REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL 4 OF 2012

NICHOLAS KIMAHALA INDUVELA……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from the original conviction and sentence by G. A. Mmasi, Senior Resident Magistrate, dated 28th December 2011 in Eldoret Criminal Case No. 955 of 2011)

JUDGMENT

1. The appellant was convicted for *robbery with violence* contrary to section 296 (2) of the Penal Code. He was sentenced to suffer *death*.
2. The particulars of the charge read as follows-

> *"On the night of 7th March 2011 at Musunzu village, Mukuyu Sub-location, Mautuma Location in Lugari District within the Western Province, jointly with others not before court; and, while armed with offensive weapons namely pangas, robbed Wellington Ojango of 5 dozens of Eveready batteries, 2 cartons of 10 kgms Golden Fry cooking fat, 2 cartons of Chef biscuits, 1 carton 2kgms Chef wheat flour, 5 mobile phones make Nokia, and cash Kshs 25,000 all vaued at Kshs 32, 370 and immediately before the time of such robbery used actual violence on Wellington Ojango"*

3. The appellant is aggrieved by the conviction and sentence. The petition of appeal was filed on 11th January 2012. There are six grounds of appeal. First, that the doctor who examined the complainant and filled the P3 form was not called to the stand; secondly, that the investigating officer did not testify; thirdly, that conditions of identification were poor; fourthly, that the lower court relied on hearsay evidence; fifthly, that the trial court disregarded the defence proffered by the appellant; and, sixthly, that the charge was not proved beyond reasonable doubt.
4. Learned counsel for the appellant, *Mr. R. Omboto*, relied on a list of authorities filed on 15th June 2016. He submitted that all the elements of the charge were not proved; that, the P3 form was only marked for identification; and, that, there was no positive identification. To buttress his argument, he said there were five attackers; that it was during the night; that there was poor lighting; and, that no identification parade was conducted. He was of the view that the investigations were shoddy. In a nutshell, he submitted that the conviction was unsafe.
5. The Republic contests the appeal. The position of the State is that all the ingredients of the offence were proved beyond reasonable doubt. The learned Prosecution Counsel, *Ms. B. Oduor*, submitted that the appellant was positively identified by the complainants from the light cast by a mobile phone; and, that the complainants knew the appellant. In that regard, an identification parade would have been superfluous. The failure to call medical evidence was not fatal in view of the

injuries to the complainants, hospitalization, and recovery of a blood-stained *panga*. The learned Prosecution Counsel submitted that failure to call the investigating officer was immaterial. The fact that the complaint to the police was made by another person, other than the complainant, was also irrelevant to the charge. It was submitted that the corpus of evidence linked the appellant to the crime; and, that his defence was hopeless. I was implored to dismiss the appeal.

6. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw independent conclusions. In doing so, I have been careful because I have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
7. PW1 and PW2 were attacked by a *panga*-wielding gang of three *or* five robbers. PW1 was operating a shop at Mosocho. His sleeping quarters were behind the shop. The structure was semi-permanent. He knew *Nicholas*, the appellant, as one of his customers. He pointed at him in the dock. He had known him for two years. On the night of 7th and 8th March 2011 at about 1:00 a.m., PW1 was asleep. He was with his wife, Kerubo (PW2), and a child. He heard the rear door hit by what he assumed was a stone. The door gave way. Three attackers entered the bedroom. He flashed a light at them from his mobile phone, a *Nokia 1200*.
8. PW1 testified that he saw *Nicholas*; that he was the one leading the assailants. He said the appellant was armed with a *panga* and torch. The robbers asked for money. He gave them Kshs 25,000. PW1 said the appellant cut him four times on the head and on the left elbow. He was emphatic that it was the appellant who cut him. In the meantime, the other two attackers entered the shop and stole the items particularized in the charge sheet.
9. All this time, PW1 and his wife were screaming. Their parents came to their rescue. He said the robbers were still in the premises. His mother was cut on the head and back. He said his wife was cut on the left hand and right foot; but, he did not know who cut her. Some other neighbours responded to the alarm. One of the neighbours was PW4. The robbers escaped. The *Good Samaritans* took the injured to Milimani Hospital.
10. That narrative was largely confirmed by PW2. She said that when the door flung open, *five* people entered the shop. She said the appellant was the first one to enter the room. She knew him as a customer at the shop. She said it was dark. When her husband flashed a light, she saw the appellant leading the robbers. She said the other four had torches and machetes. She said the appellant is the one who cut her and her husband.
11. PW3 was the mother to PW1. She was woken up by the screams from PW1 and PW2. She alerted her husband. They ran towards the shop. At the back door, she encountered one of the robbers. He flashed a torch. She attacked the person; they both fell. The stranger cut her twice on the forehead. She screamed. She felt weak and collapsed to the ground. The robber jumped over the fence and escaped. Neighbours then came to their rescue.
12. PW5 is a police officer. He said the appellant sought refuge at the Patrol Base on 7th March 2011. He testified that the appellant was running away from members of the public who were pursuing him. He said the appellant was identified by *relatives* of complainants as one of the attackers. PW5 arrested him. He did not know the appellant before then. Upon cross-examination, he said the appellant had sustained injuries. He was taken for medication later. The public surrendered a blood-stained *panga*. The *panga* was not produced as an exhibit.
13. I have then considered the material elements of the defence. The appellant gave sworn evidence. He also called one witness, DW2. The appellant stated as follows-

