REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 60 OF 2016

ISAAC BASWETI BARASIO…..……...……APPELLANT

VERSUS

REPUBLIC …….……...…… RESPONDENT

(Being an appeal against the conviction and sentence of Hon. P. K. Rugut, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Court Criminal Case No. 12 of 2016 delivered on 20/09/2016)

JUDGMENT

1. **TOM OGWENDO ONYANGO** hails from Ranen village of Awendo Sub-County within Migori County. He is a seasoned farmer and lives with *inter alia* her mother, **DEBORAH ADHIAMBO ONYANGO.**

2. As he walked home in the night of 24/11/2015 as usual, he met some four strange companions on the way. They were indeed robbers who pounced on him, assaulted him, threatened to kill him and eventually stole his money and his twin-line cell phone make LG. Before they left, the robbers demanded for and were given the identification numbers (PINs) for both lines, Safaricom and Airtel.

3. Tom then struggled and reached home where he narrated what he had encountered on the road to his mother. He reported the matter to the police and his bankers the following day. He found out that the sum of Kshs. 43,000/= had been electronically withdrawn from his Equity Bank account.

4. Out of the police intervention, the appellant herein, **ISAAC BASWETI BARASIO,** was arrested and eventually arraigned before the Senior Resident Magistrate's Court at Rongo where he faced the charge of robbery with violence. For clarity purposes, the particulars of the said charge were as follows: -

> ***On the 24th day of November 2015 at Ranen Trading Centre in Migori County, jointly with others not before court, robbed TOM OGWENDO ONYANGO of cash Kes. 43,500/= and one (1) mobile phone make LG valued at Kes. 4,500/=, and immediately before such robbery, caused grievous harm to the said TOM OGWENDO ONYANGO.***

5. As the appellant denied committing the offence, the trial of the case ensued.

6. The prosecution called five witnesses in a bid to prove the charge against the appellant. **PW1** was the complainant **TOM OGWENDO ONYANGO, PW1's** mother one **DEBORAH ADHIAMBO ONYANGO** testified as **PW2. PW3** was **Dr. SAMMY RUWA MWATELA** from Rongo District Hospital. The investigation officer **No. 58771 PC NOAH LIMO** attached to Awendo Police Station testified as **PW4** whereas **No. 80691 PC EDWIN KORIR** attached to Rongo DCIO office testified as **PW5.** For the purposes of this judgment I will refer to the said witnesses according to the sequence in

numbers in which they testified before the trial court except otherwise stated.

7. It was the prosecution's further case that when PW1 was confronted by the four men he managed to identify one of them who was the appellant. It was the same appellant who was tracked and arrested by PW5 at Mai Mahiu by the aid of some details PW4 obtained from PW1 who had also obtained them from the Equity Bank at Awendo. PW4 carried out investigations and referred PW1 to hospital where he was treated and a P3 Form duly filled and the injuries classified as grievous harm. The appellant was eventually charged aforesaid.

8. At the close of the prosecution's case, the trial court placed the appellant on his defence where the appellant gave a sworn defence. He denied committing the offence and contended that he was arrested at Ranen as he was in his usual *boda boda* business. He further challenged all the evidence tendered by the prosecution in a bid to demonstrate that he was not connected in any way with the alleged offence. He prayed that the charge be dismissed.

9. By a judgment rendered on 20/09/2016 the trial court found the appellant guilty and convicted him accordingly. The appellant was then sentenced to suffer death.

10. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal by filing the Petition of Appeal on 02/12/2016 and challenged the conviction and sentence on seven grounds of appeal which were tailored as follows: -

> ***a) THAT the learned trial magistrate grossly erred both in law and facts in convicting and sentencing I the appellant without considering that I pleaded not guilty to the offence charge and plea of not guilty entered.***
>
> ***b) THAT the learned trial magistrate further grossly erred in both law and facts in convicting and sentencing I the appellant when the salient ingredients of the offence charged were not proved beyond any reasonable doubts.***
>
> ***c) THAT the learned trial magistrate further grossly erred both in law and facts in convicting and sentencing I the appellant on the evidence of mistaken identity.***
>
> ***d) THAT the learned trial magistrate further grossly erred both in law and facts to misapprehend the tenor and/or extend the nature of offence against the provision of section 77 of the penal code.***
>
> ***e) THAT the learned trial magistrate further grossly erred both in law and facts to uphold conviction on the omission and commission of the alleged offence when the necessary key witness of the alleged offence his evidence was not tendered in court to prove and/or established the responsibility to the required standard.***
>
> ***f) THAT the learned trial magistrate grossly both in law and facts in taking into account the respondent case without considering that the identification of I the appellant was free from error as the light used to identify I the appellant.***
>
> ***g) THAT the trial magistrate further grossly erred both in law and facts in disapproving my defense evidence which could have leads to my acquittal and change the burden of proof of the offence charged to the respondent side.***

11. At the hearing of the appeal the appellant appeared in person and relied on his written submissions which he expounded the above grounds of appeal. The appellant urged this Court to allow the appeal.

