**REPUBLIC OF KENYA**

**High Court at Garissa**

**Criminal Appeal 61 of 2012**

**(From original conviction and sentence of the Principal Magistrate's Court**

**at Mwingi (H.M Nyaberi) in Criminal Case No. 624 of 2012)**

**STEPHEN KATA MWANZIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

**Background**

1. On 5th of July 2010, Stephen Kata Mwanzia (the appellant) was arraigned before the Principal Magistrate at Mwingi facing charges of robbery with violence contrary to section 296 (2) of the Penal Code. He was tried, convicted and sentenced to death. The particulars of that charge reads that on 24th day of June 2010 at 7.20pm at Kyamundatui village, Kaliluni sub-location in Migwani District in Eastern Province jointly with others not before the court being armed with dangerous weapons namely panga and rungus robbed Felistus Nduku of her leather handbag containing a mobile phone make Nokia 1208 Serial No. 35158043852222, Equity Bank card, one mirror, a biro pen, a bunch of keys and assorted documents all valued at Kshs 3,180 and at the time of such robbery used personal violence against the said Felistus Nduku.

**Facts**

2. The prosecution case was supported by evidence of five (5) witnesses while the defence case was supported by the sole evidence of the appellant. The facts of this case are that on 24th June 2010 at about 7.20pm **Felistus Nduku (PW1**), a resident of Kaliluni sub-location in Migwani District, Kitui County was walking home from Migwani market. She was in the company of **Regina Thambu (PW2).** About 50 meters from their home one Kata Mwanzia (appellant) passed them shortly followed by two other young men. The two witnesses continued walking. They were about to pass the three young men who has stopped beside the path when the appellant raised a panga and ordered them to stop. While PW1 stopped, PW2 ran off. The appellant held PW1's hands from behind and another man held PW1's hair. The third man chased PW2 but did not manage to catch up with her. He went back and took PW1's handbag containing mobile phone Nokia 1208, bunch of keys, Equity Bank card, pen and assorted documents. In the meantime PW2 ran towards her uncle's home screaming. Her screams attracted people who gathered at the scene. The two witnesses narrated what had happened to the people who gathered, among them **Kameya Vonza (PW3).** The matter was reported to the area chief and later to police station. The appellant was arrested the following day 25th June 2010 and charged with this offence. The red jacket and hat reportedly worn by the appellant during the time of robbery was recovered and produced as exhibits.

3. The defence of the appellant was that he went to his house within Migwani at 5.30pm on 24th June 2010 and he never went out that evening. The following day he reported to work but police arrested him and asked him to account for his movements on 24th June 2010. He denied knowledge of the charges but said he knows the complainant as a customer. He said the recovered jacket and hat belonged to his brother and he had not worn them on the day of the alleged robbery.

**Grounds of appeal**

4. The appellant has filed nine grounds of appeal framed as follows:

i. The learned trial magistrate erred in law and misdirected himself in finding that the prosecution had proved its case of an offence of robbery with violence contrary to section 296 (2) of the Penal Code.

ii. The learned trial magistrate erred in law and misdirected himself on the matter herein when he based his decision on extraneous matters that were not in issue, a misdirection that led him to arrive at the wrong judgement.

iii. The learned trial magistrate erred in law and misdirected himself on the facts before him in finding that the appellant was positively identified by PW1.

iv. The learned trial magistrate erred in law and fact when he depended wholly or to a great extent on the correctness of the identification of the appellant.

v. The learned trial magistrate erred in law and fact when he based identification on moonlight the brightness of which (*sic*) was not ascertained by the trial court.

vi. The learned trial magistrate erred in law and misdirected himself in facts before him in finding recognition more reliable than identification and failed to consider when a witness is purporting to recognize someone he knows, it should be born in mind that mistakes of recognition of close relatives and friends are sometimes made (*sic*).

vii. The learned trial magistrate erred in law and misdirected himself on the facts before him in finding the appellant's defence wanting and unconvincing (*sic).*

viii. The learned trial magistrate erred in law and misdirected himself on the facts before him in finding the prosecution case credible, strong and unchallenged by the appellant's defence.

ix. The sentence on the appellant is harsh and excessive (*sic*).

