REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R MWONGO, J

CRIMINAL APPEAL NO. 159 OF 2015

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 2682 of 2013 in the Chief Magistrate's Court, Naivasha, (E Kimilu – SRM)

GEORGE SHITAKHA SHITOMBOLE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. The appellant George Shitakha Shitombole and one Joel Muguku Wachira were charged with two counts of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The appellant also had an alternative charge of handling stolen property contrary to **section 322 (2) of** the **Penal Code** . Joel Muguku Wachira was discharged after the trial court found that he had no case to answer. The appellant was convicted on both counts of robbery with violence on 22nd October 2015, and sentenced to death.

2. In count one, the particulars of the offence were that the 12 October 2013 at Kikopey Area while armed with the rungus and pangas with others not before the court he robbed Willy Mbugua Kinuthia of one motor vehicle registration number KBB 353D make Mitsubishi Canter, a mobile phone Nokia Asha 200, a driving licence, National ID card and cash Kshs 840/-all totalling Kshs 1,240,000/= during which time he used actual violence.

3. The particulars of the offence in count two were that on 12 October 2013 at Kikopey Area while armed with the rungus and pangas jointly with others not before the court he robbed Joel Njoroge Wainaina of one mobile phone, a pair of shoes, one national identity card and Kenya shillings 700/-all totalling Kenya shillings 5,500/-and during the time of such robbery used actual violence to the said Joel Njoroge Wainaina.

4. Aggrieved by the sentence the appellant filed the present appeal. In his supplementary grounds of appeal filed on 4th July, 2018 together with his written submissions, the appellant bases his appeal on the following grounds:

> **a. That the learned trial magistrate erred in law and fact when he relied on the identification and the parade which the same was not proved adequately as required in law by the 46 forces standing orders.**
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> **b. That the learned trial magistrate erred in law and fact when he relied on the safaricom data which the same was unproved of its source and the same was authentic to be relied upon.**
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> **c. That the learned trial magistrate erred in law and fact when he failed to take into consideration that the accused was not arrested with stolen exhibits. i.e motor vehicle and the other items.**
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> **d. That the learned trial magistrate erred in law and fact when he failed to find that his mode of arrest did not culminate from the crime in question.**
>
> **e. That the learned trial magistrate erred in law and fact when he dismissed the defence of the accused by making a partial evaluation instead of being impartial c/s 169(1) of the penal code.**

The appellant seeks that the appeal be heard and his conviction quashed, sentence set aside.

Overview of the evidence

5. On 3rd October 2010, PW1 received a phone call on his mobile phone number 0726 718 944 from a person who said he was Stephen Njihia. He was using cell phone number 0727 411 969, and said he needed transport for manure from Gilgil to Memo along Naivasha – Kinangop highway. On 4th October, Njihia called PW4 on his mobile number to the surprise of both of them, as they didn't know how he got PW4s number. So PW1 called Njihia and requested payment of Shs 5,000/- for fuel to transport the manure.

6. Eventually Njihia sent 2,060/- to PW1s number through number 0726 718 944 saying he would pay the rest later. They agreed the job would be done on 6th October, but this did not happen due to a number of incidents explained to PW1 on telephone by Njihia.

7. On 8th October, 2010, Njihia called PW1 again and told him that he had used the money but would call again later. On 10th October, Njihia called PW1 and they agreed that they would transport manure to another customer, together. The cost was agreed at Kshs 12,000/-. It was agreed that the job would be done on Saturday 12th October.

8. That Saturday PW1 woke up at 4.00am, and transported some potatoes to his mother's house. He was with PW4, the turnboy. Whilst at his mother's house, Njihia called him and asked him to pick someone at Naivasha junction along Nairobi Nakuru highway. They embarked on the job and stopped at the Naivasha junction where they picked a man whom they had been told had attended PW1s father. (I will refer to him as Passenger 1). When they got to Gilgil weighbridge, PW1 stopped and bought milk. He also got some for the turnboy and Passenger 1, who declined saying he didn't take milk.

9. When they got near St Marys, PW1 called Njihia for directions, and he told him to proceed to Nyama Choma. On getting close to Nyama Choma, Passenger 1 told PW1 to call Njihia again for directions, and Njihia told them to turn left at Nyama Choma and they would find someone to direct them. They indeed found someone sitting under a tree holding a Dasani water bottle; they picked him up and he took up the role of giving them directions (I refer to him as Passenger 2). So, all four, PW1, PW2, and Passengers 1 and 2 were all sitting together in the vehicle cabin.

