REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 7 OF 2014

SILAS KIRIMI alias KALULU……..……APPELLANT

V E R S U S

REPUBLIC..... RESPONDENT

(From the original conviction and sentence in criminal case No. 11 of 2011 of the CM's Court at Maua)

R.P.V. WENDOH AND J. A. MAKAU JJ

JUDGMENT

The Appellant **SILAS KIRIMI alias KALULU** was charged with the offence of **robbery with violence contrary to section 296 (2) of the Penal Code CAP 63 of the Laws of Kenya.**

The particulars of the offence were that on the 14th day of November 2010 at Kanuni location, in Igembe South District within Meru County, jointly with others not before court, while armed with dangerous weapons, namely *pangas*, robbed Salome Kathure of cash Kshs.27,000/=, Nokia mobile phone 1110 valued at Kshs 4,000, identity card No. 786384, Electors Card No. 0025362556 and at immediately before or after such robbery, used actual violence on the said Salome Kathure.

The Appellant was tried, convicted and sentenced to death. The Appellant is aggrieved by the conviction and sentence and therefore filed this appeal. The Appellant Amended Grounds of Appeal were as follows:

1. **That the Trial Magistrate erred both in law and fact by failing to make a finding that the alleged identification and recognition was not free from possibility of error;**

2. **That the presentation of the exhibited items fell short of the required standards in law;**

3. **That the prosecution failed to avail vital witnesses mentioned during the trial for just decision to be reached;**

4. **That the court flouted the provisions of Section 169 (1) of the Criminal Procedure Code.**

As the first appellate court, we have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis and will draw our own conclusions. We are alive to the fact that we neither saw nor heard any of the witnesses and so cannot comment on their demeanor. We are guided on the duties of

a first appellate court by the Court of Appeal decision of ***Kiilu and Another V R (2005) 1 KLR 174*** where the Court of Appeal held thus:

> ***"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions..***
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> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.."***

The appeal was opposed by Mr. Mulochi, Counsel for the State, who submitted inter alia that the evidence tendered by the prosecution witnesses was overwhelming to support the charge; that PW2 and 4 were eye witnesses to the robbery and that this was one of recognition. With regard to the appellant's assertion that vital witnesses were not called, counsel submitted that the decision to call or not call witnesses is the discretion of the prosecution. For this proposition counsel sought to rely on the case of ***Julius Kalewa Mutunga V Republic Nyeri Criminal Appeal No. 31 Of 2005.***

The prosecution's case was as follows; PW1 Salome Kathure testified that she had just closed her business of selling clothes on 11/11/2011 at about 7.00 p.m. That she had packed the clothes in a sack and called out one Mutembei, a motor vehicle owner, asking him if he could ferry her luggage to Maua. The said Mutembei agreed and after they finished loading the bags in the boot of the vehicle, she saw the appellant at the motor vehicle driver's door talking to Mutembei. The appellant then suddenly produced a *panga*, moved towards her and held her hand bag which was strapped under her shoulder and pulled it. PW1 resisted and the appellant slapped her severally for her to release the bag but PW1 continued resisting while asking the driver why she was being robbed as they watched. The appellant continued slapping her as she resisted and eventually cut her on the both arms whereupon she was unable to resist anymore. The appellant ran off with the bag towards Kanuni area near Ura river with PW1 in hot pursuit. Fearing that the appellant might throw her into the river, she retreated, screaming and found a group of people had already formed. She then asked Mutembei how come she was being robbed as he watched and he responded telling her that he was not the one or his motor vehicle that had robbed her and that she should stop screaming since the appellant was known. He (Mutembei) then asked the driver to unload her luggage leaving her stranded. Later on, a person from Kanuni's D.O's camp came and advised her to find a person to store her luggage and go for assistance which she did by reporting at Maua Police Station. The following day, PW1 availed her witnesses who later recorded their statements. She further testified that the owner of the motor vehicle, the driver and the conductor were all summoned to the police station but they declined to come. The appellant was later arrested and PW1 found him at Kanuni D.O's camp where she identified him as the robber.

