**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 114 OF 2018**

**(*Appeal against conviction and sentence in Judgment delivered by Hon.Cheruto C. Kipkorir, Senior Resident Magistrate, on 26th July 2018 in Mumias Criminal Case No. 871 of 2017)***

**1. HASSAN MAKATSWA KWOBA**

**2. ISAAC WESONGA...........................APPELLANTS**

**VERSUS**

**REPUBLIC...........................................RESPONDENT**

**JUDGMENT**

**Background and Brief Facts**

1. This appeal stems from the Judgment of the learned trial magistrate above named. The appeal was filed on 6th August 2018. The grounds of appeal as set out in amended grounds of appeal *are* that*:*

*a) The trial court failed to appreciate that the charge sheet was defective under section 214 of the CPC*

*b) The prevailing circumstances and the alleged mode of lighting could not warrant a positive identification*

*c) The trial court and the prosecution failed to comply with section 164 and 165 of the Evidence Act on the issues of the first report*

*d) The prosecution case was marred with discrepancies*

*e) The prosecution case failed to establish the offence of robbery with violence*

2. The appellants were charged together with other people with the offence of Robbery with violence, contrary to 296(2) of the Penal Code. The particulars were that on the 9th day of September 2017, at Matungu market, Mayoni sub-location, in Matungu sub-county within Kakamega County, the appellant jointly with others, while armed with dangerous weapons namely pangas, robbed Julius Simbauni of cash, Kshs. 10,000/-, mobile phone make *Techno*, ,two and half sacks of *omena*, all valued at Kshs. 45,000/- and immediately before or immediately after the time of such robbery assaulted the said Julius Simbauni causing him actual bodily harm.

3. At the conclusion of the trial, the learned trial magistrate found the appellant guilty and proceeded to convict and sentence him to life imprisonment.

4. It is the said conviction and sentence that form the basis of the instant appeal.

5. This being the first appellate court, I am guided by the principles set out in the case of **David Njuguna Wairimu vs.Republic [2010] eKLR** where the Court of Appeal stated:

> ***"The duty of the first appellate court is to analyse and 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 appellant 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."***

6. In a much earlier decision, the Court of Appeal similarly held in Okeno **vs. Republic [1972] EA 32** 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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."***

**Issues for Determination**

> **a) Whether the charge sheet was defective**
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> **b) Whether the assailants were in the company of one or more persons**
>
> **c) Whether the assailants were armed with pangas**
>
> **d) Whether the assailants caused actual bodily harm to the said Julius Simbauni**
>
> **e) Whether the appellant was positively and properly identified**

**Whether the charge sheet was defective**

7. It was the appellants' submission that the charge describes the penalty of the offence which does not disclose the offence of robbery with violence. His summation was that the charge sheet was defective and could not be cured.

8. The charge sheet indicated that the appellants were charged with *"Robbery with violence contrary to Section 296(2) of the Penal Code"*. The said provision states as follows:

> ***"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."***

9. Section 134 of the Criminal Procedure Code provides 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."***

10. A look at Section 296(2) of the Penal Code shows that the said section provides for both the ingredients and punishment for the offence of aggravated robbery and that the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. The Court of Appeal has on several occasions held that the offence of Robbery with Violence ought to be charged under Section 296(2) of the Penal Code (See The Court of Appeal in the cases of Joseph **Njuguna Mwaura & 2 others vs. Republic [2013] eKLR; Joseph Onyango Owuor & Cliff Ochieng Oduor vs. R [2010] eKLR (Criminal Appeal No 353 of 2008)** and **Simon Materu Munialu vs. Republic [2007] eKLR (Criminal Appeal 302 of 2005**)

11. It is the finding hereof that the appellant was properly charged with the offence of Robbery with Violence under Section 296(2) of the penal code and that the particulars of the offence disclosed all the ingredients for the said offence.

