

4. The 3rd count read that on the 26th day of May, 2013 at Shiseso Catholic Church, Shiseso sub-location, Shisele location in Kakamega County within Western Province jointly with others not before court while being armed with offensive weapons namely rungun robbed MAURICE LIKHONO of a Nokia m/phone valued Ksh. 2,000/= and cash 300/= all valued Ksh. 2,300/= and at or immediately before the time of such robbery wounded the said MAURICE LIKHONO.
5. The appellants being dissatisfied with the judgment of the trial court filed similar petitions of appeal raising the following grounds:-
 - i. *That the learned trial magistrate erred in law and in fact in holding that the charge of robbery with violence contrary to section 296 (2) was proved beyond reasonable doubt in Count 1 contrary to the evidence on record;*
 - ii. *That the learned trial magistrate erred in law and in fact in shifting the balance of proof (sic);*
 - iii. *That the learned trial magistrate erred in law and in fact in holding that the appellant was positively identified contrary to the evidence on record;*
 - iv. *That the learned trial magistrate erred in law and in fact in failing to properly evaluate the evidence on record hence arriving at a wrong decision.*

The appeals were consolidated and heard as Kakamega High Court Criminal Appeal No. 105 of 2014.

The appellants' submissions

6. At the hearing of the appeal, the appellants were represented by Mr. Anziya Advocate who submitted that the complainant in count 1 was Father Pius Shikuku, PW1. On 26th May, 2013, he was not at the Parish when the offence took place. The learned magistrate found that although PW1 was not at home, the ingredients of the offence were proved. Mr. Anziya submitted that an offence of robbery with violence must be committed when the victim is present. The learned trial magistrate therefore erred in holding that count 1 was proved. It was important for the appellants to be identified. There was no proof of identification. The Investigating Officer, PW7, the OCS, Malaika Police Station organized an identification parade where he used 9 members who were the same members used in the identification parades for both the appellants. The trial court found that this was erroneous but held that it did not affect the outcome of the case. PW2 on cross examination said that he did not recognize the appellants from their appearance.
7. Mr. Anziya submitted that PW3 said that he never said that he saw the attacker, yet in the same breath he said "I said I knew them by appearance". Mr. Anziya submitted that this evidence is not tenable as no description of the attackers had been given. He cited the Court of Appeal decision in **Criminal Appeal No. 11 of 2000 at Nyeri, Joseph Mwangi Wambugu & 2 others vs. Republic**, where the Court of Appeal held that visual identification must be treated with the greatest of care. Mr. Anziya submitted that PW3 did not identify anyone at the identification parade and that the circumstances prevailing at the time of the offence were not ideal for positive identification.
8. Mr. Anziya also relied on the **Court of Appeal decision in Nairobi Criminal Appeal No. 279 of 2005, Norman Ambich Miero & another vs. Republic** in submitting that the appellants were not positively identified as by law required. He prayed that the appeals be allowed.

The Respondent's submissions

9. Mr. Omwenga learned counsel for the respondent submitted that the conviction on count 3 was not proper as PW3 was not able to identify the appellants from the identification parade. On count 2, he submitted that the conviction and sentence were proper in that PW2 stated that on the fateful night he was at work when he heard a voice commanding everyone to lie down. He saw the 2nd appellant who was armed. The 2nd appellant hit him on the forehead and he fell down. His legs and hands were tied. The 1st appellant was also present. PW2's phone and cash were taken. PW2

identified the appellants in an identification parade as being the ones that attacked them on the material night. He told the police that he could recognize the attackers if he saw them. Mr. Omwenga submitted that there were 9 members at the identification parade and the 2nd appellant Oscar Shibebe was identified by PW2. The 2nd parade was conducted using the same members and PW2 identified the 1st appellant, Oscar Muliro. It was Mr. Omwenga's submission that although the same members were used for the 1st appellant's identification parade, this does not invalidate the identification of the 2nd appellant. It only affects the identification of the 1st appellant. Mr. Omwenga prayed that the appeal of the 2nd appellant be upheld.

The duty of the 1st appellate court

10. As the first appellate court, we have a duty to analyze and re-evaluate the evidence adduced at the trial court and arrive at our own conclusion, bearing in mind that we did not see or hear the witnesses testify. In the case of **Kiilu & Another vs. Republic [2005] 1 KLR 175** the Court of Appeal stated thus:-

“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. 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.”

