REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 134 OF 2016

JOHN MAKENZI MUTUNDU.....APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

(Being an appeal from the original conviction and sentence in ***Thika Chief***

Magistrate's Court Criminal Case No. 772 of 2014 *by* ***M. W. Mutuku*** *on* ***18/09/15)***

J U D G M E N T

1. **John Makenzi Mutundu,** was jointly charged with three (3) others with three (3) Counts of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code.** In the alternative he faced a charge of handling stolen property contrary to **Section 322(1)(2)** of the **Penal Code.**

2. After full trial the trial Court acquitted his co-accuseds and found him guilty of the 1st and 2nd Counts and sentenced him to death on both Counts.

3. Aggrieved by the conviction and sentence he now appeals on grounds that:

- The trial Court erred in sentencing him to suffer death twice.
- The first reports made by the Complainants at the Police Station where the Appellant was not identified or his description given were overlooked by the Court.
- The evidence of identification was wanting.
- Witnesses were coached.
- Testimonies tendered in respect of the Appellant's arrest was riddled with doubts.
- Evidence of possession of stolen property did not meet the required standard.

4. Facts of the case were that on the **28th January, 2014** PW1 **Mercy Wariara Muthuri,** the Complainant in the 1st Count, and PW4 **Jane Nyokabi,** her mother and the Complainant in the 2nd Count who had gone to a funeral returned home at about **9.30 p.m.** PW4 called their farmhand to open the gate. The gate was opened and they drove in. As they waited for the gate to be closed they heard PW2 **Paul Waweru,** the farmhand screaming. All over a sudden a person hit PW1 with a pistol on the forehead and ordered her to come out of the motor vehicle. The person demanded for the phone she had which she gave him. It was a black berry valued at **Kshs. 40,000/=.**

They also took **Kshs. 1,000/=** that she had in the motor vehicle. They were ordered out of the car. PW4 who is paralyzed could not disembark. The people who were about three (3) in number were armed with pangas and knives. They made PW1 lead them into the house where they took three (3) televisions, make

Sony Bravia and Samsung, two (2) radios make LG, four (4) pairs of shoes, one DVD Player make Sony, and one mobile phone all valued at **Kshs. 570,000/=** the property of PW4 without her consent. They ordered the house help, **Esther** and PW2 to get PW4 out of the motor vehicle. They parked the goods inside the motor vehicle and ordered PW1 to transport them out of the compound. She drove them to **Kiandutu.**

5. She stopped the motor vehicle as ordered and they offloaded the goods. She was allowed to drive off. The matter was reported to the police who investigated the case. Later on the Blackberry phone was found in possession of PW3, **Stephen Kariuki** a member of a local church who led PW1 and others to the house of **Maina** within **Kiandutu.** He was in company of the Appellant. PW1 identified the Appellant as the person who hit her with a pistol and led her to the house. His face was not covered and electric lights that were on enabled her to identify the person. A Sony Bravia Television was found in the house of **Maina.** They moved to the house of the Appellant where they recovered a radio make LG grey in colour. PW7 **No. 58714 Corporal Rueben Tenai** continued with investigations. The Appellant and one of his co-accused led them to the house of one **Dennis** but nothing was recovered. A radio and three (3) speakers were recovered from his co-accused's house. One of his co-accused led the police to where a Television set was recovered. An identification parade was subsequently conducted where the Appellant was identified as one of the robbers. He was arrested and charged.

6. When put on his defence the Appellant gave sworn evidence. He stated that on **22nd February, 2014** he opened his shop at **8.00 a.m.** as usual. He closed down the shop at **1.00 p.m.** and went home for lunch. After lunch he decided to pass by his co-accused's house, two police officers went to the house, identified themselves and sought to go to his house. They took him to his house and conducted a search but recovered nothing. They took him to the police motor vehicle where he met two (2) people who had been arrested. They were taken to the police station and placed in custody. Three days later he was taken to the office for purposes of taking finger prints where he saw three (3) people. When the parade was conducted he was surprised to see one of the persons as an identifying witness. He indicated that he was not satisfied with the way the parade was conducted. He declined to sign the identification parade form. Later, he was charged. He denied having committed the offence in issue.

7. At the hearing of the Appeal he relied on written submissions that I have duly considered.

8. The State through **Ms. Mutheu** opposed the Appeal arguing that the elements of **Robbery with Violence** were met and the Appellant was positively identified on the identification parade.

She concluded by asking the Court to correct the error of sentencing the Appellant to death twice.

