REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 191 OF 2010

WYCLIFFE MUSALIA KENANI……..……..APPELLANT

VERSUS

REPUBLIC…….…..….RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 4534 of 2010 Republic vs Wycliffe Musalia Kenani in the Resident Magistrate's Court at Eldoret by D.K. Kemei, Principal Magistrate on 1st December 2010)

JUDGMENT

1. The appellant was convicted on a count of robbery with violence contrary to section 296(2) of the Penal Code. He was sentenced to death. The appellant has appealed against his conviction and sentence.
2. The particulars of the charge were as follows: That on 8th October 2010 at Shauri Estate in Uasin Gishu District, the appellant, jointly with others not before the court, and while armed with dangerous or offensive weapons, namely pangas, robbed Monica Maina of a television set, TV trolley, DVD player, gas cooker, stove, iron box, curtains, mattress, mobile phone, clothes and cash Kshs7,000 all valued at Kshs 40,000 and immediately before or immediately after the time of the robbery threatened to use actual violence against her.
3. The petition of appeal was filed on 22nd February 2011. It raises eight grounds of appeal. The principal grounds urged can be summarized into five. First, that the ingredients of the offence were not established; secondly that there was no corroborating evidence to the testimony of the complainant; thirdly that the sentence imposed was too harsh; fourthly, that the learned trial magistrate failed to evaluate the evidence which was inconsistent, contradictory and unreliable; fifthly, that conditions for identification were not favourable. In a synopsis, the appellant's case is that the capital offence was not proved beyond reasonable doubt.
4. The State has contested the appeal. The case for the state is that the evidence of five witnesses called established the appellant's guilt to the required standard of proof. The appellant was in the company of two other people armed with pangas and threatened to attack the complainant. Regarding identification of the appellant, the state submitted that there was sufficient light from the security lights and moonlight on the material night. Furthermore, the appellant was known to PW1 and PW2 by his nickname of *powersaw*. PW1 also identified the appellant by his voice. In the circumstances, this was a case of recognition. The appellant had a set of keys to the main gate. The State argued that since the complainant's house was not broken into, the appellant was the most likely person who robbed her. It was also submitted that the defence put forth by the appellant was not convincing.In a nutshell, the case of the State is that all the key ingredients of the charge were proved beyond reasonable doubt.
5. This is a first appeal to the High Court. We are required to re-evaluate all the evidence on record

and to draw our own conclusions. In doing so, we have been careful because we have neither seen nor heard the witnesses. See *Njoroge v Republic* [1987] KLR 99, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190, *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 (unreported).

6. The complainant (PW1) was a tenant in a compound housing multiple dwelling units. She was entertaining some guests in her house on the material night. The appellant joined them at about 7.30pm. The guests left at about 11.00pm. She retired to bed. Her evidence was as follows:

> *"At about 3.00am I was woken up by strangers. They had already entered my house and into the bedroom. I screamed once for help. They had torches; they demanded money and mobile phones. Two of them were in the bedroom while a third remained in the sitting room. I heard the voice of the one in the sitting room as I had known him before as Wycliffe and who is a construction worker in the compound. I had known him and his voice before….they were armed with pangas and threatened me to keep quiet or else they would kill me"*

7. The appellant was the caretaker of the premises. The attackers then took the cash and carted away the household goods mentioned in the particulars above. The scream from the complainant attracted her neighbours, PW2 and PW3 who alerted the police. PW2 testified that she peeped out of her window and switched on a security light. She saw the appellant whom she knew by the name *powersaw*. She said he was a construction worker in the premises. She had a few days earlier sent him to buy her some paraffin. She called their landlord and they went to the police station and then to the appellant's house which was in the same compound. They found the appellant and his son named Ben. PW3 on the other hand was woken up by footsteps or movements outside his house. He peeped outside and saw three people including the caretaker Wycliffe or *powersaw*. He said Wycliffe was in a *black jumper* and carrying away some items. He assumed he was helping a tenant to move until he heard the scream of PW1. PW4 was the investigating officer. He testified that the complainant told him the attackers were wearing *marines* at the material time. The appellant contends that there is a discrepancy in the clothes worn by the appellant. That coupled with poor conditions of identification renders the conviction unsafe.
8. The appellant's defence was as follows. He said he is a mason. On the material night at 7.30pm, he had gone to the complainant's house to help her fix some nails. He said he stayed there for some time with other guests including a lady called Njeri (PW2). He then left for his house. He was later woken up by his employer (the landlord), the police and other neighbours and accused of having perpetrated the robbery. He was locked in at Baharini Police Station. He was taken to the scene where the police confirmed there was no break-in at the gate or the complainant's main door. The appellant's case was that Njeri should have been arrested as a suspect. He felt he was framed up after refusing to part with Kshs 1,000 bribe to the police. He also felt the police investigations were incomplete or shoddy in the circumstances.
9. In the judgment, the learned trial magistrate found that the prosecution witnesses were *consistent, truthful and gave cogent evidence*. They had known the appellant and recognized him. The trial court found that the conditions of lighting were favourable. Since the accused admitted to have been in the complainant's house that evening to help her fix some nails or set up electronic equipment, he was a prime suspect. And as a caretaker who had keys to the compound, and considering that the house was not broken into, he had a clear opportunity to commit the offence. He found the charge was proved beyond reasonable doubt.
10. The key ingredients for a robbery with violence charge are found in section 296(2) of the Penal Code. It provides as follows-

> *"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death".*

11. We have re-evaluated all the evidence. We have found that the appellant was well known to the complainant(PW1), PW2 and PW3. He was a care taker and mason on the premises. He was living

in the same compound with the three witnesses. The complainant knew him by the name Wycliffe. The others knew him as either Wycliffe or by his nickname *powersaw*. He was in the in the complainant's house earlier that day and evening. In cross-examination, the complainant stated that the appellant was in her house when she brought in the TV and DVD. The appellant and Njeri (PW2) helped her to set up the equipment. The appellant clearly had other ideas. He returned at 3.00am with his two accomplices. They had torches and were armed with pangas. The pangas were not produced in evidence. But the appellant was in the company of *two* others. They threatened to *kill* the complainant.

