REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 70 OF 2015

FREDRICK OTIENO JUMA.....……...……APPELLANT

VERSUS

REPUBLIC …….....……...RESPONDENT

(Being an appeal against the judgment, conviction and sentence of Hon. E. M. Nyaga, Senior Resident Magistrate in Migori Senior Principal Magistrates Court Criminal Case No. 531 of 2011 delivered on 12/11/2012)

JUDGMENT

1. There is only one issue for determination in this appeal. It is whether or not the Appellant herein was properly identified as one of the robbers in the attack which took place in the night of 03/10/2011.

2. Following that attack, the appellant and one Daniel Nyambego Asiago (who was a night guard to PW1) were arrested and charged before the Senior Principal Magistrates Court with *inter alia* four counts of robbery with violence. The said Daniel Nyambego Asiago was acquitted on all the counts under **Section 210** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya whereas the appellant was eventually convicted and sentenced to suffer death. That was the basis of the appeal subject of this judgment.

3. Out of the eight prosecution witnesses who testified, it was only one witness, **PW3** (Winnose Apiyo Otieno) who identified the appellant as one of the robbers.

4. Since the appellant maintain that he did not take part in the robbery and so challenges the prosecution evidence, it is therefore imperative to revisit the circumstances under which the robbery took place. In doing so this Court is alive to its role as an appellate Court of first instance. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (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.

5. The robbers struck at night. It was around 10:00pm. PW3 who was then a nurse at Migori District Hospital and staying with her uncle who was a Medical Doctor in private practice (PW1) was asleep in her room with her cousin who did not testify when two people found their way into the room and held her. She screamed and was tied up. PW3 was then taken to PW1's room where there were six people therein. It was her further testimony that she saw the appellant in PW1's room and that it was the appellant who threatened her with dire consequences if she continued raising alarm. PW3 stated that the attackers were not hooded and that it was the appellant who actually inflicted injuries to her chest and

head using a hot iron box.

6. PW3 further stated that she knew the appellant well as he was their neighbour who was also known as Father Norman and used to operate a *'boda boda'* and also worked as a bouncer at a local bar known as 'Resort'. She immediately told PW1 that she had identified the appellant as one of the robbers when the robbers left.

7. The foregone scenario is what led to the arrest and subsequent charging of the appellant alongside the night watchman.

8. I will now have a look at the law on visual identification at night and by a single witness. The *locus classicus* is the much-celebrated case of **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, where 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."***

9. 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.

10. 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..."***

11. 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."

12. In light of the foregone and by applying the circumstances of this case, it can be seen that there are several loose ends in the evidence of PW3. The attack was sudden and PW3 was woken up from her sleep. She screamed and was immediately confronted, assaulted and tied up. She was then taken to PW1's room. We are not told of the type of the light and its intensity that was in PW1's room which made PW3 recognize the appellant. We are equally at a loss as to the amount of time the attack took noting that PW3 was tied and assaulted like the others. Further PW3 only stated that she knew the appellant as a their neighbour, as a *boda-boda* operator and a bouncer at a local bar. PW3 however did not state how long she had known the appellant. There was also no evidence of any interaction between the appellant and PW3 before the incident.

13. Another important issue that comes up is that there were several people in PW1's room who were family members and none except PW3 recognized the appellant. It would not be a wild supposition to reasonably expect any other family member to have also been able to recognize the appellant at the scene.

14. The investigations carried out in the matter were also pathetic, if at all any. PW8 who led the investigations clearly stated that he relied on the evidence of PW3 to arrest and charge the appellant. PW8 did not endeavour to get any evidence that connected the appellant with the commission of the crime. Going by the circumstances under which the attack took place, it was imperative that at least an identification parade was properly conducted. That would have cleared any doubts on the issue. The prosecution in this case solely relied on the dock identification.

15. The Court of Appeal at Nairobi in **Samuel Kilonzo Musau v. Republic (2014)eKLR** expounded *inter alia* on the importance of a properly conducted identification parade. The Court stated as follows:-

'.....the identification parade is not a scientific test and cannot be treated as one. Instead, it is merely the best practical method of achieving an identification without confrontation. The purpose of an identification parade, as explained in KINYANJUI & 2 OTHERS vs. REPUBLIC (1989) KLR 60, *'is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion'**. It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair.....Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is asfe and reliable, it being confirmed by the earlier out of court identification.'***

16. In **John Mwangi Kamau vs. Republic (2014) eKL**R the essence of identification parades was stated as follows:-

"15. Identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68 & 69 of 2008...."

17. In respect to dock identification, the Court of Appeal has severally reiterated its position in law. In the case of **John Wachira Wandia & Another v. Republic (2006) eKLR** the Court stated that:

'...This Court has on several occasions reiterated that dock identification without an earlier identification parade is almost worthless....'

18. From the above discourse, this Court is not satisfied that the circumstances that prevailed during the attack on PW3 and her family favored a possible identification of the attackers moreso in the absence of a properly conducted identification parade. The appellant's identification as one of the attackers was therefore not proper and free from error.

19. Consequently the conviction cannot stand and is hereby quashed. The sentence of death is also set-aside.

20. Before I come to the end of this judgment there is an issue which I would wish to point out. The appellant was charged with various counts of robbery with violence and was eventually found guilty and convicted. With tremendous respect to the learned Magistrate, the judgment did not however state which count(s) the appellant had been found guilty and convicted. That was in derogation of **Section 169(2)** of the Criminal Procedure Code.

21. The upshot is that the appellant is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED this 20th day of July, 2016.

A.C. MRIMA

JUDGE