**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL APPEAL NO 3 OF 2021**

**KEVIN OCHIENG OGUTA.....1ST APPELLANT**

**DAVID OTIENO OMOLLO.....2ND APPELLANT**

**EVANS OCHIENG' OLOO.....3RD RESPONDENT**

**JULIUS OMBORI BISIERI....4TH RESPONDENT**

**VERSUS**

**STATE.....RESPONDENT**

(Being an appeal arising from the original conviction and sentence in Criminal Case No. 1077 of 2009 at Chief Magistrates Court Kisii Law Courts by Hon. K.T Kimutai – SRM on 23rd December 2010)

**JUDGMENT**

1. The Appellants were including Kennedy Ochieng' Oguta (deceased) were convicted of an offence of robbery with violence contrary to S**ection 296(2)** of the **Penal Code** and sentenced to death.

2. The appellants appealed before this court and their appeal was heard by Maina J and Okong'o J. After considering the appeal, Okong'o J dismissed their appeal precipitating a second appeal to the Court of Appeal. However, when the matter went before the Court of Appeal, the court held that the hearing before E. Maina and S. Okong'o J was a nullity stating that a judge in the Land and Environment division had no jurisdiction to hear criminal matters. **Kennedy Ochieng' Oguta** died during the pendency of the appeal and the case against him abated following his death.

3. The Court of Appeal directed that the appeal be remitted back to this court to be reheard.

4. The appellants in the memoranda of appeal lodged before this court faulted the trial magistrate's decision stating that the prosecution did not prove its case to the required standards; that there were glaring contradictions in the prosecution case; that a translator was not availed during the hearing of the case yet they did not understand the language used during the proceedings; and that their defence was not considered by the trial court. The 3rd appellant also raised the ground that the sentence meted by the trial court was harsh and excessive.

5. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424."**

6. The prosecution case in a nutshell was that the appellants on the night of 21st May 2009 robbed the complainant, John Michael Oniko (Pw1) while he was at home. The appellants in the process of robbing Pw1 beat him up causing him grievous harm. In order to prove their case the prosecution called 7 witnesses before the trial court.

7. Pw1 testified that on the material day at 8:30 p.m. he was at his home when he heard the dog barking whereupon the appellants armed with *pangas* rushed into the house. Pw1 recalled that there was a hurricane lamp and could therefore see the appellants well. He saw the accused persons enter his house. Kevin Ogutta, Kennedy Ogutta (now deceased) and David Omollo were the first to enter his house. The 2nd appellant David proceeded to cover his face using a crotchet sofa cloth. When he tried to remove the cloth they cut him on the head and both hands and made him lie on the sofa. The appellants took Kshs 100,000/- that was under the sofa and Kshs. 50000/- from his pocket. They also took a Nokia 1100 a torch and motor bike keys. They turned him over and cut him on the back before they left. He was taken to Nyangena hospital for treatment. During cross examination Pw1 testified that, Kennedy cut him on the head, Julius the 4th appellant took Kshs 50,000/- that was in his pocket.

8. The complaint's wife who was in the home, Florence Moraa Ongoro testified as Pw2. She recalled that on the material day at 9pm she was in the kitchen cooking when she heard several footsteps of people heading to the main house. She testified that there was a pressure lamp in the main house. She heard her husband crying that they had finished him. She peaked through the slab window and saw 3 people. She recognized the 3 as her customers. She recognized Kevin Ogutta, Kennedy Ogutta and David Omollo. She ran out screaming members of public responded. On returning to the house she found Pw1 had been taken to hospital. She testified that she found Kshs. 100,000/- stolen together with the bikes keys a torch and a Nokia. Nothing was recovered. During cross examination she testified that she knew the appellants since they were her customers and that she had known them for long, however she did not mention their names when she wrote her statement.

9. Lawrence Kanga Nyakwae (Pw3) testified on the material day he heard screams from Pw1's house which is about 300 meters from his house. He was informed that Pw1 had sustained injuries during the attack. He went to the hospital to visit Pw1. Pw1 told him that he was attacked by '*vijana wa Ominto*' (sons of Ominto).

