REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO.12 OF 2015

(FORMERLY MERU HCCRA 36 OF 2015)

FRANKLINE KIMATHI MURUNGI……APPELLANT

VERSUS

REPUBLIC……...…….…….RESPONDENT

(An Appeal from the Judgment and conviction of B.N. IRERI – P.M. made on 12.3.2015 in Chuka Principal Magistrate's Criminal Case No. 1365 of 2011)

JUDGMENT

1. On 21st December, 2011, Frankline Kimathi Murungi, the Appellant herein, was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code in the Chuka Principal Magistrate's Court Criminal Case No. 1365 of 2011. In that case, the Appellant was the seventh (7) accused. It was alleged that on 6th November, 2011 at Kiereni trading centre in Mugwe Location, Tharaka Nithi, the Appellant with six (6) others, jointly while armed with dangerous and offensive weapons namely knives, pangas and metal bars, robbed Denis Muchiri Karere of one mobile phone make Nokia, one wallet, one Equity Bank ATM card, one national identity card, 10 Safaricom Sim cards, assorted documents and cash Kshs.33,000/= all valued at Kshs.37,700/= and at the time of robbery, injured the said Dennis Muchiri Karere and murdered Salome Sharon Mwende.
2. The Appellant denied the charge but after trial, he and five (5) of his co-accused were found guilty, convicted of the offence and sentenced to suffer death. All those convicted, including the Appellant, appealed against the said decision. However, at the hearing of their appeals, each of them insisted that his appeal be heard separately. Accordingly, the court opted to hear each Appellant separately and write separate judgments notwithstanding that the appeals emanated from the same conviction and sentence and most of the grounds were similar.
3. In his Petition and Supplementary Grounds of Appeal, the Appellant contended that the proceedings were conducted in Kiswahili and English, languages he was not conversant with while he was only conversant in his mother tongue; that the prosecution failed to summon vital witnesses who had recorded statements; that the trial court erred in failing to find that there was no enough evidence for which to convict him; that the trial court failed to consider his defence; that the trial court failed to consider that the Appellant was arrested through information supplied by informers and not the complainant; that the complainant had not given any description of the attackers and finally that the identification parade was flawed. This being a first appeal, it is incumbent upon this court to review and re-examine the evidence afresh and draw its own independent conclusions and findings. **See Okeno .V. Republic (1972) EA 32**. However, in doing so, the court must at all times have in mind that it did not have the advantage of seeing the witnesses testify.