10. After a short while, Passenger 2 asked PW1 to stop as he wanted to talk to two people who are walking. When they stopped, one of the people came to the driver's side and opened the door. He had a maasai sword, and tried to pull out PW1. Passengers 1 and 2 also turned against them, and pushed PW1 and PW2 out of the vehicle Passenger 2 was holding a panga. The three assailants led PW1 and PW2 into a bush and robbed them of what they were carrying: PW1 lost 840/= ID card, mobile phone Asha 3000; PW4 lost Kenya shillings 700/-, mobile phone worth 3000, units ID card and sports shoes. The assailants then tied P W1 and PW2 on the hands and legs and forced them to lie on their stomachs. According to PW1 this robbery occurred at about 8.00am.

11. While there, PW1s phone rang, and the assailants asked him to say who it was. PW1 saw it was Njihia, and they told him to tell Njihia everything was just fine. In fear of being killed PW1 told Njihia he was fine. His assailants then covered him with a woolen hat and forced him to drink some bitter water from the bottle.

12. Later, after the assailants had left having robbed the complainant's of their vehicle, PW1 and PW2 were able to untie themselves and walked to the road. From there they were directed to police officers and reported the incident. Thereafter, they were taken to Gilgil hospital where they were treated.

13. After police carried out investigations, PW1 was called to identify if their vehicle was among reported stolen vehicles. He testified that he was also invited to an identification parade on 11th November, 2010, and he was able to identify the appellant, who had been in the vehicle cabin with them for one hour. He said that as he had been unable to see the faces of their other assailants, he was unable to identify the others.

14. PW4 testified that on 11th November, 2010, he was also called to the police station for an identification parade. He was able to identify the appellant who was the first person they picked at Naivasha junction. He said they had spent 1 ½ hours with the man, with whom they talked easily in the vehicle.

15. Evidence concerning the conduct of the identification parade itself was given by PW6, Chief Inspector John Owuoth, who arranged for it. He testified that he had nine members of the parade including the accused persons. They were prisoners arrested for different offences. In conducting the parade, he said, he followed paragraph 6 of the Identification parade form which was produced as exhibit 6. The witnesses were kept in his office while the parade was set up in the cells; the witnesses never saw the suspects prior to the parade and he explained to the witnesses that there were nine members of the parade and that the witness should touch the suspect on the shoulder or stand near them if he identifies the suspect. This was also explained to the suspect and he was content and had no question.

16. The exercise was repeated for the second witness and the position of the suspects was changed. In both cases the appellant was identified by both witnesses.. Each witness explained the how he identified the suspect. The suspect was asked if he wanted to call a member of his family, but appellant opted not to. That ended the identification parade exercise.

Issues for determination

17. The court finds that the issues for determination are the following:

a. Whether the appellant was properly arrested in connection with the said robbery;

b. Whether the identification parade was properly conducted and the appellant properly identified;

Arrest of the Appellant

18. The appellant argues that although PW1 and PW4 allege they were in the vehicle with the alleged attackers, they did not clearly identify the appellant in such a way that it would have led to his arrest for the crime he is charged with. He also argues that there was nothing found on him or in his possession during his arrest that incriminated him leading to his arrest. Indeed he states that he was not arrested for having committed the crime for which he was charged.

19. It should be noted that PW1 and PW4 are the only admitted eyewitnesses who were present at the unfolding of the incident. They are also the complainants. The evidence of both PW 1 and PW4 is consistent that they were respectively the driver and turnboy of the ill-fated vehicle registration No KBB 353D Mitsubishi Canter. These facts are not disputed.

20. Both the driver and the turnboy lost their phones during the robbery. PW1's phone was tracked down at Kinamba. The person in possession of it was PW2 who told the police that it had been sold to him by the appellant, and a balance of the purchase price had been left unpaid. The appellant was arrested when he was tricked by PW2 to go and collect the balance of the price for the phone he had sold. According to the proceedings, the appellant had agreed that he had sold PW2 the alleged Nokia Asha phone.

