REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 6 OF 2016

RONALD SAID…….. APPELLANT

VERSUS

REPUBLIC…….. RESPONDENT

(From original conviction and sentence in Criminal Case Number 162 of 2015 in the Senior Resident Magistrate's Court at Taveta delivered by Hon J. Omburah (SRM) on 19th November 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Ronald Said, was tried and convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya) by Hon J. Omburah (SRM) and sentenced to death.

2. The particulars of the charge were that :-

"On the 10th day of April 2015 at [particulars withheld] within the Taita Taveta County, armed with an offensive weapon namely a knife robbed A H M Motor Cycle [particulars withheld] . Make Juan Fang valued at Ksh 70,000/= and immediately before or immediately after the time of such robbery used actual violence to the said A H M."

3. Being dissatisfied with the said judgment, on 10th February 2016, he filed a Notice of Motion application seeking leave to file his appeal out of time, which application was allowed and the Petition of Appeal deemed to have been duly filed and served. The grounds of appeal were as follows:-

1. THAT the learned trial magistrate erred in law and fact by failing to consider that both the conviction and sentence were founded on a defective charge sheet.

2. THAT the learned trial magistrate erred in law and fact by failing to consider that the trial court had no jurisdiction as the complainant had illegally entered into Kenya from Tanzania.

3. THAT the learned trial magistrate erred in law and fact by failing to consider that no

identification parade was conducted to connect the offence to the accused who was not arrested at the scene.

4. THAT the learned trial magistrate erred in law and fact in failing to consider the credibility and eligibility of the complainant to testify as a witness without proof of him being in Kenya.

5. THAT the learned trial magistrate erred in law and fact in failing to consider his alibi-defence (sic) **which was not challenged by the prosecution.**

4. On 18th July 2016, this court directed him to file his Written Submissions. Instead of doing so, on 15th September 2016, he filed his Written Submissions along with Amended Grounds of Appeal. The grounds of appeal were as follows:-

1. THAT the Pundit trial magistrate erred in both law and fact to convict him by failing to note that the charge sheet was defective (sic)**.**

2. THAT the Pundit trial magistrate erred in both law and fact to convict in failing to consider that the medical evidence presented to the court was not genuine.

3. THAT the Pundit trial magistrate erred in both law and fact to convict him without considering some of the crucial prosecution's witnesses were not brought to court to ascertain the truth c/s 150 of the CPC(sic).

4. THAT the Pundit trial magistrate erred in both law and fact to convict him in failing to note that the Prosecution's evidence adduced in of their case were contradictory and inconsistence c/s 163 of the evidence act (sic).

5. THAT the Pundit trial magistrate erred in both law and fact to convict him in failing to note that the Prosecution failed to prove their case beyond reasonable doubt c/a 107, 109 of the evidence act(sic)**.**

6. THAT the Pundit trial magistrate erred in both law and fact to convict him without considering that the mode of arrest was poorly instituted hence putting him into a great disadvantage(sic)**.**

7. THAT the Pundit trial magistrate erred in both law and fact to convict him without considering that the alleged investigations was (sic) **shoddy following that there was no first report made to connect him to the offence c/s 46 of the Police Standing Order.**

5. The State filed its Written Submissions dated 5th October 2016 on even date while in response thereto, the Appellant filed his Further Written Submissions on 9th November 2016.

6. When the matter came up on 9th November 2016, both the Appellant and the State asked the court to rely on their respective Written Submissions in their entirety as they did not wish to highlight the same. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

8. This court noted that the Appellant's Amended Grounds of Appeal were convoluted. His Written Submissions were unnecessarily long running to almost thirty (30) pages. As this was not an immigration matter, Amended Ground of Appeal No 2 was irrelevant. The court did not therefore deal with the same.

9. In establishing whether or not the Appellant's guilt was proven in the charge of robbery with violence, this court identified the following issues to really have been pertinent for its determination:-

a. Whether or not the Charge Sheet was defective;

b. Whether or not the Prosecution proved its case beyond reasonable doubt;

c. Whether or not his alibi defence had displaced the evidence that was adduced by the Prosecution witnesses.

