and in that respect and in the context of this matter; the accused is placed in somewhat advantageous position. Therefore, legal representation is a fundamental constitutional dictate envisaged under article 50 of the Constitution of Kenya 2010. Relevant in this case is article 50(2) (b) (g) (h). The same provides as follows:

“50(2) every accused person has the right to a fair trial, which includes the right –(g) To choose, and be represented by an advocate and to be informed of the right promptly.

(h) To have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”

Generally, article 50(2) (g) of the Constitution guarantees a fair trial to every accused person which includes the right to be represented by an advocate and to be informed of that right promptly. Perhaps at this juncture, it is noteworthy in the above context to venture into the provisions of the Legal Aid Act, 2016 which came into force on 10th May 2016.

The above mentioned act in its preamble states that, its focus is to “give effect to article 19(2), 48, 50(2) (g) and (h) of the constitution to facilitate access to justice and social justice.” Section 43 of the Act lays down the duties of the court before which an unrepresented accused person is presented. The same provides as follows:

“A Court before which an unrepresented accused person is presented shall:

- a) Promptly inform the accused of his or her right to legal representation;
- b) If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and
- c) Inform the service to provide legal aid to the accused person”

The key words under article 50(2) (g) and (h) of the Constitution and section 43 is “to be informed promptly of the right”. In order to fully comply with the dictates of article 50(2)(g) and (h) and section 43(1) of the Legal Aid Act, trial courts as a matter of constitutional duty and the interest of justice, ought to give the information to the accused person and/or make a preliminary inquiry at the earliest opportunity possible. A determination must be made as to whether or not the accused person would require legal representation before commencing with the hearing of the case. The earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearings...”

30. The Supreme Court Case of REPUBLIC VS. KARISA CHENGO AND 2 OTHERS (2017) eKLR stated as follows: -

“In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:

- (i) The seriousness of the offence;
- (ii) The severity of the sentence;
- iii) The ability of the accused person to pay for his own legal representation;
- (iv) Whether the accused is a minor;
- (v) The literacy of the accused;
- (vi) The complexity of the charge against the accused;

[95] In concluding on the above issue, it is our finding that in addition to the specific guarantee of legal representation afforded to an accused person by Article 50(2) (h) of the Constitution, there is now in operation an elaborate legal aid scheme that is in the process of implementation following the enactment of the Legal Aid Act no. 6 of 2016.”

31. In the instant case all the Appellants save for the 3rd Appellant were unrepresented. At no point in the proceedings did the trial court inform them of their rights to representation which it ought to have done considering the nature of the offence and the sentence. It should however be noted that the Appellants herein at no time during the proceedings complained about lack of representation. They properly and comfortably participated in the trial and exhibited no difficulties. It is therefore my view that although the Appellants were not informed of their rights to legal representation, the same did not cause any substantive injustice on them and thus the ground cannot stand.

32. The Appellants further stated that their rights under Article 50 (2) j of the constitution were violated. According to the proceedings, the Appellants were on the 23rd September 2015 supplied with the witness statements before trial and indicated that they were ready to proceed with the hearing. No complaints were made of the lack of statements. This complaint has therefore come too late in the day.

b) Whether the charged sheet was defective and whether the same is curable.

33. The Appellants contended that the Charge sheet was defective for the reason that the same did not have the word “Violence” on the charge yet the offence was robbery with violence. They submitted that the same was defective and it was thus unsafe to be convicted on the defective charge. On the same issue the court in BRIAN KIPKEMOI KOECH V REPUBLIC [2013] eKLR held that

“What constitutes a defective charge sheet was spelt out in the case of YOSEFU AND ANOTHER -VS- UGANDA (1960) E.A., 236. The East Africa Court of Appeal held: -

“The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc., in contravention of the Act.”

34. And in SIGILANI -VS- REPUBLIC [2004] 2 KLR, 480, it was held that: -

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

On the other hand, Section 134 of the Criminal Procedure Code provides for what the components/ingredients of the charge sheet constitute as follows: -

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

35. The Charge herein contains an offence described under Section 295 as read with 296 (2) of the penal code. The particular of the charge described the offence of robbery with violence. The evidence adduced by the prosecution was geared towards proving that the offence of robbery with Violence in the view of the facts that the assailants were armed and used violence on the complainants.

