REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA.

HIGH COURT CRIMINAL APPEAL NO. 111 OF 2012.

(CONSOLIDATED WITH BUSIA H.C. CR. APPEAL NO. 112 OF 2012)

ALEX KOLOMANI ..... 1ST APPELLANT

EVANS DINDI..... 2ND APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT.

(BEING AN APPEAL ON CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 750 OF 2012 IN BUSIA CHIEF MAGISTRATE'S COURT – (HON. B. A. OJOO – AG. SPM)

J U D G M E N T.

Alex Kolomani and Evans Dindi hereinafter referred to as the 1st and 2nd Appellants were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code before the Busia Chief Magistrate's court. They entered aplea of not guilty on 17.5.2012. The particulars as set out in the charge sheet was that on the 15.5.2012 at Urban village , Nambale sub-location jointly with others not before court, being armed with dangerous weapons namely panga, robbed Melza Makokha Ochaji of Kshs.12,200/=, two Nokia mobile phones make 1100 and 1208, two bicycles make Raja and Jupiter all valued at Kshs.26,200/= and immediately before time of such robbery used actual violence to the said Melza Makokha Ochaji. The two Appellants also faced another charge of malicious damage to property contrary to section 339 (1) of Penal Code whose particulars were that on 15.5.2012 at Urban village, Nambale sub location willfully and unlawfully jointly damaged one Lantern lamp valued at Kshs.500/= the property of Melza Makokha. The charge sheet was substituted on 30.7.2012 and both Appellants entered a plea of not guilty to both counts.

Both Appellants were found guilty on both counts after hearing and sentenced to life imprisonment on counts 1 and one year imprisonment in count 2. Both were aggrieved by the convictions and sentences and filed separate appeals. The 1stAppellant filed BusiaH.C.Cr. Appeal No. 112 of 2012 setting out ten grounds in his Memorandum of Appeal. The 2nd Appellant filed Busia H.C. Cr .Appeal No. 111 of 2012 also setting out ten grounds. The grounds in two appeals are similar and when the appeals came up for hearing, they were consolidated by consent of the Appellants and Mr. Obiri for the state. Busia H.C. Cr. Appeal No. 111 of 2013 became the lead file and it is on this file that the hearing proceeded.

The state had on 8.10.2013 served a notice of enhancement of sentence on the Appellants under section 354 (3) (a) (ii) of the Criminal Procedure Code Cap 75 of Laws of Kenya. It indicated the state would beasking the court during the hearing to enhance the sentence of life imprisonment for the

offence of robbery with violence contrary to section 296 (2) of the Penal Code passed on the Appellants on 11.11.2012 to death.

The Appellants confirmed having received the notice from the Respondent and indicated their intention to proceed with their appeals.

Each of the Appellants presented written submissions which they relied on and responded to the state's submissions.

The grounds of the Appellants are as summarized below;-

1. That trial Magistrate erred in law and fact by failing to consider the alibi defence contained in their sworn statement of defence.
2. That the learned trial Magistrate erred in law and fact by failing to appreciate the provision of section 32 (1) of the Evidence Act.
3. That the learned trial Magistrate erred in law and fact by relying on evidence whose standard of proof was below that set by the law in convicting them.

SUMAMARY OF 1ST APPELLANT'S SUBMISSIONS.

1. That the elements of the offence of robbery with violence have not been established by the evidence adduced.
2. That the documents of ownership of the items alleged stolen were not availed to the court.
3. That the circumstancesfor proper identification was not available due to the violence directed to the witnesses and the powerful torch lights directed to their eyes by attackers who had covered their faces.
4. That there was confusion as to the time the said robbery occurred.
5. That the learned trialMagistrate violated his rights under Article 50 (f) of the Constitution by indicating the plea was taken when he was in custody.

2ND APPELLANTS SUBMISSION'S SUMMARY.

1. That the charge sheet was defective by failure to properly describe the items alleged to have been stolen during the robbery. That the cash listed in the charge sheet as stolen was Kshs.12,400/=while evidence adduced showed Kshs.12,400/= stolen from PW 1 and Kshs.4,000/= from PW 4 That PW 4 was not named as a complainant.
2. That PW 1 and PW 4 who were allegedly in the same house during the robbery have contradicting evidence as to the time of the robbery.
3. That some people said to have been at the scene were not called as witnesses
4. That the learned trial Magistrate erred in relying on the evidence of a co- accused to convict him instead of discarding it.
5. That his arrest was based on mere suspicion.
6. That the learned trial Magistrate appeared to shift the burden of proof to the 2nd Appellant contrary to the principles of Criminal Law.
7. That the learned trial Magistrate erred in failing to consider his alibi defence.