10. The court therefore dealt with the said issues under the heads shown hereinbelow.

I. DEFECTIVENESS OR OTHERWISE OF THE CHARGE SHEET

11. Amended Ground of Appeal No 1 was dealt with under this head.

12. The Appellant submitted that the Charge Sheet did not indicate the time of the alleged offence and it was therefore not clear whether the said offence was committed during the day or during the night. It was his argument that the same was relevant because it could not be assumed that it occurred during the day and this omission thus raised doubts as to whether or not there was light.

13. On its part, the State argued that the Complainant, A H M (hereinafter referred to as "PW 1") and B H M (hereinafter referred to as "PW 2") both testified that the offence was committed at about 4.00pm and they confirmed the same during their Cross-examination and consequently, the Appellant could not purport not to have understood that the incident was said to have happened during the day.

14. It added that failure to indicate the time of the alleged incident in the Charge Sheet did not make the proceedings fatal because Section 134 of the Evidence Act Cap 80 (Laws of Kenya) provides that:-

"every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

15. It was its submission that the Charge Sheet bore the necessary ingredients as appertains the offence of robbery with violence under Section 296(2) of the Penal Code. It pointed out that the said Charge Sheet had indicated the Appellant as the perpetrator, the date of the offence as 10th April 2015, that the Appellant was armed with an knife which was an offensive weapon, it contained PW 1's name as the owner of the Motor Cycle, which was the stolen item and that there was an element of violence this satisfying the requirement of the charge.

16. It was therefore its argument that failure to indicate the time in the Charge Sheet was an omission that neither prejudiced the Appellant not prevented him from understanding the nature and particulars of the charge that faced him. It referred this court to the case of **E S L vs Republic[2015] eKLR** in this regard.

17. It was correct as the Appellant submitted that the Charge Sheet did not indicate the time of the alleged incident. It was equally correct as the State pointed out that all the witnesses were clear that the alleged incident happened at 4.00 pm.

18. A perusal of the proceedings showed that during his Examination-in-chief, PW 1 stated that the incident occurred at 4.00 pm. On his part, PW 2 confirmed the time of the incident as 4.00 pm when he was Cross-examined by the Appellant herein. The P3 Form also indicated that the offence was said to have been committed at 4.00pm.

19. From the said evidence on record, there was no doubt in the mind of this court that the incident herein occurred at 4.00 pm and the Appellant was aware of this fact. If the incident was at night, he did not raise the same in the proceedings in the Trial Court. His arguments about the lighting conditions at the material time of the incident therefore fell by the wayside as one could see another during the day.

20. Notably, an appellate court will not make a finding that a charge has prejudiced an accused person or occasioned him injustice unless the same is properly demonstrated. Although the time in the Charge Sheet was not indicated which was an omission, the Appellant did not demonstrate what prejudice he suffered as required by Section 382 of the Criminal Procedure Code Cap 75(Laws of Kenya).

21. The said Section provides as follows:-

“… no finding sentence or order passed by court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this code unless the error mission or irregularity has occasioned failure of justice.”

22. In the absence of any evidence that the Appellant suffered any prejudice or was occasioned injustice by failure of the Prosecution to indicate the time of the alleged occurrence, this court was not persuaded to find that he ought to be acquitted on account of a defective Charge Sheet.

23. In the premises foregoing, Amended Ground of Appeal No 1 was not merited and is hereby dismissed.

II. PROOF OF THE PROSECUTION’S CASE

24. Amended Grounds of Appeal Nos 3, 4, 5, 6 and 7 were dealt with under this head as they were all related.

25. The Appellant argued that the Prosecution did not prove its case beyond reasonable doubt before it did not tender in evidence the First Report contrary to Section 46 of the Police Standing Orders. **I**t was his contention that the description of the attacker ought to have been indicated in such First Report as was held in the case of **Mohamed Bin Allui vs Republic 1942 E.A.C.A.** (sic). The correct citation of this case was **Mohamed Bin Allui vs Republic (1942) 9 EACA 72.**

26. His argument was that an Identification Parade ought to have been done as since he was not known to PW 1 and PW 2, an honest witness could make a mistake in identification of his attacker. In this regard, he placed reliance on the case of **Republic vs Turnbull & Others (1976) 3 ALL ER 549** and **Criminal Appeal No 282 of 2012 Martin Oduor & 2 Others vs Republic,** The complete citation of this case was **Martin Oduor & 2 Others vs Republic [2014] eKLR**.