36. From the evidence and the proceedings, it is clear, and I agree with the Prosecution counsel, that the error and /or discrepancy was a minor omission curable under Section 382 of the Penal Code and that the said error did not in any way occasion any injustice to the Appellants. Therefore, the submission that the charge was defective has not been proved and is hereby rejected.

(c) Whether the trial magistrate failed to comply with the provisions of Section 200 of the criminal procedure Code and the consequences thereto.

37. The Appellants contend that the case was heard by three different magistrate and that none of them observed the provisions of Section 200 of the Criminal procedure Code. According to the proceedings before court, hearing of the instant suit commenced on the 23rd September 2015 and was presided over by **Hon M. C. Chepseba SPM**. On the 21st March 2015, the matter was taken before **Hon Kimmingi CM** and directions under Section 200 of the Criminal procedure code were taken and all the appellants agreed to have the matter proceed form where it had reached and that no witness be recalled.

38. On the 25th August 2016, the matter was placed before **Hon B. Ochieng CM** upon transfer of his predecessor **Hon Kimmingi CM**, and again directions under Section 200 of the Criminal procedure code were taken and all the appellants agreed to have the matter proceed form where it had reached and that no witness be recalled. Judgment in the case was delivered by **Hon B. Ochieng CM**.

39. The importance of the provisions of Section 200 in a criminal trial was emphasized by the court of Appeal in **Abdi Adan Mohamed v Republic [2017] eKLR**. In the instant suit it is clear that the Trial Court took all steps to ensure that the provisions of Section 200 of the criminal Procedure Code were complied with and thus the Appellants appeal on the same is not viable.

d) Whether the Appellants were identified

40. Evidence of identification was led by PW1, PW2, PW3, PW4, PW5, PW9 and PW12. PW 1 testified that he saw the 1st and 2nd Appellants as his assailant. He stated that despite the fact that it was at 9.00pm at night, their compound was well lit with security lights and florescent bulbs as they had just had a funeral in the compound and had guests . He was also able to see his assailants using the bulb light in the house where they dragged him to. He stated that the lights in the house and especially living room and bedrooms were on throughout the ordeal. He also identified the 1st and 2nd Appellant during the. Identification parade.

41. PW3 similarly testified that she was able to see all the Appellants who were her assailants. She stated that she was taken to her living room and bedroom which were well lit with fluorescent bulbs and that the Appellants did not wear any masks to disguise themselves. She was able to describe them to the police as she made the report and picked them out as her assailant from the parade. Her evidence of the lighting and identification of the assailants was corroborated by Pw2,4,5,9 and 12. In **Wamunga v Republic [1989] KLR 424**, the Court of Appeal cautioned that:

"Evidence of visual identification in criminal cases can bring about 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 mere identification of the accused which he alleges 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."

42. Further in **Francis Kariuki Njiru & 7 others v Republic [2001]eKLR**, the Court of Appeal stated that;

"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all"

43. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see **Maitanyi v Republic [1986] KLR 198** and **R v Turnbull [1967] 3 ALL ER 549**). The Court of Appeal was categorical in **Kiarie v Republic [1984] KLR 739**, that reliance on such evidence of identification must be "absolutely watertight" to justify conviction. See **Daniel Oginga & 2 others v Republic [2019] eKLR**.

44. As earlier stated, complainants adduced evidence that they were able to see their assailants as the house lights were on during the entire ordeal which lasted several minutes. It is my finding that the electric lights were sufficient enough to enable them identify their assailants coupled with the fact that they had several minutes with their assailants and were able to give an accurate description to the police.