**Duty of the court**

5. From the outset we have taken cognizance of the legal duty imposed on this court as the first appellate court to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour. We will give allowance for that. The Court of Appeal, in **Criminal Appeal No. 85 of 2005 Arum *v* Republic**, cited with approval the overly quoted case of **Okeno v Republic [1972] E.A 32** where it is stated that:

***"The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence and see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses."***

**Submissions for and against**

6. In support of the grounds of appeal, the appellant has, through his counsel, filed written submissions and also made oral submissions during the hearing of this appeal. The appellant is challenging evidence touching on his identification and the manner the trial court handled his defence evidence. On i**dentification** it has been submitted that the complainant based identification of the appellant on a jacket that she alleges the appellant was wearing when the jacket belonged to the brother of the appellant; that there was no identification parade conducted; that PW1 and PW2 contradicted themselves on the distance the appellant was when they saw him; that none of the stolen items were recovered from the appellant. It is further submitted that the trial magistrate erred in finding that the moonlight was sufficient to enable positive identification in complete disregard of the fact that there was a 20 metres discrepancy in evidence between the distances judged by PW1 and PW2 and that even in cases of recognition, a witness could be mistaken.

7. On the **appellant's defence** it has been submitted that the learned trial magistrate erred and misdirected himself in finding the appellant's defence wanting and unconvincing; that the burden of proof is with the prosecution and it was upon the prosecution to rebut the appellant's evidence that he was in his father's house the whole night; that the prosecution did not conclusively prove the ownership that the red jacket used in identification; that the shifting of the burden of proof from the prosecution to the appellant is a mockery of trial; that the marvin hat and red jacket are not unique and can be bought from any retail outlet.

8. In opposing the appeal the learned state counsel has submitted that the ingredients of robbery with violence have been established; that the moonlight was bright and this was identification by recognition and that there was no need of conducting an identification parade.

**Issues and Determination**

9. We understand the issues raised in this case as follows:

a) Whether an offence under section 296 (2) of the Penal Code has been proved/Whether the evidence in support of the prosecution case prove an offence under section 296 (2) of the Penal Code.

b) Whether the trial magistrate based the conviction of the appellant on extraneous matters.

c) Whether the appellant was positively identified as one of the robbers.

d) Whether the trial magistrate failed to consider the appellant's defence.

e) Whether the sentence is harsh and excessive.

10. An offence under section 296 (2) is committed if any of the following circumstances exists and has been proved, that is:

(a) If the offender is armed with any dangerous or offensive weapon or instrument, or

(b) If he/she is in the company with one or more other person/persons, or

(c) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

11. The evidence of both PW1 and PW2 is clear that there were three men. PW1 testified as follows "**While about 50 metres from home, one Kata Mwanzia who is well known to me passed us……He never spoke to us……He was shortly followed by 2 other young men. They also passed us……On nearing the house of Regina we met the 2 young men with the accused beside the road. While passing them, the accused raised a panga and the 2 young men drew their clubs. The accused ordered us to stop."** This evidence confirms that the attackers were three. It also confirms that the attackers were armed.

12. We have noted some discrepancy on the issue of the attackers being armed. PW1 said that the appellant had a panga while the other two had rungus while PW2 said that while the appellant had the panga, one of the other two young men had a stick and the third person did not have anything. We have reasoned that it is possible that PW2, who panicked easily going by the fact that she ran away upon being ordered to stop, may not have seen what the third person was holding. We have no doubt that the appellant was armed with a panga. We also find that physical violence was used on PW1 although she did not testify regarding any injuries on her body. There is evidence that the appellant held PW1 by her hands at the back while a second person held her by her hair. We hold the view that proof of any of the ingredients specified in section 296 (2) of the Penal Code is enough to base a conviction on. Even if we were wrong on the evidence as adduced especially on what the other two persons were armed with, we are convinced that the attackers were more than one. Proof of that alone is sufficient and we hold that there is such proof. In so holding we are guided by the Court of Appeal decision in **David Othiambo & Another vs. Republic Criminal Appeal No. 5 of 2005 (*Mombasa* )(*unreported*)** in which the Court while quoting with approval the case of **Johana Ndungu v. Republic (Cr. Appeal No. 116 of 1995)** discussed thevarious elements or ingredients which must be proved under section 296 (2) of the Penal Code and any of which if proved would leave the court with no discretion but to convict under section 296 (2). We find and hold that the trial magistrate was right in finding the offence under section 296 (2) having been proved and convicting on the same.

