REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL NO. 34 OF 2015

BETWEEN

DENNIS KWOVA.....APPELLANT

AND

REPUBLIC …....……..……..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. S. Shitubi, CM dated 26th September 2015 at the Chief Magistrate's Court at Kakamega in Criminal Case No. 974 of 2014)

JUDGMENT

1. Before the subordinate court, the appellant, **DENNIS KWOVA (DW 1)** faced a charge of robbery with violence contrary to **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars were that on 1st April 2014 at Shikangania area, Sichirai Sub-location, Lurambi Division of Kakamega County, he jointly with others not before the court, robbed **MICHAEL SITIMA JUMA** of 1 TFT Dell monitor valued at Kshs. 7,000/-, one woofer valued at Kshs. 3,000/-, one Nokia 2626 mobile phone valued at Kshs. 2,000/-, one Kenol gas cylinder valued at Kshs. 5,000/-, Kshs. 600/- in cash, two jerricans valued at Kshs. 400/- and one suit case bag valued at Kshs. 3,000/- all valued at Kshs. 25,000/- and immediately after the time of such robbery, threatened to use actual violence on the said **MICHAEL SITIMA JUMA**.

2. The appellant was convicted of the offence of simple robbery contrary to **section 295** as read with **section 296(1)** of the ***Penal Code***. He was sentenced to 10 years' imprisonment. He now appeals against the conviction and sentence. In his petition of appeal, the appellant attacks the judgment on the ground that the evidence against him was not corroborated and that it lacked any probative value. He stated that the trial court did not consider the fact that the initial report to the police did not name him or link him to the offence and that he was not found with any stolen property. Further that, the victim of the offence did not raise any alarm when the incident took place. He also contended that the trial court did not consider his defence which was cogent enough to exonerate him. The appellant also filed written submissions in which he amplified the grounds stated in the petition of appeal.

3. The respondent opposed the appeal and filed written submissions. The thrust of the respondent's submissions was that the prosecution proved the offence to the required standard. As regards evidence of identification, the respondent submitted that the circumstances under which the appellant was identified were favourable for positive identification and that the subsequent identification parade carried out confirmed that indeed the appellant was one of the assailants.

4. The circumstances of the case were that on 1st April 2014 at about 9.00pm, Michael Sitima Juma (PW 1) and his wife Agnes Kahi (PW 2) were at home watching television when they heard some people, who

identified themselves as policemen, knocking at the door. When he opened the window, they were able to see a person dressed in a jungle jacket like that worn by Administration Police officers. The assailants ordered PW 1 to open the door as they suspected he was harbouring a thief. As they demanded to be let in, PW 1 got his identity card and gave it to them. PW 1 testified that there the electric light in the house was on and he was able to see two assailants outside. The assailants finally gained entry into the house after PW 1 opened the gate. They ordered him to the bedroom and told him to lie down as they ransacked his house and started removing his household items. PW 1 recalled that the lights remained on throughout the ordeal.

5. PW 1's wife, Agnes Kahi (PW 2) recalled that she was able to see a short brown person dressed in police uniform. She also confirmed that the electric lights were on. After the assailants entered the house, the assailants told them to lie on the floor and remain silent while they carted their things away. PW 1 reported the incident at Kakamega Police Station on 2nd April 2014.

6. In the morning, PW 1 was informed that someone had been seen removing things in a sack from a sugarcane plantation. Levis Sole (PW 3), a child aged 8 years, recalled that as he was going to school with another child at about 6.00am, he saw the appellant leaving PW 1's house, carrying a radio belonging to PW 1. The other child confronted the appellant about stealing from people causing the appellant to beat him and run off with a sack of things he was carrying. Thereafter, PW 3 went to report the incident to his mother and PW 1 was subsequently informed.

7. The investigating officer, Corporal David Sugut (PW 4) confirmed that PW 1 reported the incident to the police. The appellant was arrested on 10th April 2014 when members of the public saw him and raised alarm. He testified that as part of his investigation, he confirmed that PW 1's house had electricity as confirmed by his electricity bill. He also confirmed that PW 1 had purchased the TFT Monitor that was stolen. PW 4 organised an identification parade which was conducted by Acting Inspector Samuel Kimutai (PW 5) where the appellant was identified by PW 1 and PW 2.

8. In his sworn defence, the appellant denied committing the offence. He told the court that he was a *boda boda* rider and that on 28th March 2014, while carrying PW 1, he stopped to talk to a girl. It became apparent that the girl was also a girlfriend to PW 1. They differed over the girl but before parting ways, PW 1 warned him that he would do something to him that he would never forget.