12. The State through Learned State Counsel Miss Owenga vehemently opposed the appeal and relied on the evidence on record.

13. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

14. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of robbery with violence were proved and as so required in law; beyond any reasonable doubt. Needless to say I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the written submissions with all the decisions referred to therein.

15. To that end, this Court will consider the following issues: -

(a) Whether the appellant was properly identified as one of the assailants;

(b) Whether the offence was proved as required in law.

I will consider each of the above issues singly.

(a) **On whether the Appellant was properly identified as one of the assailants:**

16. It is the evidence of PW1 which points to the appellant herein in terms of identification. That is the evidence of a sole witness. The attack took place at night. It was along Chamgwidu road near Yago Primary School. There was full moon. The attackers were four men with two approaching PW1 from the front and the other two approaching him from the back. PW1 saw them from about 3 metres ahead. One of them lit a torch on him and ordered him to stop. He obliged. The four men approached him. The two men who were in front of PW1 were armed; one with a big stick like a *jembe* (hoe)and who also had a torch and the other one had a *panga.* It was the one who had the *panga* that threatened PW1 with death if he ever raised alarm or ran away. The men interrogated PW1 for about 2 minutes before they assaulted him. He was then ordered by the appellant to remove his phone from the pocket and give it to them; he so complied. They also took away his Kshs. 500/= which he had with him.

17. PW1 was then hit on the back and the right eye. The eye began bleeding but that was not all. The attackers wanted the details of PW1's PINs for the two lines his phone had. PW1 gave out the PINs. It was the appellant who had the phone. He scrolled it. The one who had the torch stood next to the appellant and also watched as the appellant operated the phone. He further shone the torch on the phone so as to clearly see what the appellant was doing. It was the light from the full moon, the phone and the torch that made PW1 clearly see and recognize the appellant. The attackers used the details given by PW1 and confirmed that PW1's account at Equity Bank Awendo had some money.

18. As the appellant was scrolling the phone PW1 observed him closely and clearly. He just stood next to him. He saw him using his left hand to do so. PW1 saw the appellant's left thumb that had been cut as he scrolled the phone. PW1 noted that indeed he knew the appellant so well as he had seen him at Ranen Trading Center for a period of around one year. PW1 mostly used to see the appellant just walking around the Center. At the hearing, PW1 asked the appellant to raise his left hand and the trial court confirmed that indeed the appellant's left hand thumb was cut. The appellant also talked to PW1. He asked for the PINs and made confirmations before the attackers left PW1 and went away with his phone and the Kshs. 500/=. PW1 was also injured on the head during the ordeal.

19. PW1 reported the matter to the police the following morning as he feared doing so that night. He lodged the complaint at Awendo Police Station. He gave the description of the appellant as one he knew so well as he regularly saw him at Ranen. He stated that the appellant, who was one of the attackers, had a missing left thumb. PW1 however did not know the appellant's name as he never had any dealings with him.

20. When PW1 went to his Bank at Awendo and reported the incident, he learnt that all his money in the account had already been withdrawn. He was given his Account Statement and a detailed transaction document which showed that the money had been electronically withdrawn through number 0714 [...] between the time he was attacked and that very morning. PW1 took the documents to the police.

21. PW4 sought the assistance of PW5 in tracing and tracking the recipient number 0714 [...]. PW5 tracked the said number for a couple of days and confirmed that it was at Mai Mahiu. The number was registered in the name of Zachary Misengo. He then set out for Mai Mahiu on 05/01/2016. On reaching Mai Mahiu, PW5 reported to the Mai Mahiu Police Station and was given one officer called Mwangi (not a witness) to accompany him in tracking and tracing the said recipient number. In order to get the recipient with ease, the police officers used a source, a lady (also not a witness) who could speak Ekegusii as the name in which the number was registered under was a Kisii. They first sent Kshs. 100/= to the said number but there was no response. The lady then began tracing the holder of the recipient number and they eventually decided to meet. The lady was in constant touch with PW5. Mwangi and PW5 also kept a close trail of the lady. They were about 10 metres away from the lady. The lady called the recipient number and the appellant received the call. Immediately the appellant received the call, the police officers pounced on him and arrested him. The appellant was taken to the Mai Mahiu Police Station before he was taken to Awendo Police Station. The cell phone that the appellant was arrested with was produced as an exhibit. The appellant contended that the recipient number belonged to his brother.