27. It was his further contention that no treatment notes were produced to prove PW 1's injuries. He averred that PW 1 had testified that he had taken the P3 Form from the police at Tanzania yet it was completed in Kenya. He added that Patterson Mwapulu (hereinafter referred to as PW 5") tendered in evidence, a P3 Form belonging to one A H and not PW 1 herein.

28. He further stated that there was great variance between PW 5's evidence and that of PW 1. He pointed out that the P3 Form PW 5 tendered in evidence showed that the approximate age of the injuries PW 1 sustained to have been one (1) day, meaning that he must have sustained the said injuries on 16th June 2015. He pointed out that this was consistent with PW 5's evidence that he completed the said P3 Form on 17th June 2015 thus contradicting PW 1's evidence that he was attacked on 10th April 2015. He therefore urged this court to exercise caution as the medical evidence had been concocted.

29. In his unsworn evidence, he was emphatic that he had caught J W alias K (hereinafter referred to as "PW 3") having sex with his wife and that the said PW 3 threatened him. He questioned whether if really he had stolen the said Motor Cycle, he would have taken it to Taveta Police Station knowing very well that police would be looking for it. He averred that he gave an elaborate alibi and he had not been identified as had been contended by the Prosecution witnesses.

30. Further, he averred that PW 1 did not produce the original Logbook to confirm that the said Motor Cycle was his and therefore the doctrine of recent possession was not applicable herein. It was his contention that the logbook that was produced was forged. In this regard he relied on the case of **Criminal Appeal No 272 of 2005 Issak Ng'ang'a Kahiga alia Peter Ng'ang'a Kahiga vs Republic** (unreported) where it was stated as follows:-

"It is trite law that before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively identified. In other words, there must be positive proof first that the property was found with the suspect, secondly, that the property is positively identified as the property of the complainant, thirdly, that the property was stolen from the complainant..."

31. In addition, he argued that the Learned Trial Magistrate ought to have summoned one B M as a witness and that failure to do so was to the detriment of the Prosecution. He was categorical that a party who does not call a witness does so at his own peril and that an adverse inference should be drawn if he is not called as a witness. He referred this court to the cases of **Ng'ang'a vs Republic 1981 KLR 483** and **Charles Kyalo Katitu vs Republic KLR** (sic) in this regard. This court was unable to trace the latter case in the Kenya Law Reports website and did not therefore consider the same.

32. He pointed out that he had the option of adducing unsworn evidence but this did not mean that he was not saying the truth. He argued that it was unreasonable to have expected his wife who he caught having sex with PW 3 would have come to testify in support of his case.

33. He termed the investigations that were conducted herein as shoddy and averred that the charges that were preferred against him had been accentuated by ulterior motive. He submitted that the Prosecution had not proved the ingredients of robbery with violence and therefore urged this court to

give him the benefit of doubt and acquit him forthwith.

34. On its part, the State submitted that the Appellant presented a weak case that the Learned Trial Magistrate considered and dismissed. It contended that the Appellant failed to demonstrate that there was any ulterior motive by PW 1 in accusing him of the offence and that in any event, he could not substantiate a link between PW 1 and PW 3 that would have shown a conspiracy to frame him with the charges herein.

35. It had also argued that the Appellant had failed to produce any treatment notes or P3 Form to corroborate his evidence that PW 3 had raped his wife, a submission the Appellant responded to hereinabove. It was its further contention that PW 4 (sic) had examined PW 1 a day after the offence but completed the P3 Form on 17th June 2015 and that although no treatment notes were produced, PW 4 (sic) made his own observations when he examined PW 1. It therefore submitted that the P3 Form was sufficient to provide medical evidence as to whether or not PW 1 did actually sustain injuries during the robbery by the Appellant herein.

36. In addition, it submitted that Section 143 of the Evidence Act Cap 80 (Laws of Kenya) that provides **"that no particular number of witnesses shall in the absence of any provision to the contrary be required to prove any fact"** which provision allows the prosecution to determine the number of witnesses it would call in support of its case. In this regard, it argued that failure to call B M as a witness did not weaken the Prosecution's case.

37. It was its further submission that an Identification Parade was not necessary based on the circumstances of the case because the incident occurred during the day and PW 1 having conversed with the Appellant for some time and carried him in his Motor Cycle, this was sufficient for PW 1 to have recognised the Appellant. In addition, it stated that PW 1 reported that his Motor Cycle, which No 37607 PC Simon Gachala (hereinafter referred to as "PW 7") confirmed, was driven to the Taveta Police Station by the Appellant herein. It therefore relied on the case of **Martin Oduor & 2 others vs Republic** (Supra) on the issue of the Appellant's identification.