> *"I recall 7th March 2011 at 3:30 a.m. People came to my house; they demanded I open the door. I declined. They hit the windows. I screamed. They hit the door. One of them entered and cut me on the right hand and hit me with a stone on the head. They demanded the proceeds from bricks. I gave them 3,100 plus my purse and identity card. They left me bleeding. I left the house, I went to my [sic] brother. We went to my father [and to] the village elder. He referred us to [the] Police Post. We went. I was bleeding. We were taken to Milimani Police Post. I was treated. I have treatment notes. I wish to produce them as exhibits. I was taken back to the police station. I was told to sit there until they finish investigations.*

"I was there from 8:00 a.m. t0 8:00 p.m. I was taken to Turbo Police Station; I was there for 5 days. I was later arraigned in court and charged with an offence I never committed. I denied the charge. I still deny to-date."

14. Upon cross-examination, the appellant said he did not know PW1, PW2 or PW3. DW2 was the appellant's father. He confirmed that the appellant reported to him that he had been attacked by thugs. It was at 3:00 a.m. He advised him to report the matter to the police. DW2 said he was shown a blood-stained *panga* at the police station. Upon cross-examination, he said he had first seen the appellant at 7:30 p.m. on the material night. He later saw him at 3:00 a.m. or 3:30 a.m. when he said he had been attacked. He clarified that he could not account for the movements of the appellant in the intervening period.
15. A number of matters arise from that evidence. The first relates to identification. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal had this to say-

"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."

16. In *Obwana & Others v Uganda* [2009] 2 EA 333, the Court of Appeal of Uganda stated as follows at page 337;

"It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. The rationale for this is that a witness may be honest and prepared to tell the truth, but he might as well be mistaken. This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence"

17. In *Maitanyi v Republic* [1986] KLR 198 at 201, the Court of Appeal delivered itself as follows-

"*It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. 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. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, State counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the "greatest care" the evidence of a single witness?"*

18. When I juxtapose those authorities against the evidence, I find as follows. The appellant, PW1 and PW2 were not complete *strangers*. He was their customer. They *both* knew him as *Nicholas*. PW1 had known him for *two years*. The offence occurred at night. PW2 confirmed that there was *no* light in the house. PW1 was *woken up* by the sound of the door being hit with what sounded like a stone. The door gave way. Three attackers entered the bedroom. He flashed a light at them from his mobile phone, a *Nokia 1200*. He saw the appellant leading *three* robbers into the room. PW2 saw the appellant from the light of her husband's mobile phone. She said the appellant was the one

ahead of *five* attackers. The attackers had torches and machetes.

19. The conditions under which the identification took place were *not* favourable. It was well after midnight. The witnesses had been abruptly woken up. There were a number of robbers. The intensity of the light from the mobile phone was *not* clear. True, PW1 said it was focused on the attackers; and, that he identified the appellant. Like I have said, PW1 and PW2 knew the appellant. But I have entertained some *doubts* for three reasons. First, PW1 saw the appellant leading *three* robbers into the room. His wife, who was relying on the same light from the mobile phone, said the appellant was the one leading *five* armed attackers. That is a material inconsistency. If a witness could not clearly tell the number of attackers, it casts doubt on the *intensity* or *brightness* of the light; and, whether the *face* of the appellant was clearly *illuminated*. Secondly, the witnesses did *not* identify any of the other attackers. Thirdly, the attackers were flashing their torches towards the victims. I am thus *not* satisfied that PW1 or PW2 positively identified the appellant. I would only restate the views of the Court of Appeal in *Maitanyi v Republic* [1986] KLR 198 at 201-

> "*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"*

20. The next key question is whether *all* the ingredients for the offence of *robbery with violence* were established. Section 296(2) of the Penal Code provides-

> *"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 before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death"*.