22. When PW4 received the appellant at his station, he also confirmed that he had a cut left thumb and informed PW1 of the arrest. PW1 went to the station and confirmed that the appellant was one of the robbers he had been talking about. Since PW1 had known the appellant for such a long period and recognized him so well that night of the attack, PW4, rightly so, did not see the need to conduct an identification parade. The appellant was then charged.

23. There was also the appellant's defence on the other side. He denied taking part in the robbery and as well denied having been arrested at Mai Mahiu. As to the arrest, I have duly considered the evidence of PW5 and PW4 against that of the appellant. I have as well seen the exhibits from PW1's Bank that disclosed recipient number. I have no doubt that indeed PW4 sought the assistance of PW5 in tracking the recipient number. When the appellant was finally arrested, he was booked at the Awendo Police Station and the relevant OB number was read out to the court. Since there was no evidence that PW5 knew or had any previous dealings with the appellant I fail to understand why PW5 would have chosen not to be truthful. I therefore find the evidence of PW4 and PW5 on the arrest of the appellant as reasonable and credible and hereby find that indeed the appellant was arrested at Mai Mahiu and not at Ranen.

24. As to whether the appellant was one of the attackers as alleged, I will now seek the guidance of and refer to the settled legal principles on identification and recognition of suspects prior to arriving at a finding.

25.The Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 426** stated as under;-

> ***"It is trite law that where 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 make it the basis of conviction."***

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

26. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

27. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -

"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

28. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night: -

"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

29. As I have pointed out elsewhere above in this judgment this is a case of identification by recognition. I am persuaded that in the unique circumstances of this case PW1 was able to recognize the appellant as one of the attackers. PW1 knew the appellant for well over one year. They spent time together. They talked. There was sufficient light from the full moon, the phone and the torch. PW1 saw the appellant's cut thumb which the trial court so confirmed as well. PW1 also gave a fitting description of the appellant at the police station.

30. PW1's evidence was duly corroborated by PW4 and PW5. The evidence given by PW1 enabled the tracking and eventual arrest of the appellant thereby placing the appellant as one of the attackers. The evidence from PW1's bank on the electronic money transactions from PW1's account to the recipient number so confirmed PW1's version of what happened. That was corroboration. But even in cases where there is no corroboration a court can still convict on the uncorroborated evidence as long as the trial court warns itself of the dangers of acting on such evidence. This issue has been a subject of consideration in various cases including one before the Court of Appeal of Uganda in **Obwana & Others v. Uganda (2009)2 EA 333** where the Court presented itself thus:

"It is now trite law that when visual identification of an accused person is made by a witness in

difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. .....This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. <u>But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence</u>." *(emphasis added).*

31. As I come to the end of this issue, I wish to point out the allegation that the registered owner of the recipient number was not investigated and possibly charged or testify before the trial court does not hold any water. I say so because PW1 gave a fitting description of the appellant whom he knew well. Further, if anything the registered owner would have been treated as a joint offender with the appellant.

32. In sum, I find that the appellant herein was properly and sufficiently identified by PW1 and that the identification evidence taken in totality was safe and free from error.

(b) **<u>Whether the offence was proved in law:</u>**

33. The offence of robbery with violence is a creation of **Sections 295 and 296(2)** of the Penal Code and for clarity purposes we shall reproduce them as tailored:

"***295.Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***

296(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

34. From the foregone legal provisions, it can be seen that the offence of robbery with violence is made up of two parts. The first part is the **robbery** and the other part is the **violence**.

35. **Robbery** is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: **<u>Theft</u>** and **<u>the use of or threat to use actual violence.</u>**

36. On the other hand, the offence of **robbery with violence** is committed when robbery is proved and further if any one of the following three ingredients are established: -

(a) The offender is armed with any dangerous or offensive weapon or instrument, or

(b) The offender is in the company of one or more other person or persons, or

(c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

37. In this case, there is evidence of robbery. PW1's phone and money were stolen and never recovered. There was further evidence of actual use of violence as well threats on PW1. He was injured and PW3 confirmed so and assessed the injuries as grievous harm. A P3 Form was produced to that effect. There was further evidence of the commission of the offence of robbery with violence. The assailants were armed with a panga and a big stick. Those are dangerous weapons by any standards. The attackers were

also more than one; indeed, they were four of them and, as said, used actual violence on PW1. The offence of robbery with violence was hence proved as required in law. The appellant was hence properly found guilty and convicted.

38. The upshot of all the above is that the appeal is not meritorious and is hereby dismissed in its entirety.

It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 23RD day of March 2017.

A.C. MRIMA

JUDGE