REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 42 OF 2011

(From Original Conviction and Sentence in Criminal Case No. 143 of 2010 of the Senior Resident Magistrate's Court at Mariakani – D. M. Machage, SRM)

AHMED ISLAM …….…….. APPELLANT

V E R SU S

REPUBLIC ……. RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was convicted as charged and sentenced to death.

2. The prosecution's evidence was that the Appellant committed the offence in the company of Douglas Muchina. Muchina was arrested and convicted of the offence prior to the Appellant being charged before the lower Court.

3. The salient evidence presented by the prosecution was that Rama Saidi Chambiko the complainant on 31st December 2009 at about 10.00pm was at a bar known as Brilliant. He was celebrating the New Year's Eve. He was chewing miraa at that bar. As he was leaving he saw the Appellant in the company of Muchina. He previously knew both of them and even talked to them. Both asked him for a drink. When he declined to buy them a drink they began to kick him until he fell down. They then stole from him his LG phone and Kshs. 800/-. The place where they attacked him was lit by security light. He described the light as-

   "The place was well lit by tube lights two."

4. The complainant said that it was Muchina who kicked him down and when he fell it was the Appellant who held him down giving Muchina the opportunity to take from his pocket his phone and money. Whilst they were robbing him he heard PW2 calling out the names of the Appellant and Muchina.

5. PW2 Issa Suleiman said that on 31st December 2009 at 10.00pm he was walking near Brilliant Bar. He saw the Appellant and Muchina on top o f the complainant. The Complainant was struggling. PW2 called out to the Appellant and Muchina asking them what they were doing. Both ran away. In describing the visibility he had this to say-

   "It was at night. There are security lights at the path. Security lights were lighting

well. The place is lit by electric light."

PW2 then stated that the complainant informed him that he had lost his phone and money. He also told him that he had been injured on his leg.

6. The complainant's injuries were confirmed by the Clinical Officer who produced the complainant's P3 form. The injury was categorized as harm. The Clinical Officer noted on examination that the complainant had a bruise on the right cheek, on the nose and a minor cut on the left hand.
7. Although the complainant participated in an identification parade and picked out the Appellant that evidence could not have assisted the prosecution's case because the complainant and PW2 said that they knew both the Appellant and Muchina since they came from the same locality.

8. The Appellant gave an unsworn statement in his defence. He gave evidence about the day he was arrested. He denied committing the offence. He did not give evidence of the day when the complainant was robbed.

9. It should be noted that recognition of the two attackers was under difficult circumstances. It was at night. It is important in view of that for that evidence to be examined carefully to ensure that the witnesses did not make a mistake. The Court of Appeal in the case **JOHN NJERU KITHAKA & ANOTHER -VS- REPULBIC [2009]eKLR** had this to say of the care that should be taken when identification is under difficult circumstances-

> ***"On identification, the law is now well settled and that is that a trial court has the duty to consider with utmost care, evidence of identification or recognition before it bases conviction on it. In particular, if the conditions under which such identification is purported to have been made were not favourable and if the identification is by a single witness. Although recognition raises less problems than identification of strangers, nonetheless, even in cases of recognition, there is need to exercise caution before a conviction is entered. It is thus established that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. In the case of KIARIE V. REPUBLIC (1984) KLR 739, this Court made it clear that before a conviction can be entered against a suspect on account of visual identification, such evidence must be watertight as it is possible for even an honest witness to make a mistake. In cases of recognition it was stated in the case of R V. TURNBULL (1976) 3 ALLER 549 as follows:***
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> ***'Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.'"***

10. The complainant and PW2 gave evidence stating that the area in

which the incident occurred was well lit. The complainant even talked about there being two tube lights. To emphasize that they were able to recognize both the attackers they stated that they referred to them by their names. The complainant even had a conversation with the attackers before they robbed him. It is the Court's view that the recognition of the Appellant by the complainant and PW2 was reliable to support the conviction of the Appellant.

11. We are satisfied that the charge of robbery with violence contrary to

Section 296(2) was proved by the prosecution to the required standard. In that regard, we refer to the Court of Appeal decision of the case **OKWARO GEROGE WILLIAM -VS- REPUBLIC [2010]eKLR** where the Court alluded to what would constitute ingredients of offence with robbery with violence. The Court stated –

> ***"On the issue of whether the charge of robbery with violence under section 296(2) of***

the Penal Code was proved against the appellant on the available facts and evidence, we reiterate for the benefit of the appellant that a conviction for this offence does not depend on the establishment of all the ingredients of the charge stated in that section. It is true the evidence did not establish the presence of any weapons used in the attack against the appellant but two of the ingredients spelt out in section 296(2) of the Penal Code were present, namely the presence of three attackers and the injury inflicted on the complainant in the process of stealing from him the wallet in which was Kshs.5,000/= and his personal documents."

12.Like in that case before the Court of Appeal we find that there was no

evidence that the Appellant used any weapon but that the Appellant attacked the complainant in the company of Muchina and they injured the complainant and thereafter stole his phone and money.

13. It is because of that finding that we state that the Appellant's appeal has no merit and the same is hereby dismissed.

Dated and delivered at Mombasa this 28th day of November, 2013.

MARY KASANGO **M. MUYA**

JUDGE **JUDGE**