21. PW1 and PW2 were emphatic that the appellant was wielding a *panga* and cut them. There were at least *three* attackers. Goods worth Kshs*32, 370* were stolen by the gang. I am alive that nothing was recovered from the appellant's house. It is not clear who cut PW3. PW2 said the robbers were armed with machetes. A *panga* or a machete is an *offensive* weapon. I am alive that the *panga* was not produced in evidence. There was no chemical analysis linking it to the offence. PW1 said the appellant cut him four times on the head and on the left elbow. His mother (PW3) was cut on the head and back. His wife (PW2) was cut on the left hand and right foot.
22. I am alive that no *medical* evidence was led at the trial. In particular, the P3 form was only marked for identification; it was never formally *produced*. Learned counsel for the appellant submitted that failure to produce the P3 was fatal. He cited *James Leshoo v Republic*, Kisii, High Court Criminal Appeal 120 of 2008 [2011] eKLR. The court held-

> *"There was no evidence of him being treated anywhere as a consequence. If he was issued with the P3 form, there is no evidence whether it was filled and if so by whom. In other words there was no medical evidence tendered with regard to the alleged injuries sustained by the complainant when he was allegedly robbed"*

23. That authority can be distinguished. The facts here were quite different. PW1, PW2 and PW3 all suffered *panga* cuts during the attack. PW1 was cut four times on the head and on the left elbow. His mother (PW3) was cut on the head and back. His wife (PW2) was cut on the left hand and right foot. They were all *hospitalized* at Milimani Hospital. True, the P3 form or treatment notes were *not* produced. The P3 was only marked for identification.
24. What is then lacking in this case is *medical* evidence to corroborate further the evidence of PW1, PW2 and PW3. That is not the same thing as saying there was *no* evidence of injuries to the witnesses. The blame lies squarely at the door step of the investigating officer. I have studied the record. The clinical officer who prepared the P3 form was *unavailable* on at least *three* occasions. The trial court could not adjourn the trial forever. The learned trial magistrate had to consider the rights of the accused to a fair trial. But the point is that the prosecution could have made a suitable

application for production of the P3 by another competent witness. Even the bloodstained *panga* was not produced.

25. The bigger lapse however was the *failure* to call the investigating officer to the stand. His evidence would have been material. Did the appellant surrender to the police or did he seek refuge there from a surging crowd? Was the appellant a victim of another robbery? Did he report it to the village elder as he claimed? What happened to the *panga*? Why was the complaint made by neighbours and not by PW1 or PW2? Why was the appellant charged for this offence? The answers to all those *material* questions could only have been provided by the investigating officer. For instance, PW4 said he responded to the alarm raised at the scene. PW3 told him that the appellant was one of the robbers. PW4 and other members of the public went to the house of the appellant. When they knocked, the appellant escaped through the window. He said they recovered the *panga* in the house. He identified it in court. There was however *no* evidence that PW4 or other persons *chased* the appellant as alleged by *PW5*. The defence raised contradicted that version. The appellant said strangers broke into his house, demanded money; and, injured him in the process.
26. I am aware under section 143 of the Evidence Act, no particular number of witnesses is necessary to establish a fact. See *Joseph Njuguna Mwaura and others v Republic* Court of Appeal Criminal appeal 5 of 2008 [2013] eKLR, *Bernard Kiprotich Kamama v Republic*, High Court, Eldoret, Criminal Appeal 123 of 2010 [2013] eKLR. But in this case, failure to call the investigating officer cast a negative spotlight on the prosecution. It left open a window that unfavourable evidence was being suppressed. See *Bwaneka v Uganda* [1967] E.A 768.
27. It is not true that the appellant's defence was dismissed off-hand: the learned trial magistrate considered the defence at page 27 of the record (page 23 of the typed record). She did not believe the appellant. The appellant claimed he was asleep in his house. At about 3:30 a.m. people broke his door, entered and cut him on the right hand; and, hit him with a stone on the forehead. They were demanding money. He gave them Kshs 3,100 and his wallet. They left him bleeding. He went for assistance from his brother and father. He said he made a report to the village elder.
28. It would seem that the appellant was setting up some *alibi*. It was being set up well after the close of the prosecution's case. It was thus open to the trial court to weigh it against the evidence already tendered. See *Wang'ombe v Republic* [1976-80] KLR 1683, *Karanja v Republic* [1983] KLR 501. The *alibi* in this case was plausible. I have already found that the appellant was *not* positively identified by PW1 and PW2 as one of the robbers. There was no medical evidence to corroborate further the injuries to the complainants. A bloodstained *panga* was found in the appellant's house and surrendered to the police. It was not produced in evidence.
29. Granted those circumstances, the appellant raised some doubt about his culpability. The legal burden of proof lay throughout with the prosecution. It never shifted to the accused. The appellant had no obligation to fill in the gaps for the prosecution. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).
30. For all of the above reasons, I find that vital *ingredients* of the offence were not proved beyond reasonable doubt. The identification of the appellant was also cast into doubt. It follows, as a corollary, that the *conviction* was *unsafe*. I allow the appeal. I *quash* the conviction and sentence. The appellant shall be set free *forthwith* unless held for some other lawful cause.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 6th day of July 2016

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant.

Mr. R. Omboto for the appellant.

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.