REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 36 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

SILAS MWENDA.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. E. Mbicha, SRM dated 1st March 2018 at the Chief Magistrate's Court at Meru in Criminal Case No.964 of 2012)

JUDGMENT

1. The appellant, **SILAS MWENDA,** was charged, convicted and sentenced to death for the offence of robbery with violence contrary to **section 296 (2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the charge were that on 9th July 2012 at Mwitheria Village in Imenti North within Meru County jointly with others not before the court he robbed E K of two TV sets, one woofer, one DVD and two mobile phones all valued at Kshs. 24,500/- and immediately after the time of such robbery used actual violence on E K.

2. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**). In order to proceed with this task, I will set out a summary of the evidence as it emerged before the trial court.

3. On the night of 8th July 2012 at about midnight, C K K (PW 1) and E K K (PW 2) were sleeping together in their one roomed house when they suddenly heard the door being kicked open and some people came in. Both of them recalled that the appellant came in holding a panga and a torch. He hit the light bulb, which was on, and it broke. His torch remained on. The assailant starting demanding money and phones. Some of the assailants started removing the TV, woofer and DVD player from the room. PW 1 and PW 2 testified that the assailants were touching them all over the body. PW 1 recalled that she was beaten with a panga. PW 1 and PW 2 identified that appellant as one of the assailants as he had been a tenant of the room they were residing in. The assailants left them and proceeded to the neighbouring house.

4. PW 1 was treated at Meru General Hospital. Dr Joshua Murungi Kooro produced the P3 form prepared by Dr Njuguna who examined PW 1 and confirmed that she had injuries on the chest and left hand. There were bruises on the upper chest, base of the arm as well as the left forearm. He opined that she had been hit by a blunt object and assessed the degree of injury as harm.

5. E G (PW 3) and P M K (PW 4) were living in the same plot as PW 1 and PW 2. On the same night they were awoken by the assailants breaking windows in the compound and people screaming. Their door was kicked open and PW 3 recalled that the appellant came in with a panga and moved to cut him but he managed to block him and when he ran out, he found two other people who forced him to lie down. Since they were face to face, he told the court he recognised him as a tenant in the property who had a disagreement with the landlord and had been chased away. He also recognised him by his voice. As PW 3 was outside, PW 4 testified that one of the assailants started removing her panties and threatened to rape her. He started touching her and in the meantime was asking for her phone. As he was also searching for the phone, PW 4 managed to run away and report to Meru Police Station. She told the court she recognised the appellant as she was close to him and when the phone was on she was able to identify his face. She also knew the appellant as a tenant in the plot.

6. The investigating officer, Sgt Zakayo Kiptisa (PW 5), testified that on 9th July 2012, he was asked to investigate a robbery that had been reported by PW 2 on 8th July 2012. He took her statement and those of other witnesses. She told him that the appellant, in the company of other people had pangas and rungus. He told the court that the appellant was later arrested by administration police officers. He also visited the scene and found the window panes of the houses were broken and the complainant's door made of wood forced open.

7. The appellant denied the offence in his sworn defence. He testified that he was at work the whole day on 9th July 2017 as usual and was arrested. When he was at the police station he saw PW 1, PW 2, PW 3 and PW 4 who are the persons who used to live with him in the same plot and that they were the ones who made him disagree with the landlord. He claimed that he was being falsely accused.

8. In his amended supplementary grounds of appeal and written submissions, the appellant contended that the trial magistrate erred in law and in fact in failing to note that the circumstances at the scene of the crime did not warrant a positive identification/recognition. He complained that the trial magistrate failed to note that the complainant and witnesses had a grudge against him. He submitted that the prosecution evidence did not prove the case beyond reasonable doubt and pointed to the fact that no exhibits were recovered to implicate him and that the evidence was contradictory. He also complained that the landlord as a key witness was not called to give evidence.

9. Counsel for the respondent supported the conviction and sentence and submitted that the prosecution proved each element of the offence beyond reasonable doubt. Counsel submitted that the entirety of the circumstances were favourable for positive identification and the identification of the appellant was positive and free from error.

10. The offence of robbery with violence under **section 296(2)** of the ***Penal Code*** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic*** **NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR,** ***Oluoch v Republic*** **[1985] KLR 549** and ***Ganzi & 2 Others v Republic*** **[2005] 1 KLR 52)**.

11. Having evaluated the evidence, I am satisfied that the offence of robbery with violence was committed from the accounts of PW 1 and PW 2 who were attacked by more than one assailant armed with pangas. PW 2 was injured and her household items stolen.