We now proceed to analyze and re-evaluate the evidence tendered before the lower court.

The prosecution's case

11. PW1, Father Pius Shikuku, a Priest at Shiseso Catholic Church was the complainant in count No. 1. He testified that on 26th May, 2013, he left home at 2 p.m. and on his way back, he received a call from a neighbour who told him that people had invaded the Parish. He found police officers at the scene. Two of his workers who had been injured had been taken to hospital. He found them being attended to and they returned to the Parish. He found his house had been broken into, ransacked and several personal effects were missing. Ksh. 41,000/= had also been stolen. After a week, one of the gowns that he wears during mass, the chasubles, was recovered.
12. PW2, Benson Shichoro informed the court of how he was at his work place at Shiseso Parish on 26th May, 2013 when at 7.30 p.m., he heard a command from the door ordering everyone to lie down. PW2 sat near the door and looked towards where the command had come from. He saw 3 people, among them the appellants, whom he had never seen before. He told the court that he first saw the 1st appellant, Oscar Muliro, who had a rungu (wooden stick). When PW2 looked at him, the 1st appellant hit him on the forehead and he fell down. He was then tied up. The assailants ordered him to produce money. Knives were placed on either side of PW2's neck. He was searched and his phone make Techno worth Ksh. 5,000/= and his wallet which had Ksh. 5,000/= were stolen. His co-worker PW3, was also beaten and tied up. The two assisted in untying each other after the robbers left. They screamed for help and Police Officers went to the scene. PW2 and PW3 were treated at Shiseso Health Centre. On return to the Parish, PW2 realized that several items had been stolen from PW1's house. After some time, PW1's gown and a cooking stick were recovered, which he identified as MFI-2 a & b.
13. On 31st May, 2013, PW2 attended an identification parade at Kakamega Police Station where he identified the 1st appellant and in a 2nd identification parade, he identified the 2nd appellant. He

identified in court the identification parade forms MFI – 2c & d, his treatment book MFI-3 and report from Mukumu Mission hospital MFI-3b and P3 form – MFI-4.

14. On cross examination by Mr. Munyendo for the 2nd appellant, PW2 said that he had indicated in his statement that he would recognize the robbers if he saw them. He also told the Doctor that he would recognize the robbers if he met them. PW2 further said that he saw the person who hit him before he fell down and saw the assailants as they got into the house. PW2 further said that the lights were on. He did not see the clothes they were wearing but saw their faces.
15. On cross examination by the 1st appellant, PW2 stated that he wrote in his statement that he could recognize the assailants if he saw them but did not give their description. On re examination, PW2 reiterated that he saw the appearance of the robbers as he looked at them when they gave orders.
16. PW3, Maurice Likono, a Cook at Shiseso Parish testified that he was in the kitchen on 26th May, 2013 at 7.00 p.m., in the company of PW2 when they were attacked by thugs. They were ordered to lie facing down. He looked and saw the 1st appellant who injured PW2 on the head. PW3 asked what was going on and he was hit by the 2nd appellant. A 3rd person stood at the door. PW3 and PW2 were tied up. The robbers took PW3's phone make Nokia 1280 valued at Ksh. 2,000/=, a jumper and his coat. They took Ksh. 300/= from his jacket, his passport photograph and a copy of his identity card. They also took a cooking stick, panga and a torch. They demanded for money from PW2, whom the assailants thought was the Priest.
17. PW3 testified that the incident took less than one hour and that he was injured on the head and left arm by the 2nd appellant. After the assailants left, PW3 took a knife and cut the ropes that had tied up PW2. PW2 in turn cut off the ropes PW3 had been tied up with. The two screamed for help and Police Officers went to the scene. They were taken to hospital where they were treated.
18. On return to the Parish, they realized that Ksh. 41,000/= was stolen in offertory boxes from PW1's house. PW3 informed the court that the 1st appellant is the one who took his phone. PW3 identified his treatment book MFI- 5 a, his P3 form MF1-5 b. It was the evidence of PW3 that electric lights were on and that is how he identified the appellants. He however fainted when he was called to an identification parade and did not identify any of the appellants. He was not invited again to an identification parade. It was PW3's evidence that the appellants had not covered their faces. PW1's clothes and cooking stick were recovered which he identified as MFI - 1 a and b.
19. On cross-examination by Mr. Munyendo, PW3 stated that he reported that he was assaulted by people he could identify if he saw them again. PW3 reiterated the same when cross examined by the 1st appellant.
20. PW4, Caleb Murunga Mbakaya an Assistant Chief was on 30th May, 2013, informed by members of the public about some clothes that had been seen at a bush. He went to the scene and found some clothes for a Priest which he took to Shiseso Parish where they were confirmed as belonging to a Priest therein. There was also a damaged torch and a cooking stick. He took the items to Malaika Police Post. He identified the items as MFI -1 a and b.
21. PW5, Duncan Miningwa, a Clinical Officer at Kakamega Provincial General Hospital examined PW3 who had been treated at Shiseso Health Centre on 26th May, 2013. PW3 had a stitched cut wound on the temporal region which was swollen and tender. A blunt object had inflicted the injuries. PW5 classified the degree of injury as harm and filled the P3 form on 2nd June, 2013. PW5 produced it as exhibit 5b and treatment notes as exhibit 5a. PW5 also produced the P3 form for PW2 who had been treated at Shiseso health centre on 26th May, 2013 and at Mukumu hospital. PW2 had a stitched cut wound on the left side of the forehead which was swollen and tender. The type of weapon used was blunt. PW2's P3 form was produced as exhibit 4, his