21. The appellant was arrested based on the doctrine of recent possession which is explained in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v. Republic Cr App. No. 272 of 2005(UR**). There, the court discussed the elements of proof as to recent possession as follows:

> **"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof:**
>
> **i). that the property was found with the suspect;**
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> **ii). that the property is positively the property of the complainant;**
>
> **iii). that the property was stolen from the complainant;**
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> **iv). that the property was recently stolen from the complainant.**
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> **The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."**

22. Applying the above principle, it is clear that the phone, being an item that can readily change hands from one person to another, it is quite probable that the appellant could have already disposed of it by the time of his arrest. It must be noted from the evidence that the phone was sold at a rather low price of Kshs1700/-. PW2, who bought it, testified that he paid a deposit of Kshs 1500/- and in cross examination said that the appellant was in a hurry. He remarked that phones are not purchased anywhere like sukumawiki. Further, after PW2 was arrested and disclosed who had sold the phone to him, the appellant was arrested and whilst at the police station he admitted that he had sold the phone to PW2.

23. The fact that the stolen phone was identified by PW1 as his property, is another aspect of consideration given that the phone had been recently stolen. It was positively identified to be the property of PW1. These facts are significant in establishing the link of the appellant to the robbery, cemented by the fact that the appellant was positively identified by both PW1 and PW4, the two eyewitnesses that had spent no less than an hour in the vehicle cabin with him on the morning of the robbery in daylight and readily recognized his face.

24. Given all the foregoing, I have no doubt that the person arrested was the person who had been clearly in the vehicle with the two complainants and is the same person who was arrested for having sold the stolen phone belonging to PW1. This ground of appeal fails.

Identification parade

25. The appellant argues that no positive identification of the attackers was made; that the witnesses failed to give any physical descriptions or any unique marks regarding the appellant. He admits that though PW1 stayed with the attacker in the vehicle for over one hour, still PW1 would not have had any reason to observe the attacker keenly as he never anticipated anything queer to happen for later identification. He further alleges that the persons in the identification parade were not similar in likeness to him and also that his fundamental rights were not explained to him.

26. The issue of identification and the conduct of the identification parades has been a subject of prolonged deliberation by the courts and the law is now quite settled. In the cases of **John Mwangi Kamau v Republic [2014] eKLR** and **Douglas Kinyua Njeru vs. Republic [2015] eKLR** the Court of Appeal clearly restated the parameters in conducting parades. In **John Mwangi Kamau's case** the Court stated:

> **"15. 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 –vs- Republic – Criminal Appeal No. 68& 69 of 2008. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DW1, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB. No. 45 of 24/6/2003; the assailants' were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, this Court observed:-**

"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."

16. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure? In *Nathan Kamau Mugwe –vs- Republic- Criminal Appeal No. 63 of 2008 this Court faced with a similar situation expressed itself as follows:-*

"As to the compliant in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

17. Based on the foregoing, we are of the considered view that the failure to give the description did not invalidate the identification parade. We find the issue that falls for our consideration is the weight to be attached to the said identification evidence. On the issue of whether the identification parade was properly conducted we can do no better than to reproduce this Court's observations in David Mwita Wanja & 2 others –vs- Republic- Criminal Appeal No. 117 of 2005:-

"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -

"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

> **"6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail:……...**
>
> **(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;…….**
>
> **(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"**

18. **PW5 (IP Francis) gave evidence of how the identification parade was conducted. He testified that the appellant was placed amongst eight members; the witnesses were in a different room while the parade was being prepared; none of the witnesses met the appellant before the parade; each witness was called alone to identify the assailants from the parade; after identification each witness was taken to a different place in order not to influence the others who had not gone through the parade. IP Francis testified that the appellant changed his position in the parade when each of the witnesses identified him. The appellant never objected to the manner in which the parade was conducted. Based on the foregoing evidence and the identification parade form on record we concur with the two lower courts that the identification parade was properly**

conducted. We also note that each witness identified the appellant as the assailant who was armed with the pistol. Therefore, there was corroboration of the identification evidence. We are of the considered view that the identification evidence was positive and free from error"

27. Applying the above tests to the present case, it is clear that the parade conducted by PW 6 was in accordance with the law. He followed the Forces Standing Orders containing the identification parade form which he produced as Exhibit 6. The outcome was the identification of the appellant under very clear circumstances, having spent about an hour in good light with both PW1 and PW4. There is nothing in the evidence that has brought any doubt in my mind that the appellant was properly identified using a lawful process of identification. This ground of appeal also fails.

Disposition

28. Having considered all the appellant's grounds of appeal, and also having carefully reviewed the evidence on record, I find that on the basis of the available evidence, the learned magistrate correctly convicted the appellant.

29. Accordingly, the appeal is dismissed.

30. Orders accordingly.

Dated and Delivered at Naivasha this 18th Day of October, 2018

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. George Shitakha Shitombole the Appellant

2. Mr. Koima for the State

3. Court Clerk – Quinter Ogutu