4. The evidence before the trial court was that on 6th November, 2011 at about 8.30pm, Dennis Muchiri Karere (PW2 complainant) was in his house with his wife, Sharon Salome Mwende and son watching television. There was a knock at the door and he asked his wife to open. Immediately on opening the door, about seven (7) male persons entered armed with knives, iron bars and whips. They injured the complainant with a knife and demanded money whereby he gave them Kshs.33,000/= which he had. They ransacked the house and took away his national identity card (PExh.3), Equity A.T.M. card (PExh 4) and assorted cards (PExh 5 (a) – (g)). They also robbed him of his phone. The complainant's wife was all along calling for help but because it was raining outside, there was no help that came their way. She sustained injuries to which she succumbed to later on at Chuka District Hospital. After the robbers had left, the brother of the complainant came and helped take the complainant to Chuka District Hospital. The complainant was treated and discharged the following day but his wife died. The complainant was later called to Chuka Police Station where, on various days he attended identification parades in which he identified all the accused including the Appellant.
5. In cross-examination, the complainant told the court that there was electric light at the time of the robbery; that his was a single room; that he did not give any description of the robbers to the police; that before the identification parade, he was kept in a private room. That he identified his attackers in the parades from their physical appearance; that the attackers took about 30 minutes to be through; with the robbery; that at the parade, he identified those who had attacked him and that the police did not describe to him the people he was to identify.
6. PW1, Dr. Justus Kitili produced the Post Mortem Report (PExh 1) for Sharon Salome Mwende. The report showed that the body of the deceased had a deep cut on the neck and the deceased died of massive hemorrhage. Bonface Mugendi PW3 recalled that in the morning of 7th November, 2013 (sic) when he was going to work, he found a mobile phone and papers strewn on the road including the national identity card for the complainant. He notified the area assistant chief PW5, who collected those items and surrendered them to the police. PW4 Loyd Mugambi told the court that on 6th November, 2011 at about 8.00pm, he went to the complainant's shop after he had heard screams from there. That he had been delayed from responding to the screams immediately because of rain. He saw the deceased lying in a pool of blood and the complainant looked confused. On the way home, he collected on the road about ten mobile sim cards and a 500 note S/No. BN 8724408 which he surrendered to PW5.
7. Bedford Kinyua Mukiri (PW5) the Assistant chief told the court how the brother of the complainant came to his house on 6th November, 2011 at about 8.00pm and told him that the complainant had been attacked by robbers. He went to the complainant's home and found the complainant's wife being put in a vehicle while bleeding profusely. He called the police from Chuka Police Station. When they came, he and the police entered the complainant's room and found blood on the floor. The complainant told them that he had been robbed by some people but did not mention their names.
8. PW6, S.S.P Benjamin Marua, was the O.C.S Chuka Police Station at the time. He recalled how he was requested by the Investigations Officer to carry out identification parades for, inter alia, the Appellant. That on 28th November, 2011 at about 11.00am, he filled the identification forms for an offence of robbery with violence. He organized eight people for the parade; he called the Appellant and warned him of the offence; that the Appellant willingly agreed to participate in the parade and signed the forms but said that he did not have a friend to witness the parade. That when doing all this, he had kept the complainant in the crime office. That when he called the complainant, the witness identified the Appellant by touching him. After the parade, the Appellant stated that he was not satisfied with the parade because the witness had allegedly seen him but nevertheless signed the forms. The identification parade form was produced as PExh. 14. When cross-examined by the Appellant, PW6 denied that he showed the Appellant to the witness. He also denied having arrested the Appellant on the 8th November, 2011 for creating disturbances. He clarified that his office did not have any spaces through which the witness could peep and see the suspects at the identification parade.
9. PW7 Corporal John Mwai Mbili attached to Chuka Police Station recalled how on the 27th November, 2011 at about 1.20pm he accompanied other officers including PW6 to Kathunguthe area near Chuka Hospital where they arrested the Appellant and another accused. The O.C.S

informed him that the Appellant was a suspect in a robbery with violence case. He had seen the Appellant before within Chuka Town. PW8, Corporal Benson Sindani, was the investigating officer. He recalled how, on the morning of 7th November, 2011, he was informed of the robbery by his superiors who had visited the scene the previous night. He visited the scene that morning whereby he found PW5 and members of the public. He recovered from PW5 the documents that had been stolen but which had been collected from the road (PExh 2-7). He found the household items scattered all over the room and blood on the floor. He then visited the complainant at Chuka Hospital who narrated to him how a gang of six to seven (6-7) people had attacked him and his wife the previous night. That he had identified them by way of lamp light that was on. He identified one of the suspects by name as he was his nieghbour and that he used to see the others at the stage which was near where he worked. PW8 went to the home of the named suspect but the suspect escaped. He then circulated the names of the suspects to his informers. He later learnt that the Appellant was one of those who had been arrested and was at Chuka Police Station. He thereupon arranged for an identification parade that was conducted by PW6 whereby the Appellant was positively identified. That there had been a wave of robberies within Chuka. One police informer was killed as a result of which many people feared to testify in this. He caused the body of the deceased to be photographed which photographs he produced as PExh 18 (a) (b) and (c) and a report of scene of crime as PExh 19.