12. This ground of appeal therefore has no legs on which it can stand and the same must therefore fail.

**Whether the assailants were in the company of one or more persons**

13. One of the ingredients necessary to prove the offence of robbery with violence is that the offender must be in the company of one or more persons. (See the Court of Appeal in **Oluoch vs. Republic [1985] KLR** and a 3-judge bench decision of this court in **Joseph Kaberia Kahinga & 11 others vs. Attorney General [2016] eKLR)**

14. **Julius Omethako Simbauni,** testified as PW2 and stated that he was a businessman who sold *omena* and fingerlings. PW2 stated that on 9th September 2017 he was alone on the road when three people robbed him of Kshs. 10,000/- cash, *omena* and fingerlings. **PC Lucky Sanga** testified as PW3 and stated that he was the Investigating Officer and that on 9th September 2017 PW2 reported that three men had robbed him of his phone, make *techno*; Kshs. 10,000/- and two bags of omena all worth Kshs. 45,000/=.

15. From the evidence, it is clear that the attack on PW2 was committed by more than one person.

**Whether the assailants were armed with pangas**

16. Another ingredient necessary to satisfy the offence of robbery with violence is the fact that the offenders must have been armed with any dangerous and offensive weapon or instrument (See the Court of Appeal in **OLUOCH –VS – REPUBLIC [1985] KLR (supra);** 3-judge bench decision of this court in **Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR)(supra)**

17. PW2 testified that one of the assailants had a panga. PW3 stated that PW2 informed him that the assailants had a panga. **Raphael Mbaya** testified as PW1 and similarly stated that PW2 informed him that the attackers had a panga. While some instruments or weapons would be obvious without the need of defining them, there are others which are not as obvious. For instance, under the definition of dangerous or offensive weapon, it includes at one extreme, a stone or stick and the other extreme a firearm **(Joseph Kaberia Kahinga & 11 others vs. Attorney General [2016] eKLR) (supra)**. A rungu is definitely dangerous and offensive when used against a person and does not need defining. I find that the evidence on record satisfies the ingredient that the assailants were armed with a panga which is a dangerous and offensive weapon.

**Whether the assailants caused actual bodily harm to the said Julius Simbauni**

18. Another ingredient necessary to prove the offence of robbery with violence is the fact that the offenders immediately before or immediately after the time of the robbery wound, beat, strike or threaten to use other personal violence (See the Court of Appeal in **Oluoch vs. Republic [1985] KLR(supra);** 3-judge bench decision of this court in **Joseph Kaberia Kahinga & 11 others vs. Attorney General [2016] eKLR)(supra)**

19. PW2 testified that one of the attackers kept hitting and cutting him with the panga as he was being robbed and that he sustained injuries on his hand, legs, head and back as a result. PW1 testified and stated that he was a Clinical Officer working in Matungu. PW1 testified that he examined PW2 on 9th September 2017, a day after the attack and noted that he had a cut wound on the forehead, a wound on the left cheek, pains on the left shoulder, left finger and left leg. PW1 stated that PW2 informed him that he was assaulted by people known to him and that they had a panga. PW1 added that he examined the appellant and confirmed the injuries he sustained. PW2 also concluded that the injuries were classified as 'harm' and that the weapon used was a panga. PW1 produced treatment notes and a medical P3 report as *Pexhibit 1* and *Pexhibit2* respectively. PW3 testified that PW2 informed him that the attackers harassed and beat him up and that he issued the medical P3 form for examination at Matungu by PW1.

20. Based on the evidence above, I find that the attackers of PW2 actually used personal violence and caused him bodily harm.

**Whether the appellant was positively and properly identified**

21. Identification is another crucial ingredient necessary to satisfy the offence of robbery with violence. The ultimate question in all criminal proceedings is whether the person(s) brought before the trial court actually committed the offence(s) with which they have been charged.