RESPONDENT'S SUBMISSIONS.

1. That the Appellants were clearly seen by PW 1, PW 3, and PW 4 through light from the lantern lamp and torches and identified to have been the ones who robbed the complainant.
2. That the Appellants were arrested shortly after the robbery.
3. That the 2nd Appellant's s alibi defence was rightly rejected as evidence availed by the prosecution placed him at the scene of the robbery.
4. That as the only known sentence for an offence of robbery with violence contrary to section 296 (2) of the Penal Code is death the life imprisonment given should be enhanced to death

sentence.

5. That the appeals should be dismissed.

This court being the first to deal with these appeals is obligated to analyse the evidence afresh and come to its own conclusion, as held in the case of **Pandya –vs- Republic (1957) E.A 336, Shanitilal M. Ruwalla –vs- Republic (1957) E.A. 570 and Okeno –vs- Republic (1972) E.A. 32**. The evidence in support of the charges was given by five prosecution witnesses who testified as PW 1 to PW 5. The named complainant, Melsa Makokha testified as PW 1. She stated that she was with her husband Bernard Rori, who testified as PW 4 and their two children in their house taking a meal. The record showthat PW 1 said it was at about 8.00 pm and PW 4 said it was about 8.30 pm. PW 1 said they were taking lunch while PW 4 said they were taking supper. Whether the meal they were taking was lunch or supper is not really material. Both agree it was at night going by the time they gave and the difference in the estimated time or hour when the incident is understandable as none had said they had checked the time. Both PW 1 and PW 4 stated the room was lit with a lantern lamp when two men forced their way into the house. Each of the two men had a panga and torch. One attacked PW 1 and slapped her twice while the other held PW 4 placing a panga at his throat. The two men forced PW 1 and PW 4 into the bedroom and stole cash, 2 bicycles and three phones and while leaving the house, damaged the lantern lamp. PW 1 talked about a combined figure of Kshs.12,200/= being robbed from her and Shs.4,000/= from PW 4. PW 4 on the other had said he was robbed of Kshs.4,000/= and PW1 robbed of Kshs.12,200/=. The particulars of the charge listed PW 1 as the complainant, stating that she was robbed of Kshs.12,200/=. The differences in the figure of the amount of money stolen between the evidence of PW 1 and PW 4 does not prejudice any of the Appellant s nor change the situation as the figure given by PW 1 agrees with the figure in the charge sheet. The cash stolen from PW 4 appear not to have been included in the particulars of the charge and PW 4 was not named as a complainant. Considering PW 1 and PW 4 are husband and wife and that they were in the same house where the attack occurred, we find nothing wrong with the way the charge on count 1 was phrased. The Court of Appeal decision in the case of **Gauzi & two others –vs- Republic (2005**) eKLR on situations where more than one capital charges exists is relevant.

The evidence of PW 1 and PW 4 evidence was that the light from the lantern lamp was clear enough and covered the whole room. They were able to see properly the two men who attacked them and note how they were dressed. They told the police they could identify them if they saw them again. Then at about 9 pm, some people made an attack at PW 3's house. PW 3 and his family fought off the attackers and locked the door. The attackers broke the glass on the door and using a torch he saw 1st Appellant outside, and concluded he was one of the attackers.He called him by names as he knew him as a neighbour. PW 3 said the 1st Appellant just stood there and when he went outside he found the doors of the other neighbours, except 2nd Appellant, had been locked from outside. He openedthe doors for the other neighbours as 2nd Appellant came out saying that they all return to their houses and sleep. PW 3 reported to the police who came to the scene and he pointed out the Appellants as suspects. The Appellants were found with wet clothes and taken to the police station. PW 1 and PW 4 were recording their reports at the police station when the Appellants arrived escorted by the police officers. When PW 1 and PW 4 saw the Appellants, they identified them as the ones who had robbed them. PW 2 confirmed that indeed PW 1 had suffered harm.

PW 5 told how on 15.5.2012 at about 8 pm while on mobile patrol they met PW 1 who reported that she had been robbed. She led them to her house and with PW 4, narrated how they had been robbed. He collected the lantern lamp that had been damaged by the robbers. He said PW 1 and PW 4 told them they had seen the two robbers well and could identify them. PW 5 sent PW 1 and PW 4 to the police patrol base and continued with their patrol. They then met PW 3 who also reported he had been attacked by people he knew and led them to a house adjacent to his house. They found 1st Appellant undressing and had wet clothes , namely black half jacket and a marvin. They arrested him and on interrogation he implicated his neighbour. They went to the neighbour's house and found the 2nd Appellant. They found he had wet clothes in a basin which were a black jacket, marvin and ashy coloured trouser. The witness said the wet clothes found on 1stAppellant andthose ina basin in 2nd Appellant's house were confirmation that the Appellants had been in the rains. They arrested both Appellants and took them to

police station, and kept the wet clothes as exhibits. On arriving at the police station they found PW 1 and PW 4 who identified the two Appellants as the persons who had attacked them and he charged them as in this case.