10. In cross-examination, PW8 stated that the OB showed that the Appellant was arrested on 27th November, 2011; that he had informers to whom he gave information which led to the Appellant's arrest; he denied photographing the Appellant before parading him. He indicated that the complainant never saw any of the suspects, the Appellant included, at the station prior to the parades.
11. PW9, Corporal Elijah Wachira told the court how, on the 27th November, 2011 at about 1.20p.m, while in the company of other officers including PW6 they arrested the Appellant following a tip off. Nothing was recovered from the Appellant.
12. On being was put on his defence, the Appellant offered to give sworn evidence but called no witness. He told the court how he did his business of scrap metal the whole day of 6th November, 2011. That he and others whose names he did not disclose took beer at Kanwa until 4pm. Later, he and the said unnamed people came to Chuka town about 8.45pm and continued to drink. He later went home to sleep. That on 8th November, 2011, he was arrested for an offence that he was not told of. That he had lost a phone meant for the girlfriend of the O.C.S for which the O.C.S demanded Kshs.3,000/=in repayment thereof. That when the Appellant was unable to pay the money, the O.C.S and other police officers arrested him on 27th November, 2011 and framed him with the present offence. He contended that PW8 photographed him before the parade and that when he was called to the office of the O.C.S, he met the complainant there. That he protested on how the parade was conducted as the complainant had seen him and PW8 had sent to the complainant his photograph.
13. At the hearing of the appeal, the Appellant relied on his written submissions. He submitted that since the complainant was attacked and got injured, he did not have any opportunity of seeing his attackers and that is why that he did not disclose the names of his attackers to the Assistant Chief, PW5; that the investigations officer relied on the information given to him by informers who were not called to testify; that nothing was recovered from him. The Appellant further submitted that since the complainant did not give any description of the suspects, the identification parade conducted on 28th November, 2011was not in accordance with the law; that the evidence of the complainant. PW5 and PW8 was contradictory as to the light used to identify the attackers as well as the hospitalization of the complainant. That the trial court had overlooked his defence in breach of section 169 (1) of the Criminal Procedure Code. In his oral submission, the Appellant insisted that he was arrested by PW6 due to a grudge between the two. The Appellant therefore urged that his appeal be allowed.
14. Mr Ongige, Learned Counsel for the state opposed the appeal. He submitted that the complaint by the Appellant that the proceedings were conducted in a language he did not understand was baseless since the Appellant had addressed both the trial court and this court in Swahili language. He further submitted that the prosecution called all the necessary witnesses; that the trial court had properly warned itself of convicting on the evidence of a single witness and that it had properly

relied on the evidence adduced to find a conviction. Counsel cited the case of **Shadrack Omwaka – vs- Republic (2016) eKLR** in support of his said submissions.

