REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 72 OF 2013

BETWEEN

JUMA KOLICHA NDAMBALE....……APPELLANT

AND

REPUBLIC……RESPONDENT

JUDGEMENT

1. The appellant was charged at the Marsabit Principal Magistrate's Court in Criminal Case No. 292 of 2013 of robbery with violence contrary to **section 296(2) of the Penal Code**. He was convicted on 4th July 2013 by Hon. B M Ombewa, Principal Magistrate, of robbery with violence and sentenced to death.

2. The particulars of the charge were that on the 8th May 2013 at Marsabit Township in Marsabit Central District within the Marsabit County jointly with another not before court while armed with an offensive weapon namely a stone robbed Mureithi Mugo James of cash Kshs. 1, 200.00, and immediately before the robbery assaulted the said Mureithi Mugo James.

3. He was aggrieved by the said conviction and sentence, and filed the current of appeal through Charles Omari Nyambati Advocate, alleging several grounds – that there was insufficient evidence to support the conviction, that the court relied on the evidence of a single eyewitness, that the identification was not free from error, that no weapon was recovered from him, that the conviction was against the weight of evidence and that the trial court failed to note that the proceedings were influenced by extraneous matters.

4. At the hearing of the appeal, Mr Omari, counsel for the appellant raised several issues. He argued that the evidence on identification was not above reproach. The attack occurred at night at about 11.00 pm, only a single identifying witness was called, the attack was sudden, the appellant had been drinking – all pointing to unfavourable identifying circumstances. It was also said that other persons were said to have emerged from the darkness after the attack and lay on the complainant. He concluded that the ingredients of the offence of robbery with violence were not established against the appellant.

5. The state, represented by Mr Motende, opposed the appeal. He submitted that the appellant was positively identified by the complainant as there was sufficient light at the scene.
6. Being a first appellate court, we are bound to follow the guidelines set by the Court of Appeal in, among other cases, ***Kinyanjui vs. Republic*** **(2004) 2 KLR 364,** ***Kibuuka vs. Uganda*** **(2006) 2 EA 140,** ***M'Iithumia vs. Republic*** **(2008) 2 EA 214,** ***Pandya vs. Republic*** **(1957) EA 336),** ***Omusa vs.Republic*** **(2003) 1 EA 230,** ***Ngome and another vs. Republic*** **(2011) 1 EA 374** and ***Charo vs. Republic*** **(2007) 1**

EA 43, that a first appellate court has a duty to re-evaluate the evidence, draw its own conclusions, without ignoring the findings and conclusions of the trial court. The first appellate court must bear in mind that it did not have the opportunity to see the witnesses as they testified. The appellate court should also look at the grounds of appeal put forward by the appellant.

7. The factual background is that the complainant was on the material day walking home from a bar at about 11.00 pm, when the appellant approached him from behind and asked him for money. After an exchange of words, the appellant went ahead of him and held him by his tie tearing his shirt in the process. He pushed complainan to the ground, and then two other persons joined him and lay on him. At that point, the appellant removed a sum of Kshs. 1,200.00 from the complainant's pocket. His assailants then ran away. The complainant told the court that his attacker was the appellant. He said that the assailants were armed with a stone each, which they used on him causing injuries to his ankle. He went back to the bar where he had been drinking and informed a police officer who was in the bar, who advised him to go to the police station. He then went to the police station, where he was advised to report the following day. He did go to the station the following day and report the incident. The police officer to whom the first report was made at the bar testified as PW2. He corroborated the complainant's story that a report was made to him at the bar and that he advised that the matter be reported at the station. He also confirmed that the complainant did report the incident at the station. He further testified that he was part of the team that arrested the appellant ten days after the report was made. The only other witness was PW3, a doctor who testified on the injuries sustained by the complainant and the treatment that he received at Marsabit District Hospital. The appellant was put on his defence. He alleged that the charge was a frame-up.

8. Robbery with violence is an offence created under **section 296(2) of the Penal Code**. It is committed where the offender while committing robbery is: (a) armed with a dangerous or offensive weapon or instrument; or (b) is in company with one or more person or persons; or (c) wounds, beats, strikes or uses any other personal violence to any person at or immediately before or immediately after the time of the robbery. The *actus reus* of the offence is theft committed under the defined circumstances, that is where the offender is armed with offensive or dangerous weapons or in a gang or uses actual personal violence.

9. The issue that confronts this court is whether all the constituent elements of the offence of robbery with violence are established in this case against the appellant; that is theft in the circumstances envisaged in **section 296(2) of the Penal Code**. It was held in ***Johana Ndung'u vs. Republic*** **(1995) LLR 387** that only one of the three elements envisaged in **section 296(2) of the Penal Code** suffices to establish robbery with violence.

10. The complainant testified, if his story is to be believed, that he was initially attacked by the appellant alone, who held him by his tie and tore his shirt, before knocking him down. While he was down two other persons allegedly joined the appellant and helped him pin the complainant to the ground. It was after this that the appellant is said to have removed Kshs 1, 200.00 from his pocket. He says the men were armed with stones, and that they injured him with the stones.

11. The question that arises is whether the three elements of robbery with violence were present in this case. There is evidence that there were three assailants involved in the incident, who used violence on the complainant. There is medical evidence on the alleged injuries, although no effort was made to connect the injuries noted by the doctor with the attack on the complainant with stones. There was allegation that money was stolen from the complainant. This evidence if believed by the court establishes the elements that make up the offence of robbery with violence. We are satisfied that the offence was established to have been committed on the complainant.

12. What we need to consider is whether the offence was committed by the appellant. The complainant asserted at the trial that it was the appellant who attacked him as he knew him for he had been a resident of Marsabit town for a long time. This is therefore a case founded on recognition.

13. It has been stated by the Court of Appeal in