REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 110 OF 2013

BETWEEN

WILLIAM TARIBO MUGENYA …… APPELLANT

AND

REPUBLIC ……... RESPONDENT

(Being an Appeal against the conviction and sentence of H. Wandere – P.M. in Criminal Case No. 969 of 2011 delivered on 5th June, 2013 at Mumias.)

JUDGMENT

INTRODUCTION:

1. **SUSAN AZULU MUGENYA** was blessed with seven children being 3 daughters and 4 sons. One of them is the Appellant herein, **WILLIAM TARIBO MUGENYA** who is her second born son. They hail from Bumala village in Bungasi in Mumias District within Kakamega County.

2. The events of 04/11/2011 however led to the Appellant herein being arraigned before the Senior Resident Magistrate's Court at Mumias on a charge of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars thereof were as follows:-

> ***"WILLIAM TARIBO MUKENYA: On the 4th day of November, 2011 at about 1.00 a.m. at Umalla Gull Village, Bungasi sub-location, Musanda location, in Mumias District within Kakamega County while armed with a jembe robbed SUSAN AZULU MUKENYA of Ksh. 4,500/= and immediately after the time of such robbery used actual violence on the said SUSAN AZULU MUKENYA."***

3. The Appellant denied the charge and the trial was thereafter held.

THE TRIAL:

a. **The Prosecution's Case:-**

4. The prosecution called a total of 4 witnesses in support of the case.

PW1 was the Appellant's said mother. She was the complainant. She testified that on 04/11/2011 at

around 01.00 a.m. while asleep in her house with a friend one ANGELINE was woken up by a heavy knock on the door. Then a voice which she readily recognized to be her son's, the Appellant herein, followed in luhya language to the effect that "today is today even if you scream you will see." PW1 had with her a total of Kshs. 4,500/= of which she had received Kshs. 2,500/= from her daughter (the Appellant's sister) for repairs of her house and she also had Kshs. 2,000/= from the fish sales. It was her testimony that the Appellant herein was aware that she had the money.

5. PW1 woke up, dressed up and put on her tin lamp which lit her little bedroom well. There was a smaller sitting room which led to the bedroom. The Appellant then broke the main door and entered the sitting room. He then pushed the door leading to the bedroom open and stood at the door wearing a red T-shirt and a brownish track suit trouser. He had a cap on. PW1 saw the Appellant very well and confirmed that it was her son. By that time Angeline had also lit the torch in her mobile phone and the room was indeed well lit. The Appellant then demanded for money with one of his hands on the back. He wanted the money which his sister, the PW1's daughter, had left behind but PW1 refused to give him the money. The Appellant then hit PW1 with a small jembe on her chest and she fell down. The Appellant came upon her and began strangling her by the neck. PW1 struggled in resistance. Then Angeline intervened and attempted to rescue PW1 but she was fought off by the Appellant. Angeline too was injured in the process. The Appellant then again hit PW1 with the jembe and Angeline screamed for help. The Appellant then assaulted Angeline in order to silence her and again went back to PW1 whom the Appellant hit on her left leg, sheen, knee and thighs.

6. The trial Court noted the visible healed wounds thereof. During the struggle, PW1 testified that the Appellant assaulted her further on her right leg and the right arm. As the Appellant managed to get hold of PW1's throat for a second time and placed his legs hard on her stomach, he demanded for the money otherwise he would rape her. PW1, then fearing being raped, eventually directed Angeline to where her purse was and Angeline took it and gave the same to the Appellant. The Appellant opened the purse, counted and confirmed that the money was Kshs. 4,500/=. As the Appellant left the PW1's house, he threatened them and warned them against disclosing what had happened. Being in full fear, PW1 and Angeline remained quiet until the following morning when they realized that the Appellant had then left the homestead.

7. While in great pain, PW1 managed to report the ordeal to the village elder the next day and later on reported to the police at Lukongo after two days. As she was groaning in pain she was treated at NAYA TINCARE. The police visited the scene thereafter and confirmed the broken door. PW1 was issued with a P3 form which she took to Bukhaya Health Centre where it was duly filled. She identified the treatment notes in Court.

8. PW1 told the trial Court that the Appellant lived a very miserable life and always stole from her and that the incident of 04/11/2011 was not the first one. The Appellant has no house in the home neither is he married. PW1 described her house as a small grass-thatched mud house. The first door was made of an iron sheet from a drum and she used to lock it using a string. It is this door that the Appellant hit and broke down.

9. The Appellant, according to PW1, disappeared after this act until 27/12/2011 when he was arrested by the villagers and PW1 herself escorted him to the village elder and then to the police.