15. The first ground of appeal was that the proceedings in the trial court were conducted in Kiswahili, a language the Appellant was allegedly not conversant with and that he is only conversant in Kimeru. Neither in his written nor oral submissions did the Appellant address this ground. On his part, Mr Ongige submitted that this ground had no basis. This court has on its part perused the record and found that on 21st December, 2011 when the plea was read, the record shows that all the accused, including the Appellant, replied in Swahili. At page 46 of the record, it shows that when a new Magistrate took over the conduct of the case and was to give directions under section 200 of the Criminal Procedure Code, whilst five (5) of the accused replied in Swahili, the Appellant and one other addressed the court in English. Further, when the Appellant appeared before this court at the hearing of the appeal, he conducted his entire Appeal in fluent Kiswahili. This means that the Appellant understands Kiswahili well. That is why he was able to cross examine the prosecution witnesses at length in that language. Accordingly, I am satisfied that the Appellant was not prejudiced in anyway whatsoever when the trial was conducted in Kiswahili as the Appellant appears not only to know and understand that language well, but he has mastered the same. That ground therefore fails.
16. The second ground was that the trial court failed to consider that the prosecution had failed to summon crucial witnesses. Mr Ongige for the state submitted that all the necessary witnesses were summoned and testified before the trial court. This court has considered the record. The prosecution summoned a total of ten (10) witnesses. The offence was committed at night. The complainant told the court that he was with his wife and son when the robbers struck. He had lived with his wife for only four (4) years. There was no evidence to suggest that the son was of material age and capable of testifying. Apart from the complainant, the only other eye witness who could have given positive testimony on the occurrence of the offence was his wife. Sadly, she had died out of the injuries inflicted by the robbers. To my mind therefore, there was no other material witness who would have been called to add to or subtract on the prosecution case. In this regard, if there was any such witness who was not called, the Appellant did not mention or identify who this was. That ground therefore fails.
17. The other ground was that the trial court erred in convicting the Appellant on insufficient evidence. The Appellant further contended in his supplementary grounds of appeal that his identification was not in accordance with the law and that the prosecution evidence was contradictory and uncorroborated. That he was not found in possession of any of the stolen items or any weapon and that the trial court wrongly rejected his defence as being weak. The Appellant submitted that due to the vicious and sudden attack at the time of the robbery, the complainant did not have enough time to identify his attackers and that this is why the complainant did not identify the attackers to PW5 or the police; that the first report did not identify the attackers and that the Appellant's arrest was as a result of informers and not the information given by the complainant. Finally, that the identification parade was not conducted in accordance with the law. Mr Ongige on his part submitted that the evidence proffered by the prosecution was consistent and that the identification was lawful and corroborative.
18. On the alleged uncorroborated and contradictory evidence; it was the Appellant's contention that the complainant testified that the light at the time of the robbery was electricity, yet he (PW2) had told PW8 that it was lamp light. That there was contradiction on the weapons allegedly used during the attack as narrated by the complainant to be knives, iron bar and whips yet he allegedly told PW8 that the attackers were armed with pangas and rungus. Finally, that there was contradiction between the testimony of the complainant and PW5 as to the hospitalization of the complainant.
19. When the complainant testified, he was firm and categorical that there was electrical light at the time of the attack. Indeed he and his late wife were watching television. Obviously the television must have been using electricity. He was categorical as to the weapons that the attackers had at the time of the attack. That testimony remained unchanged and unchallenged. As regards his and his wife's hospitalization, the prosecution produced the post mortem report (PExh 1) and the P3 form in respect of the complainant (PExh8). These proved that not only did the deceased die as a result of the injuries sustained during the attack but that the complainant sustained injuries for which he was treated at Chuka District Hospital. This corroborated the testimony of the complainant. The

evidence of PW8 was what he alleged to have been told. The testimony of the complainant was not only direct but remained consistent and firm. To my mind, the alleged contradictions were not material as to the commission of the offence, the use of violence and the outcome thereof. The alleged contradictions were not material as to vitiate the decision reached by the trial court.

20. In my view, the pertinent issue in this appeal turns on the sufficiency or otherwise of the evidence of the single identifying witness. It is clear that the only eye witnesses to the robbery were the complainant and his deceased wife. After the wife died, it was only the complainant who remained to tell the story.. The Court of Appeal for Eastern Africa in **Abdala Wendo .v. R [1953] 20 E.A.C.A 166** held that:-

> ***"Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."***

21. Further, in **Roria .V. Republic [1967] EA 573** the Court of Appeal for East Africa also held that:-

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness …….***
>
> ***That danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."***

22. From the foregoing, it is clear that a court can still convict on evidence of a single identifying witness if the evidence is sufficient and the court warns itself appropriately of that danger. In this case, the trial court properly warned itself of the danger of relying on the evidence of the complainant who was the single identifying witness. This court likewise warns itself accordingly. I think it is important to note the following issues. The robbery took place at night; it took place in a single room; there was electric lighting and the robbers took about 30 minutes ransacking the house. Indeed, the robbers frisked the complainant and asked him for more money after he had handed over to them Kshs.33,000/=. The identification parade of the Appellant took place on 28th November, 2011, approximately three weeks after the incident. In my view, considering the foregoing, the circumstances surrounding the robbery were favourable for identification. The complainant may have been shocked by the attack at first, but considering the long time which the attackers took in the operation, the lighting at the time, the small room in which the incident took place giving close proximity to the complainant to his attackers, the complainant must have had ample time to recollect himself and identify his attackers. Further, at the parade, the complainant identified the Appellant without hesitation. The period between the robbery and the identification parade was short enough not to have eroded the memory of the complainant.