38. It submitted that it had provided proof that all the ingredients of robbery with violence as set out in Section 296(2) of the Penal Code had been satisfied. These were that

a. the offender must be armed with any dangerous or offensive weapon or instrument; or

b. the offender must be in the company of one or more other person or persons or;

c. 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.

39. It stated that PW 1's testimony showed that he was attacked by the Appellant herein on 10th April 2015 while being ferrying in PW 1's Motor Cycle Registration Number **[particulars withheld]** Yuangfang, the Appellant robbed and wounded him with a knife, which injuries were confirmed by the P3 Form and the treatment notes and that this evidence was corroborated by PW 2 who placed the Appellant as a passenger in PW 1's Motor Cycle, that PW 7 confirmed that the Appellant drove the Motor Cycle to the Taveta Police Station and that No 73675 PC Henry Gatithi (hereinafter referred to as "PW 8) produced the logbook that confirmed that PW 1 was the owner of the said Motor Cycle. It said that all these facts showed there were no ulterior motives in the Appellant having been charged with the offence herein.

40. It was therefore its submission that the Prosecution proved its case beyond reasonable doubt and thereby urged this court to dismiss the Appellant's Appeal as it was not merited.

41. As was rightly pointed out by the State, Section 143 of the Evidence Act is abundantly clear that no particular number of witnesses is required to testify to prove a case and that it was not necessary for the said B M to have been called as a witness if the Prosecution case could be proved without him testifying in the Trial Court. In this case, PW 1, PW 2, PW 3, PW 4, PW 6, PW 7 and PW 8 who had linked the Appellant to the said Motor Cycle that was taken to Taveta Police Station were sufficient witnesses to prove the Prosecution's case.

42. A perusal of the proceedings showed that PW 1, who was a Boda Boda rider, testified that on 10th April 2014 at about 4.00 pm, he was at Chekereni Stage in Chekereni Moshi Tanzania when the Appellant approached him to ferry him to Lotima in Kenya. They agreed on Tanzania Shillings 3,000 as the fare. The Appellant showed him the route to take.

43. When they reached Kenya, the Appellant told him that he had dropped an envelope and when he stopped for the Appellant to pick it, the Appellant held him by the neck with a knife in his hand. The Motor Cycle Registration number **[particulars withheld]** that he was riding fell. He said that he kicked the Appellant and as he was struggling to escape, he was bruised in the neck by the knife the Appellant had. He said that he got chance to escape and ran away whereafter he called his father and informed him what had transpired. In the meantime, the Appellant took off with his Motor Cycle.

44. He reported the matter at Kitobo Police Station in Tanzania but he was referred to Taveta Police Station where he learnt a week later that the said Motor Cycle had been seen at Taveta and was at the Taveta Police Station. He said that he was informed by a third party who was owed money by the Appellant herein that the Appellant had taken it there as security of payment the Appellant owed him. He said that he did not know the Appellant before. He, however, identified the Appellant in the dock as the person who had robbed him of the said Motor Cycle. During Cross-examination, he said that the person the Appellant owed money was called Kim.

45. PW 2 confirmed that the Appellant hired PW 1's Motor Cycle as a passenger and that a week after the robbery incident, they got information that the Motor Cycle was at Taveta Police Station. During his Cross-examination, he stated that Kim said that the Motor Cycle belonged to the Appellant herein. In Re-examination, he stated that the Investigation Officer called Kim and the supposed owner of the said Motor Cycle which turned out to be the Appellant herein.

46. PW 3 was the Kim who both PW 1 and PW 2 had said had informed them that it was the Appellant who had taken the said Motor Cycle to Taveta Police Station having claimed that it was his Motor Cycle. His testimony was that on 1st April 2015, he sent Kshs 4,030/= to a manager of a bank for repayment of a loan he had taken. He received a message that indicated that the monies had been received by one Ronald Saidi, the Appellant herein.

47. He stated that he arrived at Taveta the following day. Officers from the bank came to his business premises and wanted to take this property. They asked him why he was not repaying the loan and he showed them the message which showed monies had been received by the recipient.