The 1st Appellant defence is that he had spent the day at his clothes business and after closing shop went home. He did some washing and placed the clothes aside to place them for drying the following day. About 8 pm he heard doors being banged. He closed his door and raised alarm as the other neighbours were also raising alarm. Later a neighbour opened his (1st Appellant) door as it had been locked from outside and he learnt from PW 3 that there had been some thugs in the plot. As they discussed with other neighbours police officers arrived and PW 3 briefed them. The police officers searched the houses and took the wet clothes he had in the house and placed him the vehicle. The 2nd Appellant was also arrested. As they entered the report office, he saw some women. He was then placed in the cells and later charged.

The 2ndAppellant in his defence said that he had travelled to Tabaka, Kisii and returned that morning. After taking a nap, he went to take his phone for charging and returned to the house at 5 pm. It started raining heavily and he remained in the house with his wife and children. About 8 pm he heard a bang on the door of a neighbours house and he closed his door and blocked it with furniture. He heard neighbour's screaming and he tried calling the landlord to alert him about the attack but could not get him. He called a brother who contacted the police. He then realized the robbers had locked the doors from outside. Then a neighbour opened the door for him and he joined neighbours outside including PW 3. Police then arrived and searched the houses and from 1st Appellant's came out with wet clothes. Both himself and 1stAppellant were arrested and taken to police station where he saw some members of the public. The following day he was told he had robbed some people and was charged. He said when police came to their plot, PW 3 did most of the talking. He added that PW 3 had been attacked and one of his window panes smashed.

DW 3, wife to 2ndAppellant testified supporting 2nd Appellant. She said after the attackers had left, Ochieng and Beatrice are the ones who came out first and opened the doors for other neighbours. She added that when police arrived, PW 3 reported that he had been attacked by the two Appellants who the police arrested. The following morning she went to police station and found PW 1, and heard her claiming that she had been robbed.

DW 4 a neighbour to Appellants, said on 15.5.2012 about 8 pm he heard a neghbour shouting ''Mwizi, Mwizi, and he went out. He found the neighbours doors had been locked from outside and he opened for them. Then policearrived and PW 3 reported he had been attacked by Felix and Alex (PW 1) . Police arrested the two and the following day helearnt they would be charged with robbery.

The learned trial Magistrate considered the evidence before her and found as follows;-

'' I find that the circumstances prevailing at the time of the incident and the little time that lapsed between were favourable for a positive identification. PW 1 and PW 4 positively identified the accuseds at the police station that same night. The evidence of PW 3 further buttressed the couple's evidence…….police found the accuseds with wet clothes. These wet clothes were good circumstantial evidence that accuseds had been walking about in the heavy rains……The prosecution's evidence thus far is consistent and corroborated. I find the prosecution witnesses, particularly PW 1, PW 3 and PW 4 honest and credible witnesses. They told the court the truth……..The totality of the evidence before me clearly show an act of robbery with violence was perpetrated by the two Accuseds against PW 1 and her husband. I have considered the defence of the accuseds. Both alluded to alibi defence but the same was totally displaced by the strong evidence of the prosecution. The prosecutionevidence clearly put the two Accuseds at the scene and they were positively identified by their victims. I find no truth in the defence statements……..In the result, l am satisfied the prosecution has proved its case against the Accuseds as per the particulars of two offences charged……and convict them under section 215 of the Criminal Procedure Code.''