9. Although the appellant was charged with robbery with violence, the trial magistrate held that the offence was not proved but the facts disclosed the lesser offence of simple robbery contrary to **section 295** as read with **section 296(1)** of the ***Penal Code***. The respondent did not cross-appeal against this finding. The facts, as I have outlined above, disclose that the appellant in the company of another assailant, entered PW 1's house and using threats of violence proceeded to steal PW 1's household items as particularised in the charge sheet. This evidence is clear and undisputed. What was really in issue before the trial court and this court is whether the appellant was the person identified by PW 1 and PW 2 as the assailant. The incident took place at night in what were difficult conditions for identification.

10. Thus main issue for consideration in this appeal is whether the appellant was one of the assailants. The prosecution case was grounded on direct evidence of identification in difficult circumstances. The Court of Appeal in ***Odhiambo v Republic*** **[2002] 1 KLR 241, 247** set out the guiding principles for consideration of such evidence as follows:

> *The law on identification is not in doubt. It has been stated and restated in several judicial decisions by this Court and by the High Court. The Court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification. Where evidence of identification rests on a single witness, and the circumstances of identification are known to be difficult, what is needed is other evidence either direct or circumstantial, pointing to the guilt of the accused persons from which the Court may reasonably conclude that identification is accurate and free from the possibility of error.*

11 In ***Kiarie v Republic*** **[1984] KLR 739**, the Court of Appeal was even more categorical on reliance on

such evidence holding that the evidence must be *"absolutely watertight"* to justify conviction. In ***Wamunga v Republic*** **[1989] KLR 424** the Court of Appeal warned 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 be the basis of a conviction.***

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)**.

12. 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."*

13. The identification by PW 1 was based on electric light in his house. PW 1 testified that there was a fluorescent light in the house and also a lamp in the bedroom which remained on throughout. He further noted that although the appellant had a cap, he did not cover his face. From the evidence, it is clear that the appellant came into the house and ordered PW 1 to lie down and proceeded to ransack the house. I find that the nature of light at the time of interaction, from the time PW 1 opened the window to respond to the appellant's demand, to the time he entered into the house, was sufficient for him to clearly identify the appellant.

14. In addition, PW 1 testified that he knew the appellant. In cross-examination, PW 1 stated that he had seen him at the market and had even carried him on his motorbike once. This meant that this was clearly a case of recognition. PW 1 testified that when he gave his statement, he gave a description of the robbers and stated he would identify them if he saw them. PW 2 told the court that the electric lights were on so she was able to see the appellant when her husband opened the window and when the two assailants came into the house.

15. After arrest, the appellant was subjected to an identification parade carried out by PW 5. PW 5 testified that he read the statement of PW 1 and PW 2 and they recorded that they could identify the persons who robbed them. PW 5 assembled the parade of 8 people and appellant chose to stand between number 4 and 5. When PW 1 was called to come to the cells, he identified the appellant. PW 2 also identified the appellant when he was placed between number 5 and 6. In both instances, the appellant indicated that he was satisfied with the manner the parade was conducted.

16. I have evaluated the manner in which the parade was conducted and I am satisfied that it was scrupulously fair to the accused. In as much as the appellant was familiar to PW 1, PW 1 did not know him very well to point him out, all he could do was to tell the police that he knew him and could identify him if he saw him again. In ***Nathan Kamau Mugwe v Republic*** **CA Criminal Appeal No. 63 of 2008 (UR)**, the Court of Appeal dealt with the issue whether an identification parade was valid in circumstances where the witness stated that he could identify the assailant if he saw him. The Court observed as follows:

> *As to the compliant in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen*

during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.

17. The sum of the prosecution evidence was that the appellant was clearly identified by PW 1 and PW 2 when he came to their compound disguised as a police officer. He was clearly seen through the window as the lights were on in the house and even when he entered the house, his identity was not disguised. Further, both PW 1 and PW 2 were able to pick him out at the identification parade. The fact that he was familiar to PW 2 provides further assurance that this case was not one of mistaken identity. The appellant's defence that PW 1 had a grudge with him in relation to a certain girl was properly dismissed as it was an afterthought and was not put to PW 1 in cross-examination. I affirm the conviction.

18. The maximum sentence for simple robbery is 14 years' imprisonment. The appellant had expressed remorse and in light of the circumstances of the case, I reduce the appellant's sentence to 7 years' imprisonment to run from the date of sentence.

SIGNED AT KISUMU

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KAKAMEGA this 13th day of October 2017.

R. N. SITATI

JUDGE

Appellant in person.

Mr Ng'etich, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.