PW2 Joy Kanana testified and corroborated PW1's evidence that on the material date, she was with her mother (PW1) at Kimongoro market at the stage where they had finished her mother's business of selling clothes. Her mother (PW1) then crossed the road to look for a vehicle to carry their luggage. She testified that the vehicle came with one Nathan being the driver and Mutembei who gave Nathan the keys. The appellant then went to the window and spoke to the driver. The appellant did this severally and as the last luggage was being loaded, the appellant came while armed with a *panga* and slapped her mother (PW1) as he struggled to take her handbag. PW1 resisted whereupon the appellant cut her on both hands and managed to flee with the handbag towards Kanuni and they followed in hot pursuit; that the appellant's *panga* was raised and when he crossed the river, they feared and retreated; that the owner of the vehicle (Mutembei) told PW1 that the thief was known. The conductor then off loaded their luggage. They reported the incident at Maua Police Station and later took PW1 to hospital. She further testified that she saw the thief well.

PW3 Fredrick Gikundi, Assistant Chief, Amung'endi Sub-location testified that on 26th December 2010,

at about 1.00 a.m. he was on patrol with Administration Police and that they had a report from the police that the appellant had stolen from a lady a handbag with Kshs.27,000/=. They found the appellant at unity pub where he was arrested and taken to the D.O's camp where he spent the night and he took him to the police station the next day. They later searched the appellant's house and recovered PW1's identity card and voter's card buried outside the appellant's house. He further testified that he knew the appellant having been his neighbor and resident of his sub location.

PW4 Mercy Kanario testified and corroborated PW1 and 2's evidence by testifying that she knew the appellant as she used to see him at Kiamongoro market. She testified that on the material day at about 7.00 p.m. while waiting for a motor vehicle, one of the business ladies came to the owner of a vehicle that had been parked nearby and asked him if he would ferry for her luggage to Maua. The person agreed and there were three other people and another one who was pacing up and down. The driver reversed the motor vehicle to where the luggage was and began loading it. When on the last luggage, PW4 heard a scream and on looking at that direction, saw the appellant slapping PW1 and then proceeded to cut her with a panga on both hands and managed to take her hand bag and took off with it towards Kanuni direction with PW1 in hot pursuit. The appellant disappeared into the alleys and when PW1 came back, she asked Mutembei why they just stood as she was robbed but Mutembei told her off saying that it not the motor vehicle that beat or robbed her and ordered the luggage to be off loaded which was done he and drove towards the direction that the appellant ran to. PW4 then boarded a vehicle to Maua and the following day she went to see PW1 and later recorded her statement. She further testified that she saw the appellant well and that she was about five metres from the point they were struggling.

PW5, Wilson Kimathi a clinical officer at Nyambene Hospital testified that he examined PW1 and found that she had sustained a cut on the lower mouth lip on the right side, dark linear patches on the upper back and upper right hand and cut wounds on the lower right as well as left hand.

PW6 Silvestor Juma testified having been given a police file in respect of this case by Pc Esau Karani who had been transferred to Kajiado police station. He testified that PW1 had reported having been attacked by the appellant while armed with a *panga* and grabbing her handbag and when she resisted the appellant cut her on her hands and finally ran away with his bag. PW1 later reported the matter at Maua police station and the appellant was later apprehended.

After close of the prosecution case the Learned Trial magistrate found that the appellant had a case to answer and placed him on his defence. The appellant denied having committed the offence. He testified that if PW1 knew him, then he should have given his name to the police; that PW3 knew nothing about this case and that there were contradictions in the evidence of PW1 and PW3; that the reason why PW3 caused his arrest was because he used to steal relief food. He further contended that no identification parade was conducted.

We have carefully considered and reevaluated the evidence on record and the submissions by the appellant and the State Counsel. In the instant case it is not in dispute that the incident happened at about 7.00 p.m. Apart from stating that the incident occurred at 7.00 p.m. PW1 never alluded to the kind of light available at the scene that would have enabled her to see the assailant. PW1 vividly described the events of that day as she struggled with her assailant who had hovered around the vehicle for some time. PW1 further stated that she knew the appellant for long as she used to see him at Kimongoro where she used to carry out her business. She further stated that even though she did not know the appellant by name, she knew him by appearance and saw him hovering around the vehicle before attacking her. Her evidence was corroborated by that of PW2, and 4 who all stated that they knew the appellant prior to this incident. PW2 told the court that though it was 7.00 p.m. It was not very dark; that there were lights from the vehicles and from a nearby shop. PW4 also said that there were electricity lights at the scene. Further in cross examination, PW4 vividly described how the appellant was dressed that day and stated that he had no cap that day. She further testified that the appellant had a scar on his head and indeed when the appellant removed his cap in court, PW4 was able to show the court the scar on his head. Even though PW1, 2 and 4 may not have known the appellant by name, they were categorical that he is a person they knew by appearance and they recognized him. We find and hold that this was a case of recognition as opposed to identification. We are alive and we have warned ourselves of the fact that the incident having

