REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 99 OF 2014

CHACHA MARWA MWITA …..APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment on conviction and sentence by Hon. A. P. Ndege, Senior Resident Magistrate in Kehancha Senior Resident Magistrate's Court Criminal Case No. 644 of 2011 delivered on 22/05/2012)

JUDGMENT

Background:

1. The 25th day of December 2011 was a Christmas day. THOMAS MARWA, the complainant, being a Christian celebrated that day by engaging in his usual transport business. He operated a motor cycle registration number KMCJ 960H for hire at the Kehancha trading center in the hope of ferrying passengers.

2. The Complainant's prayer was answered when at around 01:00pm two people approached him posing as passengers. He did not know them but after a short discussion he agreed to take them to Kegonga town. The three men then left aboard the said motor cycle.

3. As he rode through a forest at Kibarori, the passengers turned out to be robbers and while armed with a knife and a *"simi"* they jointly and forcefully took away the motor cycle leaving the complainant behind injured. They sped off towards Kegonga town.

4. It was by luck that a fellow motor cyclist appeared almost immediately and they managed to call their colleagues at Kegonga who in turn informed the police. A road block was mounted on the road to Kegonga by the police and the other motor cyclists. That led to the arrest of the two men and the recovery of the motor cycle.

5. The two were then arraigned and charged in court with the offence of robbery with violence and in the alternative handling suspected stolen property.

The Trial:

6. On denying the charges, the prosecution called five witnesses in a bid to prove the charges. **PW1** was the complainant who narrated how the whole incident unfolded. He was the only eye-witness. He identified his attackers as well as one of the weapons used in the ordeal. He equally identified the motor cycle which had been stolen from him.

7. The registered owner of the motor cycle testified as **PW2** and produced the registration book (log book) whereas the arresting officer testified as **PW3**. **PW4** was the investigating officer and the Clinical Officer who attended to PW1 testified last as **PW5**.

8. Before the close of the prosecution's case, the particulars to the main charge were amended and the then accused persons were called upon to take fresh pleas where they again denied the charges. They opted to proceed on with the case without recalling any witnesses.

9. For clarity purposes the amended particulars read as follows:

> ***"(1) CHACHA MARWA MWITA (2) DANIEL CHACHA MWITA: On the 25th December 2011 at Kibarori area in Kuria East District within Migori County jointly, while armed dangerous and offensive weapons namely a knife and a simi robbed one Thomas Marwa a motor cycle Reg number KMCJ 960H make TVS Star blue in colour valued at Kshs. 84,000/= and at or immediately before and immediately after the time of the said robbery injured the said Thomas Marwa."***

10. The prosecution then closed its case and in a considered ruling the accused persons were placed on their defences.

11. The appellant herein, CHACHA MARWA MWITA, who was the then first accused person opted to and gave an unsworn testimony. He raised an *alibi* and wondered why and how he was connected with the offence which he knew nothing about.

12. By a judgment rendered on 22/05/2012, the then accused persons were found guilty on the charge of robbery with violence and were accordingly convicted. Upon receiving mitigations, the trial court handed each of the accused persons a jail term of 20 years.

The Appeal:

13. Being aggrieved by the said conviction and sentence, the accused persons lodged separate appeals. While the appellant herein filed the appeal subject of this judgment with the leave of this court, his co-accused timeously filed Criminal Appeal No. 74 of 2013 before the High Court at Kisii. That appeal was later on transferred to this court and registered as Criminal Appeal No. 59 of 2014.

14. We called for and confirmed that the said Criminal Appeal No. 59 of 2014 was abandoned when the then appellant was warned of the possibility of the enhancement of the sentence in the event that appeal was unsuccessful. That was on 09/09/2014.

15. When the appeal subject of this judgment came up for hearing before this Court ***(Majanja and Okwany, JJ.)*** on 23/07/2015, the appellant herein was equally warned. He then prayed for time so as to reflect on the issue. The court readily granted the request.

16. When the appeal came up again for hearing on 16/11/2015, the appellant was reminded of the warning. He however informed us that he had taken time and on a deep reflection he had made a decision to proceed on with the appeal.

17. The appeal was then heard and the appellant relied on the Petition of Appeal and the supplementary grounds in urging the court to allow the appeal, quash the conviction and set-aside the sentence.

