REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 86 OF 2015

POLYCARP IKUMU...APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(Being an appeal against the judgment, conviction and sentence of Hon. S. Mokua, Senior Principal Magistrate in Eldoret Chief Magistrates Court Criminal Case No. 28 of 2014 delivered on 29/06/2015)

JUDGMENT

1. The Appellant herein, **Polycarp Ikumu**, was jointly charged with one **Paul Kipkurui Sila** with three counts of robbery with violence before the Chief Magistrate Court at Eldoret. They denied the offence and were tried. Paul Kipkurui Sila (hereinafter referred to as **'the deceased')** died before judgment and the trial court rendered judgment on the Appellant herein who was convicted and sentenced to suffer death.

2. The particulars of the first count were that '*On the 30th day of December 2013 at Chemoset village in Eldoret West District within Uasin Gishu County jointly while armed with offensive weapon namely Somali sword, rungu, robbed Jason Kipserem Too one mobile phone make Nokia, Kshs. 2000/= all valued at Kshs. 5000/= and immediately after the time of such robbery used actual violence to the said Jason Kipserem Too.'* The particulars of the second count were that '*On the 30th day of December 2013 at Chemoset village in Eldoret West District within Uasin Gishu County jointly while armed with offensive weapon namely Somali sword, rungu, robbed Jane Too one mobile phone make Nokia, cash Kshs. 2500/= all valued at Kshs. 4500/= and immediately after the time of such robbery used actual violence to the said Jane Too.'* The particulars of the third count were that '*On the 30th day of December 2013 at Chemoset village in Eldoret West District within Uasin Gishu County jointly while armed with offensive weapon namely Somali sword, rungu, robbed Isabella Chepkemboi one mobile phone make Nokia, Kshs. 5500/=, Laptop make Sony and a computer phone all valued at Kshs. 123,500/= and immediately after the time of such robbery used actual violence to the said Isabella Chepkemboi.'*

3. Seven witnesses testified in a bid to prove the charges. They were **Jason Kipserem Too,** the complainant in respect to the first count, who testified as **PW1**. **PW2** was **Jane Too**, the complainant in respect to the second count and **PW3** was **Isabella Chepkemboi** who was the complainant in respect to the third count. **PW4** was a daughter to PW1 and a sister to PW2 and PW4. She was **Mary Jerop Too**. A Clinical Officer attached to Muliynget Health Centre one **Joseph Chesanai** testified as **PW5.** The OCS of Soy Police Station **No. 217268 C.I. Abdikadir Yusuf** who conducted identification parades testified as **PW6** and the investigating officer was **No. 39745 Sgt. Nathan Sabuni** from Soy Police Station who testified as **PW7**. I will for the purposes of this judgment refer to the witnesses in the sequence in which they testified.

4. As stated, the Appellant was found guilty of all the three counts, convicted and sentenced. It is that conviction and sentence which solicited this appeal. The Appellant mounted the appeal in person by filing a Petition of Appeal which raised six grounds of appeal as follows: -

> ***1. That the trial magistrate erred in law and facts by convicting me without that the alleged identification parade was conducted in contravention to the provisions of chapter 46 force standing orders.***
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> ***2. That the trial magistrate erred in law and facts by convicting me while relying on the evidence of identification without observing that identification was difficult especially when torch light is directed to the eyes of the victims and nowhere mentioned that the torch light shined on the faces of the assailants or robbers.***
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> ***3. That the trial magistrate erred in both law and fact by convicting me without observing that identification is difficult in darkness than day time and no physical peculiar features given the witnesses.***
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> ***4. That the learned trial magistrate erred in law and facts by convicting me on poorly investigation prosecution case in which the police failed to conduct finger dusting on the properties recovered within the compound.***

5. That the learned trial magistrate erred in law and fact by convicting me without considering that I was a victim of mistaken identity as there was nothing to link me with alleged offence.

6. That the learned trial magistrate erred in both law and facts by convicting me while rejecting my defence without giving any convincing reasons for the rejection as provided by section 169 (1) of the C. P. C.

5. The appeal was canvassed by way of written submissions on the part of the Appellant as the State made an oral response. In a nutshell, the Appellant mainly attacked the conviction on the issue of identification, that no theft was proved and that his right to fair trial under **Article 50(2)(g)** and **(h)** of the **Constitution** were infringed. In response Counsel for the State submitted that the charge was clearly and certainly proved as the Appellant was adequately identified and that all the ingredients of the charges were proved. Counsel prayed that the appeal be dismissed.

6. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

7. In discharging the foregone duty, I have carefully read and understood the proceedings and judgment of the trial court as well as this appeal. I will endeavor to deal with the following issues: -

(a) Whether the Appellant was one of the assailants;

(b) Whether the offence was proved as required in law: and

(c) Other issues raised by the Appellant.

I will consider each of the above issues singly.