10. Jackson Murauni (Pw4), a clinical officer at Kisii Level 5 Hospital, testified that upon examining Pw1 following his assault on 21st May 2003, Pw1 had a cut stitched wound on the left forehead, a cut stitched wound on occipital part and arm. He had a fracture on the skull, right hand and the left radius bone. He had a traumatic confrontation of the left index finger and several tendons of both hands. At the time of the exam the age of the injuries were 11 days and concluded that the appellants as a result of the assault caused Pw1 grievous harm.

11. The assistant chief Edward Manwacha Moenda, (Pw5) testified that upon receiving information about the theft at Pw1's home he proceeded to the scene and saw blood all over the floor. They found a stained jacked and trouser in a house that was 2kms from the scene. He testified that the suspects were later apprehended.

12. PC Timothy Njuguna No 232716(Pw6) testified that on the 22/5/2009 whilst at work he was informed by Pw5 that some suspects had been apprehended by members of public at Riana. He proceeded to the place and found Kevin and Kennedy Ogutta arrested. He took them to Gesonso police post.

13. PC Crispinas Juma No 72798 (Pw7) testified that whilst based at Gesonso Police he rearrested Kevin and Kennedy Ogutta from Pw5 and AP officers. He also took possession of 2 blood stained panga, a jacket and 2 trousers. Later he recorded Pw1's statement on the 26/5/2009. He also testified that the 2nd appellant was arrested at Sori while the 4th respondent was arrested at Kapsabet. He testified that the other appellants were apprehended by the members of the public. The appellant were later charged.

14. The appellants in their defence denied committing the offence. The 1st appellant **Kevin Ochieng' Oguta** (Dw1) testified that he was at Nyamira market when he was arrested and taken to Gesonso police post where he was charged, that he knows nothing about the offence. He denied being the child of Ominto, his father is Siega Ogutta. **Kennedy Ogutta** (2nd accused in the lower court) is deceased. **David Otieno Omollo** the 2nd appellant (Dw2) testified that on the 23rd May 2009, he was arrested by the local vigilante group on allegations of the offence of arson but was later charged with the offence of arson and robbery with violence. He testified that Pw1 and his brother in law were in a business relationship. That Pw1 did not mention him in any of his statements. Julius Biseiri Omwoyo (Dw3) testified that he recalls that on the 23/5/2009 one Lawrence Karuga and Gabriel Kebiro informed him that his elder brother had died. He accompanied them and on reaching Gesonso he was arrested. He denied committing the offence. Evans Ochieng' Oloo (Dw4) the 4th appellant testified that on the material day he was sick at home and at one time his mother asked him to tend to a goat in labour. After that he went back to bed. On the 17/7/2009 he was involved a fight over his battery that had fallen. He was taken to Gesonso police station and charged with the offence he knew nothing about. Mary Ayugi Dw5 testified that she was living with the 4th appellant who is her son. That on the material day some of the goats went into labour at night and he helped out. She testified that Dw4 could not have been involved in the robbery.

15. The 2nd appellant in his submissions stated that he had not been identified as one of the perpetrators of the crime and pointed to the fact that Pw5 had referred to him as David Ochieng' which is not his name.

16. The 3rd appellant submitted that it was not possible for Pw1 to see his attackers because his face was covered with a cloth. He submitted that the complainant was therefore coached as it is evident that he made several statements. He also submitted that he was not given an opportunity to mitigate. He cited the case of **William Okungu Kittiny v Republic (2018) eKLR** arguing that the mandatory death sentence was unconstitutional.

17. The 4th appellant submitted that identification of the 4th appellant was not proper because Pw1 testified that the first people to enter the house were 1st appellant, Kennedy Ogutta and 3rd appellant whereupon the 3rd appellant covered his face. It was submitted that with Pw1's face covered he could not see her face. He contends that he was not identified by Pw2 to be among the intruders. He pointed out that the people recognized to have attacked the complainant were '*vijana wa Ominto*' and he was not one of the sons. He also argued that the 4th appellant's alibi was not considered. They relied on the case of **Kampala Criminal Appeal No 101 of 1999 Muzahara Profilio v Republic** and **Nairobi Criminal Appeal No 73 of 2016 Michael Kerue Wanjiru v Republic**.