12. We have found that the appellant and his accomplices had offensive or dangerous weapons and that in the course of the robbery, they threatened to use actual violence on the complainant. The items listed in the particulars of the charge were stolen in the robbery. There was no break-in. The robbers let themselves in using some keys. The appellant, as the caretaker, had access to the keys to the gate. It is possible that other persons including tenants had keys, but it is the appellant who was *identified* as the robber. We find the appellant had a clear opportunity to commit the offence. True, the goods stolen were not found with the appellant minutes later. But there was a perfect explanation. The appellant was seen by PW2 in the company of two accomplices carrying away the goods. The goods may have well ended with the accomplices. What is material is that the complainant clearly identified the appellant as one of three robbers who stole her household goods. Her evidence was corroborated by PW2 and PW3. The key ingredients for the offence of robbery with violence were all present.
13. From the evidence, we have also reached the conclusion that the lighting conditions on the material night were favourable for a positive identification. We have said that the appellant was *known* to PW1, PW2 and PW3 and by his name Wycliffe or nickname *powersaw*. PW1 had spent some time with the appellant that afternoon and early evening in her house. She said she recognized his voice. The appellant was speaking from the sitting room. At that time, his two accomplices were in the complainant's bedroom. The learned counsel for the appellant took issue with that evidence. In his view, the witness should have stated what the appellant *said*. That may well have been preferable. But her evidence on identification was corroborated by PW2 and PW3. They both knew the appellant. PW2 identified him from the security light. PW3 said there was also moonlight. He saw the appellant carrying away the TV trolley and a mattress in the company of two other people. True, there was some discrepancy in the evidence of PW3 and PW5 on what the appellant or his accomplices were wearing. We have examined the record carefully. PW3 said appellant was wearing a *black jumper*. That was direct evidence. PW5 on the other hand was the investigating officer. He was merely stating what he heard from witnesses. But he did *not* single out*the* appellant as the one who was wearing *marines*. He said at page 13 of the record as follows-

> *"however at around 3.00am three people armed with pangas and wearing marines entered into the plot and complainant's house and stole goods…".*

14. There is thus no material discrepancy on what *the* appellant wore: he was wearing *black jumpers*. That is the direct evidence. Furthermore, we have stated there was other clear evidence of identification. There was no evidence of grudges between the appellant and the witnesses. PW2 and PW3 testified as much at pages 8 and 9 of the record. This in our view was clearly a case of *recognition*.
15. Evidence of recognition is generally more reliable than identification of a stranger, but mistakes may sometimes be made by witnesses. In *Wamunga v Republic* [1989] KLR 424**,** the Court of Appeal held as follows-

> *"It is trite law that where the only evidence against a defendant is 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 the possibility of error before it can safely make it the basis of a conviction."*

16. We are satisfied that the conditions of identification in this case were favourable. We are further guided by the decisions in *Abdalla Bin Wendo v Republic* [1953] EACA 166, *Joseph Ngumbao Nzalo v Republic* [1991] 2 KAR 212, *Obwana and others v. Uganda* [2009]

2 EA 333 at 337, *Richard Kinyuru and another v Republic* Nairobi, High Court Criminal Appeal 290 of 2009 [2012]eKLR, *Salim Swaleh Mapinga v Republic*[2013] eKLR.We are also satisfied that PW1, PW2 and PW3 clearly identified the appellant as one of the robbers. The defence set up by the appellant that he was asleep in his house and that he was framed by the police for failing to give a bribe is untenable in the circumstances.

17. In the end, we agree with the learned trial magistrate that all the elements of the charge of robbery with violence were proved beyond reasonable doubt. Section 296 (2) of the Penal code provides for a mandatory death sentence. The appellant had challenged the sentence in this appeal. The learned trial Magistrate took the appellant's mitigation but stated that his hands were tied up by the law on the sentence.

18. Where the law provides a sentence of death, it is untenable to argue in the same breath that the sentence is harsh. See *Joseph Mwaura Ndungu and 2 others v Republic* Nairobi, Court of Appeal, Criminal Appeal 5 of 2008 (unreported). A five judge bench of the Court of Appeal reaffirmed that the death penalty as prescribed, for instance, by section 296(2) of the Penal Code is *mandatory*. We thus have no discretion in the matter. We uphold the conviction and sentence. In the result, the entire appeal is hereby dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 28th day of November 2013

FRED A. OCHIENG **G.K. KIMONDO**

JUDGE **JUDGE**

Judgment read in open court in the presence of

Mr……for the appellant.

Mr……..……..…..…for the State.

Mr…….. Court Clerk.