REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 78 OF 2014

(FORMERLY KISII HCCRA NO. 130 OF 2013)

BETWEEN

MARKO MWITA NYAKOREMA ..…..... APPELLANT

AND

REPUBLIC …..……. RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 414 of 2013 at Principal Magistrate's Court at Kehancha, Hon. A. P. Ndege, Ag. PM dated on 14th November 2013)

JUDGMENT

1. The appellant **MARKO MWITA NYAKOREMA alias MUTUGI** appeals against the conviction and sentence of death imposed after he was found guilty of robbery with violence contrary to **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the offence as stated in the charge were as follows;

   > *On the 1st day of August 2013 at Nyametaburo Village, Nyametaburo Sub-location in Kuria West District within Migori County, being armed with a dangerous weapon namely rungu and a simi, he robbed SIMON MWITA NYAMOHANGA cash Kshs. 5,800/= and immediately after the time of such robbery used actual violence to the said SIMON MWITA NYAMOHANGA.*

2. The called 7 witnesses to prove its case against the appellant. PW 1, the complainant was a watchman at Nyametaburo Primary School. On 1st August 2013 at about 7.30 pm he was at work when the appellant came to the school gate. When PW 1 asked him what he was doing at the gate, the appellant responded by assaulting him. He injured him on the arm and took his simi, rungu and torch. PW 1's son, PW 2, was present as he had come to bring him food. As the appellant was assaulting PW 1, PW 2 ran to call his grandmother. PW 4. PW 4 testified that she came and found PW 1 had been injured on the head and arm. She raised alarm and people came and took him to hospital.

3. PW 3, another son of PW 1, was near the school when he heard screams. When he arrived at the school he found that his father had been assaulted and was lying down with injuries on the head and right arm. PW 1 told him that he had been assaulted by the appellant whom he knew. Together with other members of the public, they took the PW 1 to Nyametaburo Hospital where PW 1 was treated, on the next day he reported the matter at Nyametaburo AP Post.

4. PW 5, an administration police officer stationed at Nyametaburo Police Post, recalled that on 2nd August 2013 four members of PW 1's family came to report the assault that had taken place the previous evening involving PW 1. They identified the appellant as the suspect. PW 5 went to the home of the accused where the appellant was found asleep. When they searched his house they found the torch, rungu and panga which PW 1 identified as the items taken from him the previous evening by the appellant. He caused the appellant to be arrested and charged.

5. PW 6, a police officer from Isebania Police Station, testified that he received a report at the police station on 2nd August 2013 from PW 1 regarding the assault and robbery that had taken place the previous evening. He proceeded to issue a P3 form to PW 1 and carried out investigations, recorded statements and caused the appellant to be charged. PW 7, a clinical officer working at Isebania Sub-district Hospital, examined PW 1 on 4th August 2012 and confirmed that he had sustained injuries on the heard and left hand. He assessed the injury as grievous harm.

6. When called upon to make his defence, the appellant elected to give an unsworn statement in which he denied that he committed the offence. He stated that he did not steal anything from the appellant.

7. On the basis of the evidence we have outlined, the learned magistrate was convinced that the prosecution had proved the case against the appellant beyond reasonable doubt. The appellant challenges the conviction and sentence on the grounds set out in the petition of appeal filed on 20th November 2013 as follows;
    1. *THAT I pleaded not guilty to the charge of Robbery with violence contrary to section 295 as read with section 296(2) f the Penal Code.*
    2. *THAT the trial magistrate erred in both Law and facts by failing to consider my health status in that my brains are not functioning properly and I thought the court could order my mental assessment All these contributed my failures in the trial.*
    3. *THAT the trial magistrate erred in both law and facts by failing to consider the need of a government lawyer on my side depending on my health status.*

8. Mr Mwongera, learned counsel for the State, opposed the appeal and submitted that the prosecution proved all the elements of the offence and the conviction was proper in light of the evidence.

9. The appellant has raised the issue of mental capacity for the first time in this appeal. Ordinarily such an issue will not be entertained by the appellate court but we have however scrutinised the record and we do not find anything that would have alerted the court that the appellant was suffering from any mental incapacity. Furthermore, a defence grounded on mental incapacity is a matter which is peculiarly within the accused's knowledge and as such it could only have been raised by him. We therefore dismiss this ground of appeal.