10. **ANGELINE AUMA SHISIAKA** testified as **PW2**. She reiterated exactly what PW1 stated as she was in the house with PW1 when the Appellant struck. She also knew the Appellant who is her neighbour for over 30 years and immediately recognised his voice when he began speaking outside. PW2 had thought that the Appellant wanted food from his mother PW1. PW2 used her torch in her mobile phone to further illuminate the house and clearly saw the Appellant and personally witnessed all that the Appellant did to PW1 and herself. PW2 also identified the jembe which the Appellant used to injure PW1 and herself. She recorded her statement with the police. It was her further evidence that the Appellant also took away her mobile phone.

11. **PW3** was the Investigating Officer one number 691287 PC. Peter Martin from Mumias Police

Station. He testified that on 28/12/2011 while at Lukhongo Police Patrol Base he received the Appellant on allegations of robbery which had been reported earlier on. The robbery was allegedly committed upon PW1 and he re-arrested the Appellant and booked him in the police cells. He had recorded witness statements earlier on and had recovered an exhibit when he visited the scene. On enquiring about the Appellant's whereabouts since the alleged robbery, the Appellant told PW3 that he had gone to visit his aunt. He produced the jembe as an exhibit.

12. **ALBERT DOME**, a Clinical Officer at Bukhaya Health Centre testified as **PW4.** It was his evidence that on 29/12/2011 at the facility he received a P3 Form from PW1 who had history of assault. He noted some injuries on her chest and knees which had been caused by a blunt object and which was approximately two months old. He also had the advantage of the initial treatment notes from the facility where PW1 had been treated following the assault which notes tallied with the results of the physical examination he undertook. He produced the P3 Form and the treatment notes in Court as exhibits.

13. With the PW4's testimony, the prosecution closed its case and in a ruling delivered on 20/02/2013, the Appellant was placed on his defence.

b. **The Defence Case**.

14. The Appellant opted to give sworn evidence without calling any witnesses. He stated how he was arrested by the police on 27/12/2011 when he was in the company of two people who had called him to take some local brew, busaa. These two people ran away on seeing the police and he was arrested. He was later on informed of a robbery. He was however arrested with two other people who paid Kshs. 1,000/= to the police and were eventually released but since he did not have any money he was arraigned and charged in Court. It was his testimony that the robbery had been done by the two people who he had been arrested with but later on released.

15. It was the appellant's further evidence that he had differed with his mother on 24/12/2011 over his mother's insistence on his wife to sell the local illicit brew, chang'aa against his wish. His mother then vowed to have him rot in jail and his arrest followed thereafter. It was his contention that there was no evidence of the broken door produced in court and that the evidence of PW1 and PW2 remained contradictory. He denied being arrested with any exhibit and contended further that the arresting officer was not availed to testify in court. He prayed that he be discharged so as to re-unite with his family since on the alleged day he was in his house with his wife LILIAN NEKESA with their one-month old baby. On being asked why he would not call any witness, he said he feared that his wife might lie to the Court in her bid to assist him.

16. On closure of the defence case, the Court set the judgment on 04/06/2013 and on 05/06/2013 the Court, in its judgment found the Appellant guilty as charged and accordingly convicted him. Upon taking mitigations the Court sentenced him to suffer death as the law provides. It is that conviction and subsequent sentence which gave rise to this appeal.

THE APPEAL:

17. On 13/06/2013, the Appellant herein filed his Petition of Appeal and raised 7 grounds. The said homemade grounds are as follows:-

1. ***THAT, I pleaded not guilty to the above pending charges.***
2. ***THAT, the trial magistrate erred both on law and facts by convicting me without considering that PW1 the complainant to this matter was my biological mother and we had home family differences.***
3. ***THAT, the arresting officer never appeared before the court to disclose the circumstances of my arrest since the complainant is said to make the report one month later and I was around with the PW1 during the said period. Why was I not arrested all that time?***
4. ***THAT, the investigation officer did less to his investigation, since he didn't explain or understand why I was arrested and who arrested me.***

5. ***THAT, the trial magistrate failed to note that it was abuse of my fundamental rights to deliver death sentence to a case of family difference issues.***
6. ***THAT, the prosecution charges against me were stealing, no explanation were made to me how stealing turned to be robbery with violence.***
7. ***THAT, more grounds will be induced after receiving the proceeding copy of the law court.***

18. The appellant prayed that the appeal be allowed, conviction quashed and sentence be set-aside and he be set at liberty.

