IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E.M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 48 OF 2016

BETWEEN

IBRAHIM NAFIKI WATUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Bungoma, (Muchelule & Kimaru, JJ.) dated 17th July, 2012

in

H.C.CR.A. NO. 58 OF 2011)

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JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court dismissing the appellant's appeal against conviction and sentence for two offences of robbery with violence contrary to **Section 296(2)** of the Penal Code and attempted robbery with violence contrary to **Section 297(2)** of the Penal Code.

[2] The particulars of the offence of robbery with violence alleged in essence that on the night of 4th July, 2009, at **Sella Bar Miluki shopping centre**, the appellant jointly with others not before the court while armed with a dangerous weapon, namely, AK 47 rifle robbed **Cathrine Nekoye Wepukhulu** of Shs. 10,000/= and at or immediately before or immediately after such robbery shot her dead. The particulars of the second count of attempted robbery with violence alleged that the appellant jointly with others not before the court while armed with a dangerous weapon, namely, AK 47 rifle attempted to rob **Simon Wanyela** of his personal belongings and at or immediately before or immediately after the time of such robbery shot him to death.

[3] Cathrine Nekoye Wepukhulu, the victim of the robbery in count 1 was the wife of **Peter Wepukhulu *(Peter)*.** Peter owned Sella Bar and a posho mill at Miluki market, Bungoma and had employed **Simon Wanyela,** the victim of the robbery in Count 2 as a counterman. He had also employed **Moses Taabu** as the security guard. Moses Taabu testified at the trial that on the night of 4th July, 2009, he was guarding the bar and when he was going away for supper he met three people at the verandah of the bar; that one of them whom he identified to be the appellant was wearing police uniform and an AP beret uniform and was armed with a gun; that

there was bright electricity lights; that the three men entered into the bar; that he left for supper and heard gun shots five minutes thereafter and that he later identified the appellant at an identification parade.

[4] Josephat Wafula Masinde was a village elder and the bar manager employed by Peter. He testified at the trial that after he received a report of gun shots at the bar, at 9.00pm, he went to the bar and found that Simon Wanyela had been shot dead while Cathrine was bleeding profusely and writhing in pain and that Cathrine was taken to Bungoma District Hospital but died on the same night while undergoing an operation. Peter testified at the trial that when he went to the scene, he found that Shs.10,000/= and mobile phones of both Cathrine and Simon Wanyela had been stolen. **PC Vincent Ngereza** who was the investigation officer testified at the trial that he arrested the appellant on 3rd December, 2009; that during investigations he confirmed that Moses Taabu and **Richard Wachie Wanyama *(PW4)*** were present when the incident occurred; that he summoned the witnesses to record statements; that he carried out an identification parade " for my own good"; that five spent cartridges were collected from the scene and that he discovered that Shs.10,000/= was stolen during the robbery.

[5] The appellant gave sworn evidence at the trial. He stated that he was at home on the 4th July, 2009; that he did not go to the bar at Maluki; that he was arrested five months after the alleged robbery and identified at an identification parade by Moses Taabu and Richard Wachie who both knew him before. He admitted that Cathrine Nekoye *(deceased)* was his second wife but they separated in 1998. He further stated that he was not summoned by the police between the dates of alleged offence and arrest to make a statement.

(6) The appellant was convicted on both counts on the basis of the identification by Moses Taabu and sentenced to death, in respect of the 1st count. The sentence in respect of the 2nd count was left in abeyance.

The High Court concurred with the findings of the trial Magistrate that Moses Taabu positively recognized the appellant and dismissed the appeal.

[7] The main ground of appeal states that the appellate Judges erred in law and in fact in laying undue weight on the evidence of Moses Taabu which was basically suspect. The High Court is also faulted for failing to exhaustively re-evaluate the evidence of the appellant and to weigh it against the prosecution evidence. **Mr. Mongeri**, learned counsel for the appellant submitted that the robbery occurred at night and that Moses Taabu did not witness the robbery. He further submitted that if Moses Taabu had recognized the appellant, the police would not have conducted an identification parade. On the other hand, **Ms. Karanja**, the prosecution counsel submitted that Moses Taabu knew the appellant before and that the two courts below made concurrent findings of fact that Moses Taabu recognized the appellant.

[8] The two courts below correctly appreciated that the prosecution case against the appellant solely depended on the identification of the appellant by Moses Taabu on the night of the robbery. The two courts below also correctly stated the guiding principles of law on a case dependent on a single identifying witness. The High Court in particular relied on the case of **Maitanyi V Republic [1986] KLR 198** for the principle that a fact may be proved by a testimony of a single identifying witness but this rule does not lessen the need for testing with the greatest care the evidence of a single identifying witness respecting identification when it is known that conditions favouring a correct identification were difficult.

[9] It is clear from the judgment of the two courts below that the evidence of Moses Taabu was merely believed without sufficient evaluation of all the circumstances of the identification. The two courts below merely believed that there was sufficient electricity light both at the verandah and inside the bar without inquiring the position of light in relation to where Moses Taabu was at the time he claimed to have recognized the appellant and his accomplices.

Moses Taabu testified that the appellant was wearing an AP beret. This aspect of the evidence was not reconsidered. Further, the High Court did not inquire why Moses Taabu believed that the appellant's accomplices were police officers on routine duty yet he claimed that the appellant was a frequent customer in the bar and knew his name before. The credibility of evidence of Moses Taabu, a security guard that he went away without inquiring what the *"police"* were looking for in the bar was not tested.

[10] There was evidence from both Peter and Richard Wachie that they suspected the appellant because of his relationship with Cathrine Nekoye. The two witnesses knew the appellant before. Further, Josphat Wafula Masinde testified that the appellant was his neighbor. The appellant testified that for five months before his arrest he had not been summoned by police to make a statement. It was also evident that the appellant was arrested five months after the robbery. There was no explanation given either

by the witnesses or by the investigating officer why the appellant who was well known was not arrested within a reasonable time after the robbery. Lastly, although evidence of the conduct of the identification parades was not formally produced by the officer who conducted it, there was ample evidence from Moses Taabu, PC Vincent Ngereza and from the appellant that an identification parade was in fact conducted in which Moses Taabu identified the appellant.

The investigating officer did not explain why it was necessary to hold an identification parade if Moses Taabu knew the appellant before and had indeed recognized the appellant on the night of the robbery. All that evidence which has a bearing on the credibility of the prosecution case particularly on the credibility of the evidence of Moses Taabu relating to the recognition of the appellant was not re-evaluated and reconsidered.

[11] In the absence of the sufficient evaluation and re-consideration of the material evidence by the High Court, it cannot be said that the evidence of Moses Taabu was credible or free from the possibility of error. There remains a reasonable doubt whether the appellant was properly convicted and this doubt must lie in the appellant's favour.

[12] For the above reasons, the appeal is allowed. The convictions for robbery with violence and attempted robbery with violence are quashed and the sentences set aside. The appellant shall be set at liberty unless otherwise lawfully held.

Orders accordingly.

Dated and Delivered at Eldoret this 22nd day of March, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.