18. The prosecution opposed the appeal. They submitted that the identification was proper because the appellants were persons well known

to the complainant. There was also a lamp that was on and the complainant was able to clearly see the appellants. They cited the case of **Hassan Abdallah Mohammed vs Republic [2017] eKLR** and **R vs Turnbull & Others (1967) ALL ER 549**. They also advanced that the alleged contradictions raised by the appellants were minor contradictions hence not material so as to weaken the probative value of the evidence. They also submitted that the trial court considered the defence of alibi raised by the 3rd and 4th appellant. In conclusion the prosecution submitted that the sentence imposed by the trial magistrate was not harsh in the circumstance.

**ANALYSIS AND DETERMINATION**

19. At the center of this appeal is the determination of whether the prosecution proved their case to the required standard, beyond reasonable doubt.

20. According to the charge sheet the appellants were charged with robbery with violence contrary to **section 269 (2) of the Penal Code**. **Section 296(2) of the Penal Code** provides as follows:

> '(2) 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. In the case of **Johana Ndungu v Republic [1996] eKLR** the Court of Appeal stated:

> "In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:
>
> 1. If the offender is armed with any dangerous or offensive weapon or instrument, or
>
> 2. If he is in company with one or more other person or persons, or
>
> 3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

22. In this case Pw1 testified that the appellants had pangas which they used to beat and made him lie on the sofa. Pw4 confirmed that Pw1 was physically assaulted as he testified that the complaint had cut wound injuries and fractures. Pw1 further testified that the appellants stole Kshs 100,000/- that was under the sofa, Kshs 50,000/- that was in his pocket, Nokia 1110, a torch and the keys to a motorcycle all valued at Kshs 153,170/-.

23. I now turn to consider whether it was the appellants who committed the acts complained of. **In the case of *Francis Kariuki Njiru & 7 Others vs. Republic Cr. Appeal No. 6 of 2001 (UR)***, the Court of Appeal stated as follows:

> "The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. v. Turnbull [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all."

24. Pw3 testified that when he visited the complainant he told him he was attacked by son of Ominto. Pw3 testified that Ominto is the nickname to the 1st appellant's father. According to Pw1's testimony, the 1st and 2nd appellants were persons who were well known to him and because there was a lamp in the house he was able to clearly see the assailants. Pw1 recalled that the 1st and 2nd appellants were armed with *pangas*. This was further corroborated by the evidence of Pw2 who testified that there was sufficient light from the lamp and she saw the 1st and 2nd appellants from the window slab. On cross examination she testified that the 2nd appellant was holding the table cloth. It was her testimony that the appellants were her customers and persons well known to her.

25. In the case of **Anjononi & Others vs Republic [1976-80] 1 KLR 1566** *t*he court held as follows:

> **"…Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic *(unreported)."***

26. In light of the foregoing principles on the identification of assailants, this Court finds that the 1st and 2nd appellants were positively identified as the assailants as there was sufficient light from the lamp. It is also clear from the evidence of Pw1 and Pw2 that the 1st appellants were persons well known them. I therefore find that the 1st and 2nd appellant's appeal on conviction therefore fails. Their defence which is a mere denial cannot in the circumstance displace the evidence mounted against them by the prosecution.