9. This being the first Appeal, I am duty bound to re-evaluate evidence adduced at trial and come to my own conclusion bearing in mind the fact that I neither saw nor heard witnesses who testified. **(See Okeno vs. Republic (1973) EA 32).**

10. It is argued that the offence of **Robbery with Violence** was not committed by the Appellant. To prove the offence the Prosecution was obligated to prove that:

(a) The perpetrator of the offence was armed with dangerous/offensive weapons or instruments; or

(b)That the person was in company of one or more persons; or

(c) Immediately before or immediately after the time of the robbery the offender wounded, beat, struck or used actual violence to any of the persons **(See Oluoch vs. Repblic (1985) KLR 549).**

11. The Complainant in the 1st Count PW1 saw three people. One of them hit her with a pistol on the forehead. The persons were armed with pangas and knives. PW2 saw three people after he opened the gate for PW1 and PW4. They followed the motor vehicle that was driven into the compound. PW4 saw the person who went to the driver's side, he had a gun, and the one who was on the passenger's side who carried a panga and knife. This was proof that the offenders were more than one and were armed. A pistol

is a firearm which is a lethal weapon which can shoot and injure a person. The particulars of the offence alluded to crude weapons – what the witnesses saw were pangas and knives. These are implements used at home but can be adapted for use for causing injury to a person which makes them dangerous weapons. Hitting PW1 with the pistol on the head was a threat to use actual violence against the person of the Complainant. The perpetrators of the offence took away property from PW1 and PW4. This was proof of robbery with violence.

12. The Appellant was identified as one of the persons who robbed the Complainants on the fateful night. However he argues that he was not among them.

13. It is submitted by the Appellant that the description given to the police of the Appellant by witnesses was vague and could not be relied upon. On cross examination PW1 stated that she described the first attacker as a short person; the second one as strong and tall while the third was medium built whom she identified as the Appellant. PW4 on the other hand had stated that one of them was tall, black and of an apparent age of **18 years.** PW7 **No. 58714 Corporal Rueben Terai** who received the report stated that PW1 described the attackers as young persons and she did not estimate their age. The Appellant argues that he could not have been one of the persons described. It is common knowledge that estimating the age of an individual would differ from one person to another. People perceive things differently. There are some people who take good care of themselves who would pass for young persons when they are adults. PW4 was an adult person confined to a wheel chair. Describing a person she saw as a younger person would not be questionable. The description given by witnesses herein cannot be dismissed as having been imprecise as it does not point to deliberate untruthfulness. PW1 clearly stated that the medium built individual she referred to was the Appellant, a fact not challenged. These did not affect the substance of the Prosecution's case.

14. This was a case of visual identification. In the case of **Wamunga vs. Republic (1989) KLR 426** the Court stated that:

> ***"It is trite law that where the only evidence against the 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 the possibility of error before it can safely make it the basis of conviction."***

15. The homestead of the Complainants was well lit by electric lights. PW1 was made to enter the house by the robbers. She led them to her bedroom. As they took away various items the electric lights were on and they had not concealed their faces.

She identified the Appellant as the person who hit her with a pistol and ordered her to lead them into the house. In the cases of **Obwana and Others vs. Uganda (2009) 2 EA 333** and **Etubedo & Others vs. Uganda 2009 (1) EA 132** that were cited by the trial Court, the Court identified the following conditions as being favourable to a positive identification:

> ***"(a)……..***
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> ***b) The length of time the witness took to identify the Accused.***
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> ***c) The distance from which the witness identified the Accused.***
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> ***d) The source of light that was available at the material time."***

16. The 1st Complainant walked into the house with the robbers, she had ample time with them. The source of light being electric light was sufficient to enable her recognize them. Later on she drove them up to where they offloaded stolen items.

17. In the case of **Maitanyi vs. Republic (1986) KLR 198 al 201** it was stated thus:

"It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into."

I have inquired into circumstances that prevailed. Evidence adduced by PW1 as to the person who ordered her to lead them into the house is corroborated by that of PW2; and PW4 who stated that she was slapped by the Appellant. The person stood next to her and fluorescent tubes that were lit emitted sufficient light that enabled her to see clearly.

18. An identification parade was conducted by PW6, **No. 233420 Chief Inspector Nahashon Kipsoi.** The Appellant consented to appear before the parade and duly signed the parade form. He was duly identified by PW4 and on being asked if he was satisfied with the conduct of the parade he had no comment. However he refused to sign the parade form. The Appellant has not faulted the procedure adopted but argues that witnesses who identified him did not give his description before the parade was conducted.

19. In the case of **Ajode vs. Republic (2004) 2KLR 81** the Court of Appeal held that before an identification parade is held, a witness should be asked to give the description of the person sought to be identified. PW4 who identified him stated that he was with her for a duration of one hour and she interacted with him. She described her attackers in her statement.