12. The substantial issue in this case is whether the appellant was identified as the person who attacked PW 2. The incident took place at about midnight in circumstances that were difficult for positive identification. In ***Wamunga v Republic*** **[1989] KLR 424** the Court of Appeal warned that:

> ***[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.***

13. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see ***Maitanyi v Republic*** **[1986] KLR 198** and ***R v Turnbull*** **[1967] 3 ALL ER 549)**. The Court of Appeal was categorical in ***Kiarie v Republic*** **[1984] KLR 739**, that reliance on such evidence of identification must be *"absolutely watertight"* to justify conviction.

14. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see ***Anjononi & Others v Republic*** **[1980] KLR 59**). But in ***Wanjohi & 2 Others v Republic*** **[1989] KLR 415**, the Court of Appeal held that, *"recognition is stronger than identification but an honest recognition may yet be mistaken."*

15. This case was not one of identification of a stranger but of recognition as the key witnesses: PW 1, PW 2, PW 3 and PW 4 knew the appellant as a former tenant at the plot. PW 1 and PW 2 knew him as the person who had indeed occupied their room before he was chased by the landlord. In his defence, the appellant also confirmed that he knew the witnesses.

16. The testimony of PW 1 and PW 2 is that when the assailants broke into the house, the appellant is the one who came in first with the panga and hit the light bulb that was on. In that fleeting moment, the witnesses had recognised the appellant. Further, their impression of the appellant was fortified given the length of time the appellant was in the confined space of the room harassing and threatening them. PW 1 stated in cross-examination that, *"I recognised you because you used to live in that plot and I saw you, you had not covered your face, and you were talking to me directly so I even recognised your voice."*

17. Apart from the testimony of PW 1 and PW 2, PW 3 and PW 4 also recognised the appellant. As regards PW 3, he was close to the appellant when the appellant tried to cut him and due to their interaction, he was able to recognise his voice. He stated that, *"When he came to hit me with a panga we were face to face and even it was dark I was able to recognise him. It was someone I knew for long. I also recognised his voice. When he was kicking the door he was shouting and abusing me and I recognised his voice."* PW 4 also recognised the appellant when he tried to rape her. She stated, *"I recognised Mwenda. He was lying on me. I could see his face as he was close to me. Also when my phone lit up, it shone light and I could see as the phones was just there next to us."*

18. Given the familiarity of the witnesses and the appellant, their proximity and time of interaction, I am satisfied from the evidence of PW 1, PW 2, PW 3 and PW 4 that the appellant was positively identified at the scene as the person who led the gang of assailants to their respective homes. The appellant claimed that he had a disagreement with PW 1 and PW 2 who framed him because they wanted the room he was occupying. PW 1 and PW 2 rejected this suggestion in cross-examination. I also reject this defence because he did not have any issues with PW 3 and PW 4 who also implicated him.

19. The appellant submitted that there were some inconsistencies in the prosecution evidence particularly the testimony of the PW 1 and PW 2 regarding the money that the appellant is said to have taken. PW 1 stated that PW 2 gave the appellant Kshs. 250/- while PW 2 stated that she gave the assailants Kshs. 5000/- from the jacket that was hanging. In my view, this contradiction was not material did not go the heart of the case and that is whether the appellant was one of the assailants.

20. The appellant complained that landlord was not called as a witness. In ***Sahali Omar v Republic*** **MSA CA Crim. App No. 44 of 2016**

[2017] eKLR, the Court of Appeal discussed the issue where the failure to call a witness was fatal. It observed as follows held:

> *The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. Keter v Republic [2007] 1 EA 135).*

21. The appellant suggested the landlord would have given evidence to support the grudge. However, in light of the totality of the evidence I have outlined putting the appellant at the scene as one of the assailants, the landlord's testimony would neither add nor subtract from the prosecution case.

22. It is true that none of the items stolen or weapons used were recovered but the offence of robbery with violence was established by credible eye witness testimony as I have outlined in the judgment hence failure to recover or indeed produce exhibits in this case was not fatal to the prosecution case. In ***Karani v Republic*** **[2010] 1 KLR 73**, the Court of Appeal this issue and held that:

> *The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit.*

23. I affirm the conviction.

24. As regards the sentence, the Supreme Court in ***Francis Karioko Muruatetu & Another v Republic*** **SCK Pet. No. 15 OF 2015 [2017] eKLR** declared the mandatory death sentence for the offence of murder unconstitutional. The Court of Appeal in ***William Okungu Kittiny v Republic*** **KSM CA Criminal Appeal No. 56 of 2013 [2018]eKLR** applied the same principle to the offence of robbery with violence contrary to **section 296(2)** of the ***Penal Code***. I therefore set aside the sentence of death and now call upon the appellant to make his mitigation.

DATED and DELIVERED at MERU this 25th day of October 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.