(a) **On whether the Appellant was one of the assailants:**

8. The alleged robberies took place in the night of 29th and 30th December 2013 at the home of PW1 who was the husband to PW2 and the father to PW3 and PW4. PW1 did not witness the incident at all. He only woke up to find the lights in the house on and on asking PW2 if there was anything wrong it was PW2 who informed him that they had been attacked and robbed. PW1 realized that he had injuries on the hands, was bleeding from the mouth and nose and was feeling pain allover the body. Likewise, PW2 did not identify any of the attackers. She only saw them inside her room and she was rained on some blows. She was ordered to give them money and surrendered her Kshs. 2,000/= and gave them her phone together with the PIN as she had Kshs. 4,000/= therein. She then fell unconscious.

9. It was PW3 and PW4 who testified to have identified the attackers. PW3 stated that she heard some movement outside their house at night as she was in their room with her sister and cousin and stayed awake. She then heard PW2 scream. PW3 quickly sent a phone text message to his brother on the incident. The attackers then came to the door to their room and knocked. A loud bang followed and two of the attackers entered. They asked for money and ordered PW3 to open her handbag which she did and poured the contents on the bed. One of the intruders searched the items as PW3 looked at him under the light from the torch which the other intruder had. PW3 clearly saw the intruder under that light. That attacker took a Samsung Galaxy Tablet and Kshs. 5,500/=. The attackers then asked PW3 to escort them to PW1's room and that they needed Kshs. 100,000/=. PW3 pleaded with the attackers and promised co-operation. They left their room and went towards PW1's room. They walked through the corridor whose electricity lights were on. They passed PW3's grandmother's room and as the demand for the money intensified before they entered PW1's room.

10. There was a third attacker whom PW3 did not clearly see as he did not come near her. PW3 pleaded with the attackers that they did not have money as their maize, though packed, had not been sold yet. Inside PW1's room the lights were also on. PW3 saw PW1 injured and bleeding. Whereas the deceased was just calm the Appellant, armed with a knife and a rungu, kept on insisting on the money. PW3 asked PW1 if he had money but he did not. PW3 opened the drawers as she searched the room for money. PW3 interacted with the Appellant under electricity lighting for 20 minutes before the attackers left with a warning that on return the money must be available otherwise they were to kill PW1.

11. PW3 then recorded her statement with the police and gave a description of the attackers. Identification parades were conducted by PW6 and PW3 managed to identify the Appellant and the deceased.

12. PW4 corroborated the evidence of PW3. She also confirmed that she jointly with PW3 pleaded with the attackers that they did not have money and that they do not kill PW1. She likewise gave the description of the attackers to the police. PW4 described the Appellant as the one who was commandeering the ordeal and dealt with her and PW3 at very close range that they observed him well. Both PW3 and PW4 confirmed they did not know the deceased and the Appellant before the attack.

13. The villagers were so enraged with the attack and organized to pursue the attackers that very day. They recovered some of the stolen items around the dam side. Guided by the description given by PW3 and PW4 the search ended with the arrest of the deceased and the Appellant who were taken to Soy Police Station. PW7 requested PW6 who conducted twin identification parades where the deceased and the Appellant were each picked by PW3 and PW4. PW6 carefully explained how he conducted the parades. He emphasized that he complied with all the requirements and delivered well conducted parades. That, the members of the parade were from the police cells and that no police officer whether in uniform or otherwise participated. That, the Appellant as well as the deceased chose their positions on the parades and raised no objections and even voluntarily signed the parade forms. PW6 produced the parade forms as exhibits.

14. The foregone circumstances must now be interrogated with a view of ascertaining whether the identification of the Appellant was without error. The principles to guide this Court when faced with the foregone issue are well settled. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under; -

> ***i. "It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

15. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***ii. "... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

16. With the foregone caution it is imperative that I look at the issue of identification parades. PW6 stated clearly how he conducted the twin parades and spent time explaining to the Appellant the purpose of the parade. The conduct of identification parades was revisited by the Court of Appeal at Nyeri in **John Mwangi Kamau vs. Republic (2014) eKL**R where Honourable Justices Visram, Koome and Odek JJ.A. greatly and at length expressed themselves as under: -

> ***ii. "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:-***
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> > *iii. "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."*
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> > ***iv. 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:-***
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> > *v. "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.*
> >
> > *vi. 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."*
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> > ***vii. 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 inDavid Mwita Wanja & 2 others –vs- Republic- Criminal Appeal No. 117 of 2005:-***
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> > *viii. "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: -

ix. "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."

x. 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:

xi. "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: -

xii. ………………………………………………………

xiii. (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;

xiv. ………………………………………………

xv. (n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"

xvi. 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"

17. The Court of Appeal again and more reaffirmed the foregone legal position in **Douglas Kinyua Njeru vs. Republic (2015) eKLR.**

18. Based on the foregoing evidence and the identification parade forms on record and upon re-evaluating the evidence the totality thereof, and as weighed against the defence tendered by the Appellant, is that the identification parade was properly conducted. I also note that PW3 and PW4 identified the Appellant as the assailant who was commandeering the ordeal and was so close to them throughout the period and under a bright electricity light armed with a knife and a rungu which evidence further waters down the defence which mainly centrered on how the Appellant was arrested. Therefore, there was corroboration of the identification evidence. I am hence of the considered view that the identification evidence was positive and free from error.