13. We note that out of the nine grounds of appeal, four grounds of appeal, that is, grounds numbers 3, 4, 5 and 6 challenge evidence on identification. The evidence on identification was adduced by PW1 and PW2. The time was 7.20pm (7.00pm according to PW2) and both testified that there was moonlight. PW1 said the appellant was someone known to her before. PW2 did not say whether she knew the appellant before but called him by name when testifying. We are guided by the leading case of **R v Turnbull and others [1976] All ER** on the issue of identification which laid down guidelines for consideration by the courts in trials where the identification evidence is disputed, namely the amount of time the suspect was under observation by the witness; the distance between the suspect and the witness; visibility at the time the witness saw the suspect; obstructions between the suspect and the witness; whether the suspect knows the suspect or has seen him/her before; any particular reason for the witness to remember the suspect; the time lapse since the witness saw the suspect; and the error or material discrepancy in the description given by the witness.

14. We have considered the evidence on the identification of the people who attacked PW1 and PW2. PW1 states that ***"While about 50m away from home, one Kata Mwanzia who is well known to me by passed us. He is the accused in the dock. He never spoke to us. He was wearing a red jacket with a red marvin hat. There was enough moonlight. He was shortly followed by 2 other young men. They also by passed us. I did not identify them."*** PW2's evidence on the same issue it that "***On nearing my house about 50m away, Kata Mwanzia by passed us very fast. We kept on walking. Again I saw 2 men coming from behind. They bypassed us. When nearing the junction which is about 10m, they stopped. I saw Kata Mwanzia coming from the other side. He greeted them. On nearing them, I heard 'stop'."*** The appellant was someone known to the two witnesses. When PW1 and PW2 told PW3 what had happened, they named one of the attackers as Kata. PW3 told the court that the named Kata was known to him.

15. We have carefully examined and evaluated this evidence. We believe the evidence of PW1 and PW2 that the appellant was known to them before the date of the offence. They both recognized him as the person who had passed them as they walked. They both saw and recognized the appellant as the one who had the panga and who raised it. We noted some differences in that while PW1 said it was the appellant who uttered the words 'stop', PW2 said she heard the words 'stop' without specifying who uttered them. When they narrated to PW3 who the attackers were, they told him that one of them was Kata the appellant whom PW3 knew. The time the two witnesses stayed with the suspects is not indicated but we note that PW1 was being held by the appellant and another suspect long enough to enable the other suspect chase PW2 fail to catch her and return to take PW1's handbag while the appellant and the other suspect were holding her before the three ran away.

16. We have noted the evidence that the appellant was wearing a red jacket and a marvin hat. The alleged

red jacket was recovered the following day although evidence differs as to where it was found. PW1 said it was inside appellant's room on a bed while PW4 said the jacket was recovered from a string where it was hanging. We are aware that it is may be difficult to differentiate colours in moonlight but we take the view that the appellant was a person known to the witnesses and they recognized him as one of the robbers. In estimating how far one could see with aid of the moonlight at the time of the robbery PW1 approximated about 50 meters while PW2 approximated 30 metres. While we note this discrepancy, we have considered that the appellant was someone known to the witnesses and that he was holding PW1 by her hands, which was close enough. We also note that the appellant was arrested the following day still wearing the marvin hat that PW1 identified as the same one the appellant had been wearing during the time of robbery. Our view is that grounds numbers 3, 4, 5 and 6 which are challenging the evidence on identification are baseless and we hereby reject the same.

17. Although the appellant through his counsel submitted that the trial magistrate relied on extraneous matters, it was not pinpointed what those extraneous matters are. We have carefully perused the record of the trial court and particularly the judgement and we find this ground unfounded. We also find the claim that the trial magistrate disregarded the appellant's defence and shifted the burden of proof to the appellant unfounded. The trial magistrate considered all the evidence and analysed the same in his judgement. He rejected the defence of the appellant and convicted.

18. On the issue of harsh and excessive sentence we wish to state that death sentence is lawful in this country. We therefore go by the law and maintain the same.

19. In conclusion, we dismiss the appeal and uphold the conviction and sentence.

**Florence N. Muchemi** **Stella N. Mutuku**
**Judge** **Judge**

**Signed, dated and delivered this 28th day of January 2013**