22. PW2 testified that he recognized the appellants using the moon light as the robbery happened between 5.00-6.00am. PW2 added that he knew the appellant and his accomplices as they used to be *boda boda* operators in his home area and that during the robbery, the appellant returned to carry the items several times. During cross-examination, PW2 stated that there was no one else around when the robbery happened and that he did not see the attackers approaching. PW2 added that even though the appellant was a *boda boda* operator, he did not have a motor bike that day. PW2 further testified that he knew the appellant's home but he did not know it very well. PW2 added that he was not present when the appellant was arrested and that he was only called to identify him once he was arrested.

23. PW3 stated during cross-examination that PW2 had specified the appellant's name when he reported but then he did not indicate the same in his initial statement. PW3 added that there was no independent witness apart from PW2 and that it was PW2's word against the appellant's. PW3 further testified that PW2 informed him that it was still dark at the time the incident occurred. PW3 further stated that they were not able to recover the stolen items including the phone which they did not track so as to place the appellant at the scene. PW3 stated that PW2 named the 1st appellant by his first name alone and conceded that it was not possible to know someone just by one name. PW3 added that the scene was well lit as it was Matungu market near a hospital and he stated during re-examination that there were security lights at the scene and that they were on at the time.

24. In his defence as DW3, the appellant testified that he did not know PW2 and only saw him for the first time in court giving evidence

25. The Court of Appeal, in the case of **Jali Kazungu Gona vs. Republic [2017] eKLR** held that:

> "*In* ***Wamunga vs. Republic [1989] KLR 424*** *this Court while discussing the caution to be taken where the only evidence against an accused is of identification succinctly stated: -*
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> ***"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".***
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> ……………………………………….
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> "*To begin with BP was clear that she did not know the appellant prior to the incident hence, it was crucial for the veracity of her identification of the appellant to be tested through an identification parade. For the reason that identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in* ***John Kamau Wamatu & another vs.***

***Republic* [2010] eKLR**. *Unfortunately, her identification of the appellant at the trial as submitted by the appellant amounted to dock identification. In that regard, we reiterate the findings in the decision of this Court in* ***Ajode vs. Republic* [2004] eKLR** *which expressed 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."***

(See **Court of Appeal in Maitanyi vs. Republic [1986] KLR 198** and **D.K Kemei J** in **Hassan Abdallah Mohammed vs. Republic [2017] eKLR**,)

26. The Court of Appeal in the case of **Toroke vs. Republic [1987]eKLR 204** observed that it is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So the error or mistake is still there whether it be a case of recognition or identification.

27. It is the finding of this court that the evidence of the identification of the appellant is very shaky and unreliable. Firstly, I do not believe that the moon provided sufficient lighting at that time (5.00 a.m. ) to enable PW2 positively recognize his attackers. Secondly, going by PW3's testimony, they were able to apprehend the appellant without being given any other description by PW2 other than one name. It could not have been possible for the police to know the appellant with just information of a singular name and since PW2 was not present during the appellant's arrest, one wonders how the police were able to know the identity of the appellants with such scanty information. PW3 conceded that he had not included the name of the appellants in his initial report and this adds to my conclusion that PW2 never mentioned the appellants to the police when he first made his report. The evidence by PW3 that the appellants' names were in the statement recorded later can only be an afterthought and thus unreliable. The same can also be said of PW3's testimony that the crime scene was well lit at the time as there were street lights and yet PW2 never mentioned anything to do with streetlights insisting that he used the moon to identify the appellant. The totality of the foregoing is that it was not proper to convict the appellants on the basis of such faulty or unreliable identification evidence. The appellants were not properly and positively identified

**Disposition**

28. It is the finding hereof that the respondent failed to discharge the burden of proof to the required standard of beyond reasonable doubt for the offence of Robbery with Violence contrary to section 296(2) of the Penal Code against the appellants.

29. The upshot is that this appeal is merited and succeeds on both conviction and sentence and that the appellants are herewith forthwith released unless lawfully held.

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

**E. K. OGOLA**

**JUDGE**