23. The Appellant complained that the identification was flawed; that he was photographed and called to the office of the O.C.S to give opportunity to the complainant to see him. When he cross examined the complainant, the Appellant did not challenge him on how he identified him at the parade. He never raised with him the allegation of the complainant having been shown the Appellant's photograph or having been shown to the Appellant at the O.C.S's office. The Appellant only raised these issues with PW6 and PW8 who strenuously denied the same. PW6 and PW8 were firm that the parade on the Appellant was carried out strictly in accordance with the rules. I accept the evidence of PW6 and PW8 on how the parade was conducted. I reject the Appellant's contention because it seems to the court to have been an afterthought. He did not indicate these two issues in PExh 14 parade forms nor did he put them to the complainant when he

testified. The signing of PExh 14 and the cross-examination of the complainant were the earliest opportunities the Appellant had to raise these issues but he never raised them. I have seen PExh 14 and considered the testimony of PW6 who conducted the parade. The number of persons put on the parade were eight (8) in accordance with the law. The explanation given by PW6 on how he conducted the parade seems probable and I am satisfied that the parade was conducted in accordance with the law.

24. The other contention was that the police informants were not called to testify and that nothing was recovered from the Appellant. I do not think that it was necessary to call the police informats. The complainant had positively and firmly identified the Appellant. When dealing with an issue of information obtained from informants in the case of **Kigecha Njuga .V. Republic [1965] E.A 773** the court stated that:-

> ***"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 very lives may be in danger. But if the 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."***

25. Further, in the case of **Joseph Otieno Juma .V. Republic [2011]eKLR**, the Court of Appeal observed as follows:-

> ***"Finally, whether the informers should have been summoned to testify, we are aware of the fact that their protection springs from public interest considerations because were they to testify, their future usefulness in the same role could be extinguished or their effectiveness in their work considerably impaired!***
>
> ***However, all the same, in the circumstances, we think there was no need for any additional witnesses to testify since the trial court had already found that the evidence of PW1 was credible and sufficient having identified the Appellant at an identification parade……"***

26. In the present case, there was evidence of PW8, the investigating officer that after the short release of one of the Appellant's co-accused, one of the police informants whose name PW8 disclosed was killed. This shows the importance of keeping the identity of such informants privileged or secret. The necessity of their being called to testify can only arise where there are gaps in the prosecution evidence and that it is only their information or evidence that can clear the innocence of an accused person. In the present case, this court is of the view that the firm and unshaken evidence of the complainant was sufficient and there was no need to call the informants whose information may have led to the arrest of the Appellant. Further, the failure to recover any of the stolen items from the Appellant was not prejudicial. The arrest was way after the date of the robbery. There was sufficient evidence to implicate the Appellant than necessarily the recovery of the stolen items.
27. As regards the defence of the Appellant, I find that the trial court properly considered the same and came to the correct finding that the same was weak. The Appellant's allegations that PW6, who was the O.C.S of Chuka Police Station at the time, fixed him were but an afterthought. When PW6 testified, the Appellant did not challenge his testimony. Neither did he put to him those allegations for PW6 to either confirm or deny. In this regard, I find that the trial court was right in its finding on the insufficiency of the Appellant's defence. There was no breach of section 169 of the C.P.C as contended by the Appellant.
28. In the premises, I find that the prosecution did prove its case against the Appellant beyond reasonable doubt and that the conviction was safe and the

sentence lawful. I find the appeal to be without merit and dismiss the same.

Dated and delivered at Chuka this 7th day of April, 2016.

A.MABEYA,

JUDGE.