19. At the hearing of the appeal on 03/03/2015, the Appellant who was unrepresented relied on his written submissions which he rendered to Court and reiterated that he never committed the offence in issue and that he had been framed by his mother out of a grudge. The State which was represented by Mr. Ng'etich opposed the appeal and prayed for its dismissal on the grounds that the charge had been proved beyond any doubt. This Court then retired for this judgment.

ANALYSIS AND DETERMINATION:

20. This being a first appeal, the role of this appellate Court of first instance is well settled. 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.

21. From the Petition of Appeal and the submissions tendered, the following issues are for determination in this appeal:-

a. ***Whether the appellant was properly and positively identified.***
b. ***Whether the offence was proved as required in law?***
c. ***The constitutionality of the death penalty.***

This Court will deal with each of the issues separately and as under:-

a. **On whether the Appellant was properly and positively identified:**

22. PW1 and PW2 testified at length on the events of the night of 04/11/2011. They clearly described how the Appellant took part in the acts complained of. PW1 is the mother to the Appellant. PW2 is a neighbour and a friend to PW1 who had known the Appellant for well over 30 years. The room in which PW1 and PW2 were sleeping was lit by a tin lamp and the light from the torch on PW2's mobile phone. They both recognized the Appellant the moment he hit the front door and issued a warning that that day was indeed the day. When the Appellant came into the house both PW1 and PW2 described how he looked like and what he did with precision.

23. Even though this is a case of recognition as opposed to one of visual identification, Courts are cautioned to treat such evidence of recognition with care since one can even be mistaken in such cases. The Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 424** 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."***

24. 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.

25. 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 taken into account 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 reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

26. 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..."***

27. 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."***

28. From the above analysis and going by the evidence adduced before the trial court, we find that the recognition of the Appellant by PW1 and PW2 was free from error and hence safe.

b. **Whether the offence was proved as required in law**.

29. Having held that the Appellant was positively recognized during the robbery, we shall now proceed to ascertain if there was robbery and if so if actual violence was used.

30. The evidence of PW1 ad PW2 clearly elaborated how the Appellant forced his way to getting money. PW1 had in her custody Kshs. 4,500/= and explained stated clearly how she came into possession of such

money. She had been given Kshs. 2,500/= by her daughter towards her house repairs and she had saved Kshs. 2,000/= from her business on fish sales. This made a total of Kshs. 4,500/=. The evidence confirms that the Appellant no doubt knew that PW1 had some money. When eventually PW1 gave out her purse and the Appellant opened it, he removed some money therein as PW1 and PW2 watched. They confirmed seeing the Appellant counting the money to the tune of Kshs. 4,500/=. He then left with the said money and dared them not to raise any alarm. It ought to be remembered that PW1 gave out the money against her will.

31. This issue is clearly intertwined with that of actual violence. Again the evidence of PW1 and PW2 clearly states how the Appellant held PW1's throat twice in a bid to force her to give out the money. When PW1 resisted the Appellant used a jembe and hit her on the chest, legs among other areas. When PW2 intervened, she was also hit with the said jembe. When PW1 was held by the throat on the second time, the Appellant threatened her with rape and it is at this point in time that PW1 feared for the worst, going by the Appellant's determination. By that time PW1 was down and the Appellant had firmly placed his legs on her stomach and held her throat. It was PW2 who asked PW1 to give out the money as she also feared the worst to happen. PW1 eventually gave out the money.

32. The trial Court was shown the scars where PW1 was injured. The jembe was produced as an exhibit too. There were the treatment notes for PW1 which confirmed those injuries as stated by PW1 and PW2 and even when PW4 filled the P3 form he still confirmed that the initial injuries as appeared in the treatment notes were in consonance with his physical examination on PW1. It was PW1's evidence that she sustained all those injuries during the ordeal with the Appellant and in the cause of the robbery. PW2 too vouches on the same. We therefore find no reason to disbelieve the evidence of PW1, PW2, PW3 and PW4. We find that the prosecution proved that PW1 was robbed of her money being Kshs. 4,500/= by the Appellant herein and that in doing so the Appellant used actual violence on PW1. This was also medically proved.

