REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HCCRA NO. E003 OF 2025

JULIUS NGOLEI LOMUNA ……

APPELLANT

VERSUS

REPUBLIC ……

RESPONDENT

(Being an appeal from the conviction and sentence delivered on 27 June 2024 in Naivasha CM's Court in Cr Case No. 767 of 2016 by Hon. N.S. Lutta)

JUDGMENT

1. The appellant was charged with the offence of Robbery with Violence contrary to section 296(2) of the Penal Code. After full trial, the Appellant was convicted and sentenced to 20 years imprisonment.

2. Aggrieved by the decision on both conviction and sentence, the appellant filed this appeal raising several grounds relating primarily to identification, failure to conduct an identification parade, reliance on uncorroborated evidence, alleged unfair trial, and failure to consider the defence.

3. The State opposed the appeal but conceded one crucial point; namely, that the appellant was not positively identified during the robbery.

4. This being a first appeal, the court is obligated to re-evaluate the entire evidence afresh with a view to arriving

at its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. (See ***Okeno vs. Republic*** **[1972] EA 32**)

5. A summary of the evidence tendered before the trial court was as follows: -

6. PW1 testified that he was at work with the deceased when at about 2:30 a.m., they were approached by four men armed with metal bars. PW1 was beaten and witnessed the deceased being struck on the head, but testified that he was unable to identify the particular assailant who inflicted the fatal blow.

7. PW1 further stated as follows:

> ***"there was one tall man…the others were mixed. Short and tall. They had hoods and caps. I never saw their faces."***

8. PW1 stated that he was called to the police station for an identification parade, but no identification parade forms were produced to confirm whether the same was properly or at all . He stated that there were no recoveries of the alleged stolen items.

9. PW2, PW3 and PW4 (police officers) testified on the arrest and the circumstances of the investigation. No independent witness was called.

10. When placed on his defence, the appellant denied the offence and alleged that PW1 only identified him because he had sought employment where PW1 used to work.

11. The appeal was canvassed by way of written submissions which I have considered.

The Appellant's Submissions

12. On the requirement for an identification parade, the Appellant cited the decision in the case of ***Charles O. Maitanyi vs. Republic*** **[1985] 2 KAR 75** where the Court of Appeal held:

> ***"even where the dock identification is preceded by a properly conducted identification parade, the evidence of a single identifying witness must be tested with the greatest care before a conviction is entered."***

13. He further relied on the case of ***Peter Mwangi Mungai vs Republic*** **Criminal Appeal No.140 of 2000 eKLR**, where it was held that:

> ***"dock identification of a suspect is worthless unless it is preceded by a properly conducted identification parade."***

14. The Appellant argued that PW1 did not describe the attackers as he was lying face-down at the time of the attack and did not mention knowing the appellant at the time of reporting.

15. The appellant relied on **Section 124 of the Evidence Act**, citing the statutory text verbatim as follows:

“the Accused shall not be liable to be convicted on such evidence unless it is corroborated by other material implicating him.”

16. It was submitted that the trial court improperly relied on PW1’s allegations that the Appellant had approached PW1 seeking assistance to steal spare parts.

17. The appellant argued that his Article 50(2) of the Constitution rights were violated when the advocate assigned by Legal Aid withdrew after which the trial proceeded the same day while he was unrepresented and without witness statements.

18. The appellant submitted that the trial court failed to consider his defence alleging business rivalry and misidentification.

The Respondent’s Submissions

19. The respondent conceded that the appellant was not positively identified at the scene, noting that from the evidence on record, nothing was recovered from the Appellant herein linking him to the robbery incident.

20. The state however maintained the other ingredients of robbery with violence were proved.

Issues for Determination

21. I have carefully considered the record of appeal and the parties rival submissions. I find that the following issues arise for determination: -

a) ***Whether the appellant was properly identified as one of the robbers.***
b) ***Whether failure to conduct an identification parade rendered the identification unsafe.***
c) ***Whether the conviction was based on uncorroborated or insufficient evidence.***
d) ***Whether the appellant's constitutional right to a fair trial under Article 50 of the Constitution was violated.***
e) ***Whether the sentence was lawful and proper.***

Analysis and Determination

22. **Section 296(2) of the Penal Code** provides that a person is guilty of robbery with violence if they are armed with dangerous or offensive weapon, are in the company of one or more persons or use actual violence before, during or after robbery.

23. Conviction also requires proof, beyond reasonable doubt, of the identity of the offender.

24. On whether identification of the Appellant was positive and reliable, PW1 expressly stated he did not see the faces of the assailants as he was lying face down during the attack.

25. I further note that, no identification parade form was produced to confirm if any parade took place. The prosecution bears the burden of proving identity. In ***Charles O. Maitanyi vs. Republic*** **[1985] 2 KAR 75** the Court of Appeal in held:

"the evidence of a single identifying witness must be tested with the greatest care before a conviction is entered."

26. In **Peter Mwangi Mungai v Republic (2000)** the Court held:

"dock identification of a suspect is worthless unless it is preceded by a properly conducted identification parade."

27. Applying the principles stated in the above cited cases, I find that PW1's dock identification was wholly insufficient and that the state correctly conceded to the appeal on this point.

28. I find that the appellant was not positively identified as one of the robbers and that this issue alone is fatal to the conviction. I further find that failure to conduct or prove an identification parade rendered identification wholly unreliable.

29. I note that the trial court relied on PW1's allegation that the Appellant had earlier approached him seeking assistance to steal spare parts. I further note that PW1 however admitted, on cross-examination, that he never reported that the appellant wanted to steal spare parts. No corroboration existed and I therefore find that the evidence was insufficient.

30. On the issue of whether the trial was unfair under Article 50 of the Constitution, the record reveals that the Appellant's

assigned advocate withdrew on the day of hearing after which the trial proceeded immediately at a time when he lacked witness statements.

31. Article 50(2)(c) of the constitution requires that an accused person be accorded adequate time and facilities to prepare a defence.

32. I find that proceeding with the hearing while the Appellant was unrepresented and unprepared prejudiced the Appellant and that the trial was therefore procedurally unfair.

33. On the issue of non-recovery of the alleged stolen items, I find that the same does not defeat a charge of robbery with violence but, when combined with failed identification, adds to the doubt created in the entire prosecution's case.

Conclusion

34. From the findings that I have made in this judgment, it is clear that the appeal turns on the issue of identification of the Appellant as one of the robbers. My finding is that the prosecution failed to establish the key ingredient of robbery with violence, which is the identity of the offender, to the required standard. The concession by the State reinforces the conclusion.

35. Consequently, I find that the conviction is unsafe and I therefore allow the appeal, quash the conviction, set aside the sentence and direct that the Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 19TH DAY OF FEBRUARY, 2026.

HON. W. A. OKWANY

JUDGE

19/02/2026

FOR APPELLANT Present

FOR RESPONDENT Ms Achieng

COURT ASSISTANT Karani

File closed