48. It was then that he realised that he had saved wrong numbers as manager's numbers. These two (2) numbers were 0733-341681 saved as Manager Sahidi and 0733-973149 that had been saved as Manager. He then went to the Appellant's place of work but he was informed by the Appellant's employer that he had dismissed him from work the previous day.

49. The Appellant then came riding a Motor Bike and when he tried to stop him, he refused to stop. He took another Boda Boda and gave chase to the Appellant and caught up with him. He held the Appellant by the trouser and after telling him that they should talk, the Appellant ran away into swampy waters leaving his open shoes. PW 3 then carried the shoes and reported the matter to the Police Station.

50. He stated that the following day, someone by the name of Hassan came with Kshs 2,500/= and said he had been sent by the Appellant. He asked for the Appellant's shoes which he gave him after pleading a lot and promising that the balance would be paid after two (2) days.

51. On a day he did not disclose, the said Hassan came on a Motor Cycle and told him that he had found Ronald with a Motor Cycle and had left him being guarded. He then went to Kwa Kiriti garage where Hassan used to work and found Ronald being guarded by people. He asked him for his money but Ronald said he did not have the same but he could deposit the Motor Cycle which had a Tanzanian Number plate at the Police Station while he repaid him the money.

52. The following day, Ronald sent some people to him and he went and recorded the matter in the OB. He said that he was attended to by PC Kezola when the Appellant confirmed that the Motor Cycle belonged to him. The OCS released the Appellant because it not wise to keep him and the Motor Cycle at the Taveta Police Station. He stated that after two (2) days, he was called by PW 8 who told him that two (2) people had come to claim the said Motor Cycle as theirs.

53. He said that PW 8 told him to pursue the Appellant through other means as the said Motor Cycle now had a case. He later traced the Appellant and he was accosted by PW 1 and PW 2 and even after claiming the Motor Cycle was his, the Appellant did not produce a sale agreement.

54. Hassan Riziwani (hereinafter referred to as "PW 4") testified that in the month of April 2015, the Appellant came and sked him to take a sum of Kshs 2500/= to PW 3 because he feared him. He did not know what the money was for. He said that PW 3 told him that he had sent Kshs 4,000/= to the Appellant and had therefore taken his shoes but that he had given him two (2) days to pay the money. On the third day, he rang the Appellant who informed him that he was still looking for the money. He looked for him around the airstrip and eventually found him sitting on a bench.

55. He further stated that the Appellant stood up and rode into his garage with a Motor Cycle that he used to go to PW 3's place. He had stated that the Appellant used to use this Motor Cycle. They then went to the police station with PW 3 and reported the matter to the police and it was recorded that the Motor Cycle with Tanzanian Registration Number belonged to the Appellant.

56. It was his further testimony that PW 3 called him and told him that the Appellant had been accused of stealing the said Motor Cycle. He said that he traced the Appellant with PW 3 and after finding him next to a miraa shop, they took him to the police station.

57. PW 5 testified that he completed the P3 Form on 17th June 2015 and the approximate age of the injury was one (1) day. PC No 96460 PC Benjamin Kishoyian (hereinafter referred to as "PW 6") was attached to Kitobo Police Station. He confirmed that PW 1's Motor Cycle had been stolen in Kenya and that PW 1 had sustained injuries. PC No 37607 PC Simon Gichala (hereinafter referred to as "PW 7") was attached at Taveta Police Station. He said that on 14th April 2015, Titus Wambua, PW 4 and the Appellant found him at the Police Station. It was not clear whether this was the same as Julius Wambua, PW 3 herein. The said Titus informed him that the Appellant took his money fraudulently after cheating him that he was working with SMEP.

58. He interrogated the Appellant who admitted the fact. He searched him and found him with the said Motor Cycle which he booked as the Appellant's after he confirmed that it was his. Two (2) days later, he later learnt from PW 8 that the said Motor Cycle had been stolen.

59. PW 8 stated that on 17th April 2015, PW 1 and PW 3 went to the Police Station and told them that the Motor Cycle that had been parked at the Police Station yard belonged to them. He confirmed from OB of 30/14/4/15 at 1345 hours that the said Motor Cycle had been booked as belonging to the Appellant and the complainant was PW 3 who had informed him that the Appellant owed him money and the said Motor Cycle had been kept there as surety as the Appellant repaid him the money. He said that the OCS had intervened and the Appellant was released from the cells.