33. On the allegations that the investigations were incomplete, we have gone through the record before the trial court and noted that the Investigating Officer visited the scene, recorded statements from witnesses, issued P3 form to PW1 and endeavored to avail witnesses to Court. We do not think that there was anything significant that he did not do that may have amounted to the alleged inadequacy of the investigations. In reaching that conclusion, we remain aware of the Appellant's submission that the prosecution failed to avail the arresting officer. It is on record that the Appellant was arrested by a member of public given that the robbery was an issue of public knowledge and immediately PW1 availed herself. She was personally present when the Appellant was escorted to the village elder and then to the police. According to PW1, the only reason why the Appellant had been arrested was in connection with the robbery and not otherwise. We do note that under Section 143 of the Evidence Act, Chapter 80 of the Laws of Kenya, the prosecution is at liberty to decide on which witness to avail in a trial. The only danger in failing to avail a crucial witness is that the court may infer that such evidence which was not adduced would have adversely affected the prosecution. (***See Bukenya and others versus Uganda (1972) EA 549, Joseph Munyoki Kimatu v. Republic (2014) eKLR among others).***

34. However in this case, the member of public who arrested the Appellant was not such a crucial witness as the reason why the Appellant was arrested was quite clear and as so explained by PW1 who was personally present from the time of arrest upto handing over to the police.

35. We are further not convinced that there are any material inconsistencies in the proceedings before the trial court which can lead to the trial being rendered unreliable and a nullity. However, in the event there are any inconsistencies, the same are curable under Section 382 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, given that no miscarriage of justice was occasioned.

36. We have also had a look at the Appellant's defence. The same centers on how he was arrested and also introduces the issue of a grudge with PW1 arising out of PW1's insistence that the wife of the Appellant engages in an illicit brew business which the Appellant was not agreeable to. We have looked at the entire proceedings and noted that the Appellant never raised this issue during cross examination of PW1. We therefore find that the same is an afterthought and we hereby reject the same. Be that as it may,

PW1 testified that the Appellant is not married and has no house at home as he used to stay in his elder brother's house. Without in any way shifting the burden of proof, we also note that the Appellant stated that he is married to LILIAN NEKESA and they had a one-month baby and when the Appellant was prompted by the prosecution (during cross-examination) as to why he was not considering the wife a witness, he responded as follows:-

"My wife may lie to court so as to assist me as her husband."

We are therefore left wondering on what exactly the Appellant meant or was as driving at by the above utterance.

37. Further the Appellant did not deny that on the said day he was at home as he clearly stated as follows:-

"On the night in issue I was in my house with my wife called

LILIAN NEKESA. Our child was a month old. My mother's

home is about 70 metres from mine. My younger mother

was also in the homestead."

We therefore find that the Appellant's defence was properly and rightly considered by the trial court and when weighed in light of the prosecution's evidence, that defence did not shake the prosecution evidence as to create any reasonable doubt in the mind of the court. We therefore return the finding that the offence which the Appellant faced was rightly proved in law.

(c) **<u>On the constitutionality of the death penalty</u>**.

38. Grounds 5 and 6 of the Petition of Appeal were tailored as under:-

5. ***THAT, the trial magistrate failed to note that it was abuse of my fundamental rights to deliver death sentence to a case of family difference issues.***

6. ***THAT, the prosecution charges against me were stealing, no explanation were made to me how stealing turned to be robbery with violence.***

It appears from ground 6 that the Appellant knew that he was to be charged with stealing but was surprised how it all changed to be robbery with violence. This aspect has however already been covered hereinabove and rested with our finding that the Appellant was rightly charged and convicted with the offence before the trial court. It was not for the Appellant to choose what charges the Investigating officer was to prefer against him, but was upon the investigating officer depending on the evidence at hand.

39. The constitutionality of death sentence has been a subject of serious litigation over time. The Court of Appeal in a bench comprising five judges in the case of **<u>JOSEPH NJUGUNA MWAURA & 2 OTHERS versus REPUBLIC, Criminal Appeal No. 5 of 2008</u>** unanimously upheld the constitutionality of death penalty in capital offences including robbery with violence. In the absence of any review or change in the law, the foregone holding remains the only applicable law and we have no hesitation in so following that decision. Indeed the same is binding upon us. We therefore reject the contention that the sentence of death is unconstitutional since it remains lawful in Kenya and we do uphold the same.

<u>CONCLUSION:</u>

40. Having carefully and in great detail considered the appeal before us, we have come to the finding that the appeal lacks any merit and is hereby dismissed. The decision of the learned trial magistrate on

conviction and sentence is hereby affirmed. Right of Appeal within 14 days.

Orders accordingly.

DELIVERED, DATED and SIGNED in open court at Kakamega this 24th day of July, 2015.

RUTH N. SITATI **A.C. MRIMA**

JUDGE **JUDGE**

In the presence of

Present in Person ..... For Applicant.

Mr. Omwenga ..... For Respondent.

Mr. Langat ..... For Assistant.