treatment notes from Shiseso Health Centre and St. Elizabeth Mukumu hospital were produced as exhibits 3 a & b respectively.

22. On cross examination by Mr. Munyendo, PW5 informed the court that PW2 and PW3 said that they could recognize the attackers if they saw them. PW5 gave the same response to the 1st appellant on cross-examination.
23. PW6, Inspector Francis Kariuki was the Deputy OCS, Malaika Police Station. On 26th May, 2013 at 8.10 p.m., he received a call from the area Assistant Chief informing him of a robbery at the Catholic Father's residence. They arrived at the scene in twenty minutes and found the thugs had disappeared. They took PW2 and PW3 to hospital as they had been injured. PW2 and PW3 said that they could recognize the thugs. An identification parade was held and PW2 identified two of the thugs. Later the Father's clothes, cooking stick and a torch were recovered. Photographs of the items were taken by the scenes of crime personnel, he identified the items as MFI – 1a and b.
24. On cross examination by Mr. Munyendo, PW6 informed the court that PW2 and PW3 had stated that they were attacked by people they could identify.
25. PW7, Chief Inspector Benedict Musyoka, the OCS Malaika Police Station, conducted two identification parades on 31st May, 2013. The 1st identification parade had 9 members. The 2nd appellant, Oscar Shibeye was the suspect in the first identification parade. He was identified by PW2 by touching. PW3 did not identify him.
26. The 2nd identification parade was held for the 1st appellant, Oscar Muliro. PW2 identified him. PW3 was unable to identify him. PW7 produced the identification parade forms as exhibits 2a and b. On cross examination by Mr. Munyendo, PW7 admitted that he used the same parade members for the two identification parades. PW7 produced the photographs of the recovered exhibits as exhibit 1a and 1b.

The defence case

The 1st appellant's defence, Oscar Muliro (2nd accused in the lower court)

27. The 1st appellant, Oscar Muliro informed the court that on 28th May, 2015 at 8.00 p.m. he was at home. There was a loud knock on the door. His mother opened the door. The 1st appellant saw six persons, 3 of whom were Police Officers. One police officer asked him why he had escaped before finishing his prison term. He was arrested. An identification parade was later carried out and PW2 was forced to identify someone. He was identified by PW2. PW3 did not identify him. He was then charged in court.

2nd appellant's defence (1st accused in the lower court)

28. The 2nd appellant Oscar Shibebe informed the court that he was arrested on 26th May, 2013 as he went on with his business at a kiosk. The Police went there and asked him if he was the Oscar who had been released from jail. He said he was not the one and took the police to the 1st appellant who was arrested. The 2nd appellant was also arrested and charged with this offence.