happened at dusk conditions were not favourable for a positive identification/recognition. In the case of ***Anjononi & Others V Republic (1980) KLR*** the Court of Appeal stated as follows:

> "***the proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We draw attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported).***"

We fully associate ourselves with the sentiments expressed by the Court of Appeal in the above case and find that the appellant was properly recognized by the prosecution witnesses. Consequently this ground of appeal must fail.

There is no doubt that after arrest of the appellant, no parade was conducted by the police on which the complainant was called to identify the appellant. In the case of ***Gabriel Njoroge v Rep (1982-88) 1 KAR 1134,*** the Court of Appeal held that dock identification of a suspect is generally worthless unless other evidence is adduced to corroborate it. The rational for that principle was explained in the case of ***Amolo v Rep (1991) 2 KAR 254*** where the court said:

> ***"The reason for the court's reluctance to accept a dock identification is part of a wider concept or principle of law that this court is not permissible for a party to suggest answers to his own witness, or as it is sometimes put to lead his witness".***

The same principle was further corroborated in the case of ***Muiruri & 2 Others v Rep (2002) 1 KLR***. The Court said:

> ***"It is believed that because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of crime even though he ought not be sure of that fact. It is also believed that ht e accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of".***

In the instant case, thought the police did not conduct any parade, we are satisfied that the appellant was properly identified as the robber. We find so because, PW1 was not the only witness but PW2 and 4 who were present at the scene also knew the appellant as a conman person at the market only that they did not know his name; further all the three witnesses had been seeing the appellant hovering at the said vehicle before the robbery took place. If the robbery took place at 7.00 p.m., it means they had been seeing him before 7.00 p.m. which cannot have been as dark. The appellant insisted on the production of OB 66 of 14/11/2010 when he was booked at Maua Police Station. It was produced before us at the hearing of the appeal.

The court confirmed that PW1 made a report to the Police Station that she was robbed by a person known to her. It is the same evidence she maintained that she knew the appellant by appearance but not by name. To reinforce PW1's testimony that it is the appellant who robbed her, her ID and voter's card were recovered by PW3 in front of his house, evidence we have considered elsewhere in this judgment. The recovery of PW1's ID card and voter's card, though it was after averment, goes to concretise the prosecution evidence that it is the appellant who robbed PW1.

With regard to the ground that the presentation of the exhibited items fell short of the required standards in law, the appellant did not demonstrate how the presentation of the exhibits was flawed. We do note that the P3 form and treatment notes were produced as PEx No. 1.The ID and voter's card were produced in

evidence a PEx. 2A. PW1 confirmed that the two documents which had been stolen had been recovered. PW3 identified the ID and voter's card that he recovered. The same were produced in court by PW6. We have no doubt that the documents were regularly produced in court as exhibits after they were identified. In the case of PW4, the appellant was alleging that PW4 planted the documents in his house which PW4 vehemently denied.

The offence was committed on 14/11/2010 and the appellant was not arrested till 26/12/2010, about 1½ months after the robbery. Apart from the ID and voter's card, the rest of the complainant's property was not recovered i.e., money, phone and handbag which I believe were valuable. The ID and voter's card may not have been valuable and the best way was to discard them away. We have no doubt that PW3 was truthful and the items were found buried outside the appellant's house. PW3 is the appellant's Assistant Chief and he said he knew his house. Consequently, this ground of appeal must as well fail.