(b) Whether the offence was proved in law:

19. The Appellant was convicted with three counts of robbery with violence. The starting point is the legal provision. The offence of robbery with violence is a creation of **Sections 295** and **296(2)** of the Penal Code. For clarity purposes I reproduce the sections as tailored: -

i. "***295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***

ii. ***296(2). 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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

20. From the foregone legal provisions, it can be seen that the offence of robbery with violence is made up of two parts. The first part is the **robbery** and the other part is the **violence**.

21. **Robbery** is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses

actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: **Theft** and **the use of or threat to use actual violence.**

22. On the other hand, 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.***

23. In this case there is credible evidence that the Appellant was in the company of two other persons, the deceased and another one who was not arrested. Although each of them executed a clear role in the act, it was the Appellant who led the gang and actively engaged PW3 and PW4. The Appellant and the deceased were both armed. The three persons acted together to further a common intention and as such the doctrine of common intention under **Section 21** of the **Penal Code** Chapter 63 of the Laws of Kenya comes to play. The Court of Appeal in the case of **Njoroge v. Republic (1983) KLR 197** explained the doctrine as follows:

> ***'…If several persons combine for unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavor to effect the common object of the assembly…'***

24. In the case of **R v.Tabulayenka s/o Kirya (1943) EACA 51** the Court of Appeal of East Africa held that common intention may be inferred from the accused presence, their actions and omissions of either of them to disassociate himself from the assault. In this case the Appellant, the deceased and the other one who is at large executed a common unlawful intent against the complainants.

25. The attackers also used actual violence on PW1 and PW2. The P3 Forms filled by PW5 vouched for that. There is evidence that they used weapons like knives and rungu as well as blows. The rungu and knives were dangerous weapons in the circumstances of this matter. As for PW3, there is evidence that the Appellant was armed with a knife and a rungu and was in the company of the deceased as they commandeered her.

26. As to whether there was theft, there is as well evidence to that end. PW1 lost Kshs. 2,200/= and a mobile phone, PW2 lost Kshs. 2,000/= in cash, Kshs. 4,000/= in electronic form and her mobile phone. PW3 lost Kshs. 5,500/= and a Samsung Galaxy Tablet. That evidence was uncontroverted. It is therefore reasonable and believable that PW1, PW2 and PW3 lost their items in the attack and that constitutes theft.

27. The upshot is that all the ingredients of the offence of robbery with violence in each of the here counts were proved. The Appellant was hence rightly found guilty and convicted.

(c) The other issues raised by the appellant:

28. The Appellant further raised several other issues which I must consider. One of them was that none of the lost items were recovered from him. The Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret Peter Okee Omukaga & Another vs Republic (unreported)** rightly stated that such non-recovery of the items did not in any way point to the innocence of the Appellants. On whether **Article 50(2)(h)** of the **Constitution** was infringed during the trial, this Court concurs with the position taken by the State that the Appellant was charged during the transition period as provided for under the **Fifth Schedule** of the **Constitution** hence no violation.

29. The Appellant also contended that the sentence was very harsh, unconstitutional and excessive. I have looked at the sentencing proceedings where the court was then rightly guided by the mandatory nature of the then sentence. The court then had no option but to hand down the death sentence.

30. That legal position has by now changed courtesy of the Supreme Court in **Francis Karioko Muruatetu & Another v. Republic (2017) eKLR**. The Court, rightly so, found and held that the mandatory nature of the death sentence in capital offences is unconstitutional since mitigation is an important congruent element of fair trial. The Supreme Court remitted the matter to the High Court being the trial and sentencing court for purposes of sentence re-hearing. I have no doubt that such remain the only reasonable way forward as the sentencing court will receive appropriate submissions from the prosecution and the defence prior to the sentencing.

31. One thing which I must clarify is that although the decision in **Francis Karioko Muruatetu** (supra) was on a murder case, the position changes not in the case of robbery with violence cases since **Section 296(2)** of the **Penal Code**, Cap. 63 of the Laws of Kenya provides the only sentence on conviction to be a death sentence.

32. The upshot of the foregone analysis is that the appeal is dismissed on conviction and allowed on sentence only. The matter is hereby remitted to the Chief Magistrate's Court at Eldoret for hearing on sentence only and on priority basis.

It is so ordered.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at ELDORET this 1st day of November, 2018.

H. A. OMONDI

JUDGE