Determination of the appeal

29. After analyzing the evidence on record, we find that the conviction of the appellants on count 1 cannot stand on a charge of robbery with violence contrary to section 296 (2) of the Penal Code. PW1, the complainant was not at his house at the time the offence occurred. The definition of robbery under the provisions of section 295 of the Penal code is that:-

“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.”

30. Based on the foregoing definition, we find that the charge in Count 1 was incurably defective as the said complainant Father Pius Shikuku, stated in his evidence that he was not in the Parish when the robbery occurred. He could therefore not have been robbed in absentia. We therefore quash the conviction and set aside the sentence in Count 1 for the foregoing reasons.

31. As regards counts 2 and 3, there is no doubt that PW2 and PW3 were robbed of their personal effects on the night of 26th May, 2013. The robbers meted out violence against the two witnesses as a result of which they were treated in hospital. Their P3 forms were produced in evidence by PW6. The bone of contention in this appeal is if the appellants were positively identified by PW2 and PW3 as their assailants. Once this issue is resolved, it will address other issues raised in the petition of appeal such as if the charge was proved beyond reasonable doubt.

32. The offence having occurred at night, the learned trial magistrate was under duty to treat the evidence adduced with great care to satisfy herself that there was no mistaken identity of the appellants. PW3 testified in court that there was electric light in the house where the robbery took place. There is no doubt that the assailants were in close contact with PW2 and PW3 as they inflicted injuries on them and tied them up. What is in issue is if the appellants were properly identified.

33. In the decision of **Simiyu & Another vs. Republic [2005] 1 KLR 192**, the Court of Appeal had this to say:-

“In every case in which there is a question as to the identity of the accused, the fact of there having been a description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who give the description and purport to identify the accused, and then by the person or persons to whom the description was given. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker’s identity.”

34. In the instant case, the assailants were strangers to PW2 and PW3. Although the two witnesses did not give a description of the attackers to the police or to anyone else, they said they would be able to identify them if they saw them again. PW3 was unable to identify any of the appellants at the identification parade. PW2 identified both appellants at the identification parade. We note however that PW7 used the same parade members to conduct two identification parades whereby PW2 identified both appellants. It is our finding that the manner in which the identification parade was conducted was flawed as different parade members should have been used. PW7 admitted that he used the same members for the identification parade and that the 1st identification parade he conducted was for the 2nd appellant, Oscar Shibiye. The use of the same members rendered the identification parade worthless and made it very easy for PW2 to pick out the 1st appellant, Oscar Muliro as he was the new entrant among the parade members, in the 2nd identification parade.

35. In the case of **John Mwangi Kamau vs. Republic [2014] eKLR** the Court of Appeal cited with approval the decision of **David Mwita Wanja & 2 Others vs. Republic, Criminal appeal No. 117 of 2003** on the conduct of identification parades, as follows:-

“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 Mwangi 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.”

36. Having perused the identification parade forms, we cannot determine which identification parade was conducted first. The two identification parade forms indicate that identification parades were carried out from 10.30 a.m. to 11.00 a.m.
37. We find that the learned trial magistrate misdirected herself when she found that PW2 and 3 had seen the robbers before the night of the incident. None of the two witnesses gave such evidence. The learned trial magistrate also found that Chief Inspector Musyoka who conducted the identification parade messed up by using the same parade members for both the appellants. She was also unable to tell which parade was done before the other but went ahead to make a finding that the careless manner in which Chief Inspector Musyoka handled the parade did not in itself cast doubt on her mind as to the fact that the appellants were properly identified.
38. In our view, we find that it was unsafe to base a conviction on identification parades which were not conducted with scrupulous fairness. We therefore give the benefit of the doubt to the appellants. Consequently, we quash the convictions on counts II and III, and set aside the death sentence imposed on each appellant on the two counts.

The appellants are herewith set at liberty unless otherwise lawfully held.

It is so ordered.

JUDGMENT DELIVERED, DATED and SIGNED in open court at KAKAMEGA on this 3RD day of MARCH,2016.

RUTH N. SITATI

NJOKI MWANGI.

JUDGE

JUDGE.

In the presence of

..... for the 1st and 2nd Appellant.

..... for the Respondent.

.....Court Assistant.