18. Mr. Ndung'u Learned Counsel who appeared for the State opposed the appeal and asked us to enhance the sentence to that of death.

Analysis and Determinations:

19. This being the appellant's first appeal the role of this court 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, analyze 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.

20. Going through the Petition of Appeal and the Supplementary Grounds, the issue of the identification of the appellant comes up as the main ground of appeal. We will hence deal with that aspect first.

21. The incident occurred on 25/12/2011 at 01:00p.m. As briefly revisited in the background of this judgment PW1 dealt with the two men who posed as passengers until when they robbed him of the motor cycle. The two men and PW1 definitely spent some time together. That was from the time they met at the Kehancha stage and negotiated the fare through to when the incident took place in the forest at Kibarori and the two men later arrested.

22. When the two men confronted PW1 and ordered him to stop, PW1 appears to have defied the order. That led to PW1 being grabbed by the neck from the back. He however struggled and managed to jump off the motor cycle which was still in motion. The motor cycle then lost control and fell on the ground. And, as PW1 was jumping off the motor cycle, one of the attackers struck him with a *simi* on his thigh. PW1 was injured. The other man had a knife. PW1 saw both attackers armed.

23. The passengers-cum-robbers then took off with the motor cycle leaving behind PW1 by the roadside. He was all by himself and screamed for help in vain. By good luck, a fellow motor cyclist came by from the direction of Kehancha town. He stopped and rescued PW1. They alerted the police and their fellow motor cyclists who were at Kegonga of the incident. PW1 was then carried by the good Samaritan towards Kegonga town, in the same direction the robbers had taken.

24. As they approached Kegonga town, PW1 saw a crowd of people on the road and as well as the motor cycle which he had been robbed of. He also saw the appellant and readily recognized him as one of the attackers. Both the appellant and the motor cycle had been detained by some police officers who were at the scene. PW1 narrated what had happened and identified the appellant as one of the robbers.

25. PW1 was thereafter led to the C.I.D.'s offices at Kehancha where he recorded a statement. He then went to hospital for medical intervention. A P3 Form was filled on his behalf.

26. PW3 who was an Administration Police Officer was patrolling with a colleague at Kegonga town on the 25/12/2011 at around 01:00 p.m. He received a call from a motor cycle operator and was informed that a motor cycle had been stolen and was being ridden towards Kegonga town from Kehancha town. He was also given the registration number of the alleged stolen motor cycle.

27. PW3 immediately swung into action and informed his colleagues who were at the Kegonga AP Camp of the incident. Six of his colleagues turned up. The police then mobilized the motor cyclists who were at the town and blocked the road using the motor cycles.

28. Within no time, a motor cycle with two men riding on and driven at a very high speed approached them from the direction of Kehancha town. On realizing that a road block had been mounted, the rider applied emergency brakes and since he was at such a high speed he lost control and the motor cycle fell off the road. According to PW3, the two fell down about five meters from where he stood.

29. PW3 confirmed the registration number of the motor cycle to be the one reportedly stolen. The two people who rode on that motor cycle then started running away on realizing that they had actually been blocked leavng the motor cycle behind. As they ran away they brandished weapons and threatened anyone who would pursue them with harm. PW3 saw them with a knife and a *simi*.

30. The police and the members of public then gave chase. One of the men ran into a nearby thicket and after a formidable search he was arrested. He was the one who was armed with a *“simi”*. The other man

ran into a homestead and entered into a house. PW3 led the chase. He did not lose sight of the man until he entered into the house. He also entered into the house and personally arrested him. He was the one who was armed with the knife. PW3 identified the man in court as the appellant herein.

31. PW3 then led the appellant to where the motor cycle was. PW1 then arrived and readily identified the man as one of the attackers and the one who was armed with a knife.

32. When the other man was also arrested PW3 later on handed them over to the police at the Kehancha Police Post. The evidence of PW3 hence corroborated that of PW1.

33. PW1 identified the appellant before the trial court as one of his attackers and the one who had a knife. He also identified the knife in court. PW4 confirmed re-arresting the appellant and his companion and preferred the charges before court.

34. The foregone are the circumstances under which the appellant was alleged identified as one of the robbers. The appellant however maintained his innocence and raised an *alibi*. He called upon the trial court to carefully go through the prosecution's evidence and ascertain that indeed he was not involved in the robbery. To him he had gone to attend to his father's animals in a neighboring village when he was arrested by people in civilian clothing and led to the police.