The above extract from the learned trial Magistrate's judgment shows a finding was made as to whether indeed a robbery against PW 1 occurred. The finding was in the affirmative. The learned trial Magistrate consolidated the defence offered but rejected it.The court also addressed whether the circumstances at the scene allowed for a positive identification. The lamp was lit and its light and covered the whole room. PW 1 and PW 4 gave descriptions of the clothes the two attackers had and when they later saw Appellants at the police station that night they identified them as the two who robbed them. We find nothing to fault the evidence of PW 1 and PW 4 especially when taken together with that of PW 3 and PW 5 that both Appellants had on arrest, with them clothes that fitted the descriptions they had given to the police. The arrest was a few houses after the robbery and the fact that each Appellant had wet clothes, could only lead to one conclusion, that they were rained on as they went to rob left the scene of the robbery. We find no reason to disbelieve PW 3 who said 1st Appellant was among those who attempted to gain entrance to his house. He saw him dressed d the same way PW 1 and PW 4 had described. When PW 3 found all the other neighbours doors except that of 2nd Appellant had been locked from outside. He suspected 2nd Appellant had been with 1st Appellant and informed police who recovered wet clothes also fitting those described by PW1 and PW 4 in a basin in his house. These cannot be coincidences. Had it been true that Appellants had been in their houses as alleged in their defence, then they would not have had wet clothes and the learned trial Magistrate was right to reject their alibi defences. We are satisfied that there sufficient light from the lantern lamp in the house of PW 1 and PW 4. They were able to see the two attackers to a level that they described the clothing's the two were wearing to the police. The court also notes that when the Appellants were arrested they had with them wet clothing's which fitted the description given by PW 1 and PW 4. PW 3 knew both the Appellants even before the attack at his house and is the one who pointed them out to the police for the arrest. There is therefore no possibility of a mistaken identity in this case. In the case of **Muiruri and 2 others –vs- Republic (2002) KLR 274** this court held that not all dock identifications are worthless, and further that a court might base a conviction on the evidence of dock identification if satisfied that on all facts and the circumstances of the case the evidence must be true and if prior thereto the court warns itself of the possible danger of mistaken identification.

We agree with the learned trial Magistrate that the Appellants were among those that robbed PW 1 of the listed items. The robbery was carried out by more than one person and both Appellants were armed with pangas which are dangerous weapons. The Appellants are the ones who damaged the lantern lamp as they left the scene after the robbery. Their convictions on both counts was based on sufficient evidence that proved the prosecution cases beyond reasonable doubt.

Now, the court has to look at the sentence. The Respondent has applied, after giving notice to have the life imprisonment sentence on count 1 enhanced to death on the basis that , it is the only sentence provided for under section 296 (2) of Penal Code. We have looked at the recent of a bench of five in **Joseph Njuguna Mwara & 2 others –vs- Republic Nairobi C.A.Cr. Appeal No. 5 of 2008**, The court of Appeal after considering previous decisions including **Godfrey Ngotho Mutiso – V- R** (2010) eKLR on the matter held:

'' **Our reading of the law shows that the offences of murder contrary to section 203 as read with 204 of the Penal Code, treason contrary to section 40 of the Penal Code, administering an oath to commit a CapitalOffence contrary section 60 of Penal Code, robbery with violence contrary to section 296 (2) of the Penal Code and attempted robbery with violence contrary to section 297 (2) of the Penal code carry themandatory sentence of death.''**

The decision is binding on this court and being the most recent decision on the issue of sentences on capital offences, it reflects the correct interpretation of relevant sections including section 296 (2) of the Penal Code.

Mr. Obiri for the state in his submissions asked for the sentence to be enhanced. This court has the power under section 354 of CPC to consider the request for enhancement . The Court of Appeal in the case of **JJW –V- Republic** Kisumu C.A. Cr. Appeal No. 11 of 2011 held:

'' **It is correct that when the High Court is hearing an appeal in a Criminal case, it has**

powers to enhance sentence or alter the nature of the sentence. That is provided for under section 354 (3) (ii) and (iii) of the Criminal Procedure Code…….it is a requirement that the appellants be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced.''

In view of the clear provisions of the section 296 (2) of Penal Code on the mandatory death sentence on conviction for the offence, and the confirmation by the bench of five in the Court of Appeal case of **Joseph Njuguna Mwaura and two others – vs- Republic**. We find that the learned trial Magistrate erred in law by giving a sentence not provided for under section 296 (2) of the Penal Code and this calls for this courts interference. The sentence of one year imprisonment in respect of count 2 is however vacated in view of the decision of the Court of Appeal in the case of **GAUZI & 2 others –vs- Republic (2005) eKLR.**

For the reasons set out above, the appeals by the Appellants on conviction and sentence on both counts are without merit and are dismissed. We confirm the convictions and substitute the sentence of life imprisonment on count 1 of robbery with violence contrary to section 296 (2) of Penal Code with a sentence of death. The sentence in respect of count 2 is placed in abeyance.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 13TH DAY OF NOVEMBER, 2013.

F. TUIYOTT **S. M. KIBUNJA**

JUDGE **JUDGE.**

IN THE PRESENCE OF;

GEORGE OMGUNGA……COURT CLERK.

……..APPELLANTS.

……..RESPONDENT.