10. As to whether there was sufficient evidence to support the conviction, this Court, as this is the first appellate court, is enjoined to consider the entire evidence, evaluate it and reach an independent conclusion bearing in mind that it neither heard nor saw the witnesses testify (see ***Okeno v Republic*** **[1972] EA 32**).

11. In order to succeed in proving the offence robbery with violence, the prosecution must prove that certain items were stolen in circumstances of robbery with violence. The ingredients of the offence of robbery with violence were further elaborated by the Court of Appeal in the case of ***Oluoch v Ganzi & 2 Others v Republic*** **[2005] 1 KLR 52** where it was held that robbery with violence is committed in any of the following circumstances:

    (a) The offender is <u>armed</u> with any dangerous and offensive weapon or instrument; <u>or</u>

    (b) The offender is <u>in company</u> with one or more person or persons; <u>or</u>

*(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes oruses other personal violence to any person….." [***emphasis supplied]**

The use of the word *"or"* implies that if any of the three conditions is fulfilled then the offence would be said to have been committed.

12. The prosecution case was predicated on the recognition of the appellant as the person who committed the act of robbery with violence and the fact that he was found with certain items belonging to PW 1 so soon after the incident. As regards the identity of the appellant, PW 1 recognised the appellant when he came to the school and before he assaulted him while PW 2 actually saw the appellant assault PW 1. We have no doubt that this was a case of recognition and the circumstances were favourable to positive identification as the appellant and PW 1, who knew each other, talked before the assault.

13. Although the issue was not raised, we note that PW 2 was a child of 12 years old. The record shows that the learned trial magistrate did not conduct a *voir dire* to determine whether child understood the duty to speak the truth and the nature of the oath. The principles applicable in such circumstance are that where a child of tender years is called as a witness, the court must first conduct a *voir dire* examination before allowing the child to testify. This is meant to find our whether the child understands the meaning of an oath. Where the court finds that the child does not understand the nature of an oath but is possessed of sufficient intelligence and understands the duty to tell the truth, the child may give unsworn testimony.

14. Whether the child is of tender years is a matter of the good sense of the court. In ***Kibangeny Arap Kolil v Regina*** **[1959] EA 92** it was held by the Court of Appeal that the term tender years meant a child under the age of 14 years. In the case of ***Johnson Muirui v Republic*** **(1983) KLR 445**, **448** the Court of Appeal gave the following guidance in dealing with the testimony of tender years:

> *We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In* ***Peter Kiriga Kiune,*** *Criminal Appeal No. 77 of 1982 (unreported) we said:-*
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> *"When in any proceeding before any court, a child of tender years is called as a witness, the court is required to form an opinion, on voire dire examination, whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, Oaths and Statutory Declarations Act Cap 15). The Evidence Act (section 124, Cap 80). It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions."*

15. In the circumstances of this case, the trial magistrate erred by accepting the testimony of the PW 2 without conducting a *voir dire* examination. Was this fatal to the prosecution case? The effect of failure to comply with these provisions must depend on the circumstances of each case. In this case, PW 2 was present when the appellant was assaulted. Even if his testimony is disregarded, there remains the testimony of PW 3 who came to the scene as soon as he heard the screams and whom the PW 1 told that he had been robbed by the appellant.

16. The prosecution case was fortified by the fact that the items stolen from PW 1 were found on the very next day in the home of the appellant. The principles to be followed in application of the doctrine of recent possession were restated by the Court of Appeal in ***Erick Otieno Arum v Republic*** **KSM CA Criminal Appeal No. 85 of 2005 [2006]eKLR** where it stated that the

doctrine was applicable where the court is satisfied that the prosecution have proved the following:

a. that the property was found with the suspect
b. that the property was positively identified by the complainant;
c. that the property was stolen from the complainant;
d. that the property was recently stolen from the complainant.

17. We are satisfied that the simi, rungu and torch, which were positively identified by PW 1 were found in the appellant's house by PW 5 on the day next after the incident. The doctrine was therefore satisfied. The appellant did not give any reasonable explanation as to why he had these items belonging to PW 1.

18. Having reviewed the evidence, we affirm the conviction and sentence.

19. The appeal is dismissed.

DATED and DELIVERED at MIGORI this 13th day of February 2015.

D.S. MAJANJA **C. B. NAGILLAH**

JUDGE **JUDGE**

Appellant in person.

Mr Mwongera, Prosecuting Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.