20. The Appellant declined to sign the parade form but failed to give the reason why he did not. In his defence the Appellant stated that he was surprised to see one of the persons he had earlier seen at the Investigating Officer's office as the identifying witness. He went on to allege that he stated reasons why he declined to sign the form but no reasons are included in the form. In Court he did not specifically state that the person he saw was PW4. There were three (3) identifying witnesses, PW4, **Jane Nyokabi, Paul Waweru Njoroge** and **Esther Njeru Njuguna.**

21. Some of the stolen items were recovered namely:

- A cellphone – Black berry.
- Sony Bravia Television set.
- LG Radio.
- A Black Radio and one Speaker.
- A Samsung Television set.

22. The first item to be recovered was a cellphone. It was found in possession of PW3 **Stephen Gathombe Kariuki.** He testified that he purchased the cellphone from **Maina** a person he knew very well who was a co-accused of the Appellant in the Lower Court. This particular cellphone was identified by PW1. PW3 led the police and PW1 to where they found **Maina** and the Appellant and a lady. PW1 was able to identify the Sony Bravia Television set that was stolen from them.

23. From there, according to PW5 **No. 2002055239 APC Pius Nganga** they were led to the house of the Appellant where they recovered the LG Radio 3 CD Changer and one speaker make Max which was identified by PW1.

24. In convicting the Appellant the learned trial Magistrate disregarded the evidence because the Prosecution failed to connect the Appellant and the house in issue. There was no attempt to call the landlord or even neighbours to confirm that the house belonged to the Appellant. There was also disconnect in evidence as to who led the police to the house or if they were acting on information received.

25. It is argued by the Appellant that there was contradiction as to his mode of arrest. The date of arrest on the charge sheet is indicated as **20th February, 2014.** PW5 stated that the Appellant was arrested on **20th February, 2014.** The parade was conducted on **23rd February, 2014** which was evidence that he

was arrested prior to that date. PW1 alluded to **23rd February, 2014** as the date when they went to the Zion Church after she got information regarding the cellphone.TheProsecution did not re-examine the witness to clarify the issue ofhe date. The issue of contradictions was addressed in thecase of **Twehangane Alfred vs. Uganda Criminal Appeal No. 139 of 2001 (2003) UGCA, 6** where it was stated that:

> ***"With regard to contradictions in the prosecution's case the law as set outin numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

26. The Appellant ultimately ended up in Court following is arrest. A discrepancy in the date as stated by PW5 and PW1 is sominor that it would not affect the Prosecution's case. vidence tendered against the Appellant could not have failed beause of such a minor issue.

27. Further it is submitted that per the evidence adduced by PW5 an informer led them to the arrest of the Appellant and another yet the informer was not called to testify. In the case of **Kigecha Njuga vs. Republic (1965) EA 773** the Courtstated thus:

> ***"Informants play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their lives may be in danger. But if the***
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> ***Prosecution desire the courts to hear the details of the information an informer has given to the police clearly the informer must be called as a witness."***

The police in the instant case were led by an informer to where items were recovered. The Appellant was arrested because he was found inside the house. But the trial Magistrate did not base the conviction on that particular evidence because there was no proof that the house belonged to the two (2) men who were found inside. It was not necessary to call the informer to testify.

28. From the foregoing it is apparent that conditions that prevailed were favourable to correct identification of the Appellant as one of the robbers. There was no mistaken identity.

29. With regard to sentencing, the Appellant was sentenced to hang on both counts. In the case of **Samuel Waithaka Gachiru vs. Republic Criminal Appeal No. 261 of 2003 (unreported)** the Court of Appeal stated thus:

> ***"…..we have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thingto do is to sentence him to death on only one of the counts and have the others in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hanged…….***
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> ***Thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the 1st appellant provides a good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served is he required***
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> ***to serve that sentence and complete it first before the sentence of death is carried out" We can find no sense at all in such a proposition and the long practice which we are aware of is that once a sentence of death is imposed, the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the court dealing***

with the appeal would consider all counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed. We hope that sentencing counts will take head of these simple requirements and act appropriately…"

30. In the result, I am satisfied that the conviction of the Appellant on both Counts of **Robbery with Violence** was safe. The conviction is upheld.

31. On sentence, the learned Magistrate made an error. Therefore I set aside the sentence imposed and sentence the Appellant as follows:

Count 1 – To suffer death as provided by law.

Count 2 – Sentenced to death but to be held in abeyance.

32. It is so ordered.

Dated and **Signed** at **Kitui** this **25th** day of **April,** 20**17.**

L. N. MUTENDE

JUDGE

Dated, Signed and **Delivered** at **Kiambu** this **12th** day of **June ,** 20**17.**

PROF. J. NGUGI

JUDGE