60. He said that he then called PW 3 who together with PW 4 went and arrested the Appellant as they knew where he was and brought him to the Police Station. PW 1 identified him as the person who had robbed him of the Motor Cycle. He said that PW 1 was able to identify the Appellant as he had a gap in his teeth.

61. In his unsworn evidence, which had very little probative value, the Appellant stated that on 5th April 2015, he found PW 3 having sex with his wife. He said he reported the matter to the police but he was not given any OB Number. It was his testimony that PW 3 came to his shamba on 9th and 13th April 2015 and 1and threatened him that he would get lost.

62. It was his evidence that he harvested crops in his farm on 10th April 2015 and the following day, he went to sell the same at Mombasa. PW 3 came to his farm on 13th April 2015 and told him he had money which they could share. It was on 17th April 2015 that officers came to his shamba and arrested him for something he did not know about.

63. The trial in the Lower Court was quite lengthy going by the number of pages of the proceedings. It therefore took this court quite a bit of time to go through and analyse the evidence that was adduced as there appeared to have been two (2) incidents that came to be connected somewhere along the way. After perusing the evidence in totality, it tried to construct what it understood parties had contended happened on the two (2) material dates.

64. In the first scenario, on an unknown date, PW 3 sent the Appellant money by mpesa, which the Appellant had undertaken to refund but was unable to repay the said sum and that is why PW 3 reported the matter to Taveta Police Station. This court was unable to conclude with certainty under what circumstances PW 3 sent money to the Appellant. It was also not clear to this court whether Hassan Shafi who was referred to by PW 3 was the same person as PW 4.

65. His testimony that he sent money to the Appellant in his capacity as manager of the bank he had taken a loan did not sound convincing. This is because he had testified that he had known the Appellant for a long time as he used to go to his barber. It was also not lost to this court that PW 3 did not provide electronic proof that he did in fact sent the said Ronald Saidi, money, in his capacity as a manager of a because it is unheard of that monies are repaid to banks through mpesa and to individual managers.

66. On the other hand, there was no evidence to confirm the Appellant's evidence that he found PW 3 having sex with his wife. It did not appear to this court that it was reasonable for the Appellant to have reported his wife sexual escapades with PW 3 to the police. What was evident was that PW 7 had testified that PW 3, PW 4 and the Appellant went to the Police Station regarding the issue of the money. In addition, it did not make sense why he would share money he had made from selling vegetables with a man he had found having sex with his wife.

67. What was clearly discernible was that the appeared to be bad blood between PW 3 and the Appellant herein.

68. In the second scenario, on 10th April 2015, someone hired PW 1 to ferry him on his Motor Cycle to Kenya. He was, however, robbed of the said Motor Cycle. He reported the matter to Kitobo Police Station, Tanzania and was referred to Taveta Police Station as the incident had occurred within its jurisdiction. Seven (7) days later, he learnt that the said Motor Cycle was at Taveta Police Station.

69. It appeared that PW 1 met PW 3 at the Taveta Police Station and PW 3 told him that the Appellant had taken the said Motor Vehicle there as security to pay him his money back. Indeed, PW 8 testified that PW 1 and PW 2 found him at the Police Station and after checking the OB, he called PW 3 and PW 4, a fact PW 3 confirmed in his evidence, and they informed him that they knew where the Appellant's whereabouts. They brought the Appellant to his office at which point PW 1 identified him as the person who had robbed him.

70. Having said so, the Appellant's contention that he could not have stolen the said Motor Cycle and taken it to the Police Station as security for a debt was arguable. The way the said Motor Vehicle thus found itself at the said Police Station was a critical piece of evidence. Unfortunately, the evidence that was adduced in this regard was confusing and had several glaring gaps.

71. Notably, PW 4 had testified that the Appellant used to use the Motor Cycle. He did not, however, say for how long the Appellant had used the said Motor Cycle. This piece of evidence was material as it would have assisted this court in establishing whether indeed, it was the same Motor cycle the Appellant was said to have taken to Taveta Police Station, if at all. In fact both him and PW 3 never mentioned the registration number of the said Motor Cycle.