45. Identification parade procedures are regulated by Police Force Standing Orders now under the National Police Service Act 2011, and previously under the Police Act (repealed). The procedure for identification parades were also laid out in the cases of

R V. Mwangi s/o Manaa and Ssentale v Uganda. The rules include the following: -

- i. The accused has the right to have an advocate or friend present at the parade;*
- ii. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;*
- iii. Witnesses should be shown the parade separately and should not discuss the parade among themselves;*
- iv. The number of suspects in the parade should be eight (or 10 in the case of two suspects);*
- v. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;*
- vi. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and*
- vii. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.*

46. The Appellants have not given reasons for faulting the identification parade. There is nothing to show that the procedures were not followed. In any case the identification parade reports adduced to evidence indicate that the Appellants signed and confirmed satisfaction in the manner in which the parades were carried out. It is the finding hereof that the identification was proper and sufficient in the circumstance.

e) Whether the prosecution evidence was contradictory.

47. The Appellants took issue with the Prosecution evidence contending that it was so contradictory, inconsistent and full of discrepancies. They cited contradiction as to what they were wearing and their physical description.

48. The Court of Appeal, **in Joseph Maina Mwangi –Vs- Republic Criminal Appeal No. 73 of 1992.** made it clear that:

“An appellate court in considering those discrepancies must be guided by the wording of section 382 Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence”.

49. In the more recent case of **Philip Nzaka Watu vs. R [2016] eKLR** the Court of Appeal held that:

“...it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

50. Odunga J in **Michael Mumo Nzioka v Republic [2019] eKLR** observed that:

“The general rule as regards the effect the discrepancies in the evidence of witnesses have in discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling, substantial or deliberate. See Law of Evidence (10th Ed) Vol. 1 at 46.

86. Where there are differences in the narration of events by prosecution witnesses, especially as to recounting or recollecting the dates of the events, which are mere discrepancies that would not avail the accused person, because some of such discrepancies are expected as being natural (The State vs. Sunday Dio Dogo (Alias Sunday Idogo) HSO/3C/2012, Oboh J in the High Court of Nigeria).....

It therefore follows that each case must be considered on its own peculiar circumstances. There are cases where the inconsistency is so minor that clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness’s evidence or any part of his testimony.”

51. From the evidence it is the finding of this court that the inconsistencies raised in the prosecution’s case were minor and did not go to the root of the case.

f) Whether the prosecution proved the case against the Appellant beyond any reasonable doubt

52. The Appellants were convicted on the three counts of robbery with violence. The offence of robbery with violence is a creation of Sections 295 and 296(2) of the Penal Code. The offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

(a) The offender is armed with any dangerous or offensive weapon or instrument, or

(b) The offender is in the company of one or more other person or persons, or

(c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

See **DONALD ATEMIA SIPENDI V REPUBLIC [2019] eKLR**.

53. In the instant case there is credible evidence that the Appellants were in a group of eight when they attacked the Complainant and hence executed a common intention. (See Section 21 of the Penal Code Chapter 63 of the Laws of Kenya, the case of **Njoroge v. Republic [1983] KLR 197**. The Appellants were also armed with pangas and other crude weapons which they used to cut the Complainants. In fact according to PW1 he only complied with the demands of the assailants after he was beaten seriously by the assailants. PW7 confirmed that Pw1 was treated at the health facility and that he had serious cut injuries. The P3 Form which was produced as an exhibit vouched for that. As to whether there was theft, there is as well evidence to that end. The complainants lost money, a mobile phone and other personal items. These items were never recovered. It is therefore reasonable and believable that PW1 lost these items in the attack and that constitutes theft.

54. In the upshot this court finds that all the ingredients of the offence of robbery with violence against the Appellants were proved, and that the Appellants conviction on the evidence before the court was safe.

Sentence

55. The Appellants were sentenced to suffer death on the three counts of robbery with violence. During the sentencing, the trial magistrate considered their mitigation. However, by the time the court rendered the sentences the offence of robbery with violence attracted a mandatory death sentence on conviction. Now due to a change in law courtesy of the Supreme Court decision in **Francis Karioko Muruatetu & Another v. Republic [2017] eKLR** sentencing courts now have discretion upon conviction in capital offences. I therefore herewith quash the death sentence imposed on the Appellants. In place thereof I hereby sentence all and each of the Appellants to a prison term of twenty (20) years from the date of arrest. Right of appeal in 14 days.

Dated, Signed and Delivered in Open Court at Kakamega this 13th day of December, 2019.

E. K. OGOLA

JUDGE