35. Courts have had several occasions and dealt with the issue of identification. It is now firmly settled that evidence on identification must be treated with such great caution so as not to lead to miscarriage of justice.

36. We wish to revisit, but some of the decisions on the subject. The Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 426** had the following to say on the subject: -

> ***"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.

37. In the famous case of **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 albeit 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."***

38. The above does not however 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..."***

39. Again the Court of Appeal in **<u>Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)</u>** 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."***

> **"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..."***

40. On re-evaluation of the evidence in totality and upon taking the requisite caution, we are convinced that the prevailing circumstances provided sufficient and adequate opportunity for an unmistaken and positive identification of the appellant as one of the PW1's attackers. For avoidance of doubt, the attack occurred during the day and the attackers were arrested just a short while with the motor cycle and the weapons they had when they attacked PW1. Further PW3 never lost sight of the appellant from the time he started running away after falling down with the motor cycle at the road block until when he arrested him. PW1 then surfaced and without a second thought identified the appellant as one of the attackers. The knife which PW1 saw the appellant armed with when he was robbed of his motor cycle was the very one which the appellant was arrested with.

41. We are hence satisfied that the appellant's identification was without any error and that he was properly placed at the scene of crime as one of the perpetrators. We equally find that the appellant's *alibi* defence did not shake the prosecution's evidence.

42. The prosecution further proved that the appellant while in the company of his companion were indeed armed with dangerous and offensive weapons during the robbery. The appellant had a knife whereas the other person had a *simi* with which he hit PW1 on his right thigh. The knife was produced as an exhibit. PW5 confirmed the injuries PW1 sustained which he classified as "harm". He so produced a P3 Form for PW1. The evidence by PW5 corroborated PW1's evidence further.

43. The evidence on record also proved that PW1 was in the possession of the motor cycle number KMCJ 960H the property of PW2 which motor cycle was stolen by the appellant and his companion. The motor cycle was recovered in the possession of the appellant and his colleague and was also produced in

court as an exhibit.

44. The appellant also raised the issue of contradictions and discrepancies in the prosecution's evidence to the extent of making the evidence unreliable. We have carefully revisited the evidence on record and did not come across any such contradictions. In the event of any such contradictions and discrepancies existing, we do treat them as of minor nature and we readily take refuge under **Section 382 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya** in finding that no failure of justice was visited upon the appellant. **Section 382** aforesaid states as follows:

> ***"382. Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reserved or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to question whether the objection could and should have been raised at an earlier stage in the proceeding."***

45. Further our attention is drawn to the words of the Learned Judge in **R =vs= Pius Nyamweya Momanyi, Kisii HCRA No. 265 of 2009 (UR)** in stating thus:-

> ***"...It is trite law that minor discrepancies and contradictions should not affect a conviction."***

46. Our foregone analysis hence bring us to a firm finding that the offence of robbery with violence was proved as required in law as against the appellant. The conviction by the trial magistrate is hence affirmed.

47. On the issue of sentencing, the appellant was handed down twenty years in jail. This court warned the appellant on two occasions on the possibility of enhancement of the sentence in the event the appeal is unsuccessful. The appellant however opted and insisted on proceeding on with the prosecution of his appeal. On the other hand the prosecution opposed the appeal and prayed for the enhancement of the sentence to the death sentence.

48. The law on sentencing in capital offences is also well settled. It was held by the Court of Appeal in a five-Judge bench criminal appeal in **Joseph Njuguna Mwaura and others vs. Republic (2013) e KLR** that judicial officers do not have any discretion in sentencing in respect to offences which attract a mandatory death sentence. Therefore in the absence of law reform or a decision reversing the decision in **Joseph Njuguna Mwaura & Others vs. Republic (2013) e KLR**, this Court has no option but to impose the mandatory sentence in law. The sentence by the trial court is therefore set-aside and the appellant is sentenced to suffer death pursuant to **Section 296(2)** of the Penal Code.

Orders accordingly.

DATED, SIGNED and DELIVERED at MIGORI this 31ST day of MARCH 2016.

D. S. MAJANJA	**A. C. MRIMA**
JUDGE	**JUDGE**