It was also contended by the appellant that vital witnesses mentioned during the trial were not called for a just and fair decision to be reached. The appellant did not state who the alleged vital witnesses were. We however note there are other witnesses who witnessed the robbery but were not called to testify. This includes Mutembei (the owner of the vehicle), the conductor and his driver. According to PW1, 2 and 4's evidence which remained uncontroverted, all these people did not come to the aid of PW1 as she was being robbed. From their conduct, they could have been accomplices to the appellant. PW1 and 2 said that the owner of the motor vehicle had talked to the appellant several times before the appellant committed this offence. In addition, the driver and conductor actually off loaded PW1's luggage from the vehicle and headed to the direction that the appellant had run to leaving her stranded. PW1 further testified that they were summoned to the police station but they refused to attend. They probably would not have been of any help to the prosecution case and that was the probable reason as to why they were not called as witnesses. As for the Investigation Officer, he was said to be on transfer and despite adjournments, he was not found. In any event, all he may have said is what he was told. Be that as it may under **Section 143 of the Evidence Act CAP 80 of the Laws of Kenya** no particular number of witnesses are required to prove a particular fact unless the law so requires. For this proposition we are guided by the Court of Appeal decision in the case of ***Benson Mbugua Gitau V Republic Eldoret Criminal Appeal No. 257 Of 2009.*** Consequently, we find no merit in this ground and the same must accordingly fail.

With regard to the allegation that the trial court failed to comply with **Section 169 (1) of the Criminal Procedure Code**, the said section deals with the contents of a well structured judgment. A judgment is supposed to be in the language of the court, the point or points for determination. The decision and the reasons for the decision, be dated and signed. We have carefully gone through the judgment of the Learned Trial Magistrate. Even though the same was not very detailed, the same was clear and coherent and the court gave its reasons for the decision that was arrived at. We are unable to agree with the appellant that **Section 169 (1) of the Criminal Procedure Code** was flouted and this ground of appeal must as well fail. In any event, this court will examine the evidence adduced before the trial court afresh and this court will make its independent determinations and the appellant will not suffer any prejudice.

The appellant in his defence denied having committed this offence and stated that he was framed up by PW3 because he used to steal relief food. In cross examination PW3 denied having heard any grudge against the appellant. He admitted having had a case in 2007 which was not related to this case. If PW3 had a grudge against the appellant as alleged, he would not have admitted this fact. The appellant further stated in cross examination that the reason why he was arrested was because he refused to bribe PW3. PW3 denied this allegations and the appellant did not raise this issue in his defence. We find the appellant's defence to be untruthful and we accordingly reject the same. The prosecution witnesses had no reason whatsoever to frame the appellant whom they clearly stated that they did not even know his name.

It was also contended by the appellant that there were discrepancies in the testimonies of PW1 and 3 in that PW1 stated that her identity card was found in the appellant's house on a table whereas PW3 stated that it was recovered outside his house in a fence. We have carefully looked at the proceedings. Nowhere was it stated by PW1 that her identity card was found in the appellant's house on a table. She only stated

that her personal effects were found in the appellant's house. She did not state whether it was inside or outside the appellant's house. It must be noted that PW1 was not present when the recovery was made. In any event even if we were to find that there were inconsistencies which we do not, the same are immaterial and do not go to the root of the matter. In so saying we are guided by the case of ***Njuki V Republic (2002) 1 KLR 771***, where it was stated as follows:

> "***in certain criminal cases, particularly those which involve many witnesses' discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused……however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."***

The appellant also complained that no parade was conducted. We would agree with the appellant that his is a case where the police should have conducted a parade as respects PW1, 2and 4. However, even if the parades were not conducted, there is still evidence to convict appellant with the offence.

Having considered the totality of the evidence tendered in this case, we find that the same to have been overwhelming, clear, consistent, credible and reliable to found a conviction. Consequently, we do hold and find that the conviction entered against the Appellant was safe. We uphold it.

The Learned Trial Magistrate sentenced the appellant to the mandatory death sentence as provided under **Section 296 (2) PC.** The sentence was therefore lawful and legal and we find no basis in interfering with the same. We dismiss the appeal.

DATED AND SIGNED THIS 30TH DAY OF OCTOBER 2015.

R.P.V. WENDOH **J. A. MAKAU**

JUDGE **JUDGE**

DELIVERED THIS 30TH DAY OF OCTOBER, 2015

R.P.V. WENDOH **J. A. MAKAU**

JUDGE **JUDGE**