27. In regard to the 3rd and 4th appellants, I am mindful of the fact that the evidence on identification was given by a single witness, Pw1. In

the case **of Roria v Republic [1967] EA 583**, at page 584, the Court of Appeal had this to say on identification by a single witness;

> "Subject to certain 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 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."***

28. Similarly, in the case of **Maitianyi –vs- Republic [1986] KLR** the Court of Appeal held that:

> **"Subject to well-known exceptions it is trite law that a fact maybe 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 respecting identification ……. "**

29. It is not in dispute that the 3rd and 4th appellants were identified solely by Pw1. Although Pw1 testified that he was able to recognize the 3rd and 4th appellant because they were local residents well known to him, his testimony was that the 1st and 2nd appellants were the first to enter the house and upon gaining entry, the 2nd appellant blindfolded him using the sofa cloth. It is not clear from his evidence at which point he saw the 3rd and 4th appellants. Pw1 testified that he never removed the cloth from his face and when he tried to do so he was beaten by the assailants. I have also considered that he did not give out their names or description immediately following his attack. Considering that Pw1 never removed the cloth from his face and that the 2nd appellant covered his face immediately after he entered the house, I find that the identification of the 3rd and 4th respondent was not positive, thus rendering their conviction unsafe.

30. Although the appellants also argued that the proceedings were conducted in a language that they did not understand, the trial magistrate's record shows that interpretation of the proceedings was being done from English to Kiswahili and most of the witnesses testified in Kiswahili and the appellants cross examined them in the Kiswahili language. The proceedings were mostly conducted in the Kiswahili language. The appellants' defence was also made in Kiswahili. The record further shows that charges were read and explained to the appellants in Kiswahili, a language that they understand. I therefore have no doubt that the proceedings were conducted in Kiswahili language that the appellants understood so well.

31. Next I will consider the effect of the contradiction in Pw1 and Pw2's evidence on the lamp and the time that the incident took place. Pw1 testified that the incident occurred at 8:30 p.m. while Pw2 testified that the incident took place at 9:00 p.m. in considering a similar issue the Court of Appeal in in **Philip Nzaka Watu v. Republic [2016] eKLR** where it was stated:

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

In DICKSON ELIA NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC, CR. APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."
>
> The main contradiction that the appellant complains about relates to the time when the offence was committed. The prosecution witnesses were clear that they were not testifying to the exact time. They were approximating, to the best of their abilities as common rural folk. The witnesses mentioned various times, ranging from 6.30 pm, 7.00 pm, 7.30 pm and 8 pm. The only exception was the evidence of PW1 where the time is recorded as 6.30 a.m. granted the consistency of the estimates of the other witnesses, we cannot rule out the possibility that the reference to 6.30 a.m. was in fact a typographical error in the record. The trial court was satisfied that the offence was committed between 6.30 pm and 7.00 pm and we have no basis for concluding that there was material contradiction in the prosecution evidence to warrant interference with the conclusion of the trial court. In any case, the time when the offence was committed is a question of fact, which the two courts below determined."

32. Having carefully considered the evidence by Pw1 and Pw2, I find that there were no material contradictions in the evidence adduced.

33. The appellants also contend the mandatory death sentence that was imposed was too harsh. However, the Supreme Court in **Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR** issued directions on the 6th day of July, 2021 on mandatory death sentences in offences other than murder. It stated:

> **(i) The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code;**
>
> **(ii) The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu;**

**(iii) All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.**

**(iv) Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.**

**(v) In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under Section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence.**

**(vi) An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.**

**(vii) …….**

**(viii) Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on resentencing.**

**(ix) These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu.**

34. Following the Supreme Court's directions in the **Muruatetu case supra**, the appeal on sentence therefore fails.

35. In the end, the convictions of 1st and 2nd appellants are well-founded and their appeal on conviction and sentence are dismissed. The appeal of the 3rd and 4th appellants, **EVANS OCHIENG' OLOO** and **JULIUS OMBORI BISIERI**, are allowed, their conviction is quashed and the sentence is set aside. I hereby order that **EVANS OCHIENG' OLOO** and **JULIUS OMBORI BISIERI**, to be released forthwith unless otherwise lawfully held. Right of appeal explained.

**DATED, SIGNED AND DELIVERED AT KISII THIS 21ST DAY OF OCTOBER, 2021**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

**1st Appellant Present in person**

**2nd Appellant Present in person**

**3rd Appellant Present in person**

**4th Appellant Present in person**

**Mr. Kaino State Counsel Office of the DPP**

**Ms. Asunna Counsel for the 4th Appellant**

**Ms. Rael Court Assistant**