72. In addition, although both PW 3 and PW 4 both alluded to the fact that they took the Motor Cycle to the Police Station while accompanied by the Appellant herein, PW 7's evidence that he searched the Appellant and found him with the said Motor Cycle was rather confusing. It was not clear where he searched him eventually finding the said Motor Cycle.

73. Although the State had rightly submitted that the Prosecution could call any number of witnesses to testify in support of its case, it was the considered view of this court that the OCS and PC Kezola were critical witnesses for the reason that it was not indicated anywhere in the OB that the Appellant had claimed that the said Motor Cycle belonged to him.

74. It was clear from PW 3's evidence that it was PC Kezola who asked the Appellant whether the Motor Cycle was his was to which the Appellant was said to have confirmed. He never mentioned PW 7 to having been present at the material time.

75. On his part, the OCS would have shed more light on how the said Motor Vehicle found itself at the Taveta Police Station because PW 8 had testified that it was the said OCS who had ordered the release of the Appellant but retained the said Motor Cycle at the said Police Station, a fact that PW 3 confirmed in his evidence.

76. If the Appellant verbally informed PW 7 that the said Motor Cycle was, then the said contention was not recorded in the said OB. The OB Report No 30 of 1345 hours which PW 7 recorded was as follows:-

"Sgt Mwau and Gachena do now take action. One Ronald Saidi to be charged with offence of

stealing who was brought in by the complainant Titus Wambua accompanied by Hassan Kisiwani in that the suspect received money through--- which was sent by the complainant Justus Wambua phone No 07---571 KSHS 4,030/= who pr---to be manager of S.M.E.P---18 of 2/4/2015..Placed in cell by Gachena with no---and---M/Cycle –T451 AXL as prisoners property."

77. There also appeared to be several contradictions regarding when PW 1 learnt that the said Motor Cycle was at Taveta Police Station. In his evidence, he stated that he learnt of the sighting of the said Motor Cycle seven (7) days after the alleged incident, which must have been on 17th April 2015. This contradicted PW 6's evidence who had testified that PW 1 and two (2) others informed him that the said Motor Cycle had been seen at Taveta on 14th April 2015. This was the same day PW 7 had said had booked the Appellant with the said Motor Cycle.

78. PW and PW 2 did not also tell the Trial Court how they learnt of the sighting of the said Motor Vehicle because they did not reside in Kenya. Being residents of Tanzania at the materia time, someone must have told them about the sighting of the said Motor Vehicle and it being at Taveta Police Station. This evidence was critical so as to remove a link of conspiracy between the Prosecution witnesses, a link the State had alluded to in its submissions.

79. This court was also concerned about PW 4's active role in this matter. He came from being a helper to the Appellant to his hunter. It was not clear from his evidence and that of PW 1 why the Appellant had to be guarded. In fact, this court was unable to comprehend why a group of people would detain the Appellant for no apparent reason and then call PW 1. It was even stranger that the detention of the Appellant by the group of people was in respect of a sum of Kshs 1,500/=.

80. In view of the said gaps, this court did not therefore deem it fit to ignore any contradiction in the evidence that was adduced by the Prosecution witnesses. This court took particular interest in the evidence regarding the Appellant's arrest and his identification. PW 1 and PW 2 were already at the Police Station by the time PW 3 and PW 4 brought the Appellant to PW 8's office where PW 1 identified him as the person who robbed him.

81. Indeed, identifying the Appellant in PW 8's office was unsafe because any ordinary person would more often than not confirm that a person who he is shown to have been the person who attacked him to be that person even without being certain.

82. As PW 1 confirmed, the Appellant was a stranger to him. The fact that he could identify him by the gap in the teeth as had been stated by PW 8 was not a guarantee of safe identification. This is because there was no evidence of any such unique physical feature having been recorded in the First Report. It if was indeed recorded, the said First Report was not tendered in evidence during the Trial. This court wishes to point out that tendering in evidence a First Report is not mandatory but it could assist especially where physical descriptions of a person have been recorded therein.

83. Notably, this court was not certain whether PW 1''s observation of the gap in the Appellant's teeth was made when he saw the Appellant on 17th April 2016 at PW 8's office. In fact, a gap in the teeth is not unique to any particular person. There was therefore need to have established without any reasonable doubt that it was indeed the Appellant who robbed him by way of conducting an Identification Parade.

84. The importance of scrutinising evidence of such single witness was emphasised in the case of **Oluoch vs Republic 1985 KLR** in which the Court of Appeal stated as follows:-

“A fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favouring a correct identification were difficult.”

85. In the case of **Kiilu & Another vs Republic [2005] eKLR** , the Court of Appeal also stated as follows:-

“Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, whether it be circumstantial or direct, pointing to guilt, from where a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can be safely accepted as free from possibility of error.”

86. In the absence of proof of water tight identification of the Appellant, the circumstances under which the said Motor Cycle found itself at the Police Station and the failure by PW 4 to state how long the Appellant had the said Motor Cycle, if at all, this court could not for a fact conclude that it was the Appellant who had possession of the said Motor Cycle or that he personally took it to Taveta Police Station as had been contended by the Prosecution witnesses.

87. The question that also came in the mind of this court was, it the Appellant was a violent robber as he had been portrayed by PW 1, he could not really have stolen the said Motor Cycle, retained its number place almost a week after he had stolen the same, ride around with the same in Taveta fearlessly for a whole week, not arouse PW 3’s and PW 4’s curiosity from where he had suddenly acquired the said Motor Cycle yet he owned PW 3 a sum of Kshs 1,500/= which he could pay and actually driven it to Taveta Police Station and deposited it as security as he paid PW 3 his money.

88. In fact, this brave conduct seemed to have been out of the Appellant’s character as PW 4 portrayed him as a very scared man who could not face PW 3 because he had his Kshs 4,000/= and actually had to use PW 4 as an intermediary.

89. Further, since PW 4’s was not mentioned in the OB, this court was also puzzled why PW 8 called PW 4 when PW 1 and PW 2 came to Taveta Police Station yet he was not even a complainant and had supposedly assisted PW 3. Notably, both PW 3 and PW 4 were very evasive in their evidence about dates. They did not mention any specific date. Something did not just add up in this case and there appeared to have been more than met the eye.

90. Turing to PW 5’s evidence, this court noted that there was a huge difference between 10th April 2015 when PW 1 was said to have been attacked by the Appellant and 16th June 2015 when PW 5 suggested to have been the date of PW 1’s injury. If as the State had suggested that PW 5 had adduced his evidence on what he had observed when he saw PW 1, then the only logical explanation was that he was mistaken when he indicated that PW 1’s injuries were a day old. In any event, a P3 Form is clear that the age of injuries is at the time of the completion of the P3 Form.

91. Further, the Prosecution also failed to clarify the difference in the names appearing in the said P3 Form. PW 1 had told the Trial Court that he was called A H M. The said P3 Form indicated that it was for A H. If indeed A H M and A H were one and the same person, nothing would have been easier than for the Prosecution to have clarified the same during PW 5’s Examination-in-Chief.

92. In the circumstances foregoing, Amended Grounds of Appeal Nos 3, 4, 5, 6 and 7 were merited and are hereby upheld.

CONCLUSION

93. Accordingly, having considered the Appellant's Appeal, his Written Submissions and those of the State, the case law they each relied upon and the evidence on record, this court was of the view that the Learned Trial Magistrate may have been persuaded to make the findings that he did regarding the Appellant's identification and his having possession of the said Motor Cycle, this court was not equally persuaded.

94. The several gaps in the Appellant's identification by PW 1, the circumstances under which PW 1 and PW 2 came to know of the whereabouts of the Motor Cycle, the circumstances surrounding the Appellant's possession of the subject Motor Cycle as was testified by PW 3, 4, 6, 7 and 8 and the disparity in the date of PW 1's attack and the age of injuries shown in the said P3 Form as were detailed hereinabove were sufficient to make this court hesitant to find that the Prosecution had proved its case beyond reasonable doubt.

95. It must be noted that the Appellant was faced with a death sentence and accordingly, greater scrutiny must be made to ensure that the proof must be beyond reasonable doubt despite him having adduced unsworn evidence.

DISPOSITION

96. For the foregoing reasons, the upshot of its decision was that the Appellant's Petition of Appeal that was lodged on 10th February 2016 was merited and the same is hereby upheld. This court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless be held or detained for any other lawful reason.

97. It is so ordered.

DATED and **DELIVERED** at **VOI** this **20TH** day of **DECEMBER** 2016

J. KAMAU

JUDGE

In the presence of:-

Ronald Said……..Appellant

Miss Anyumba…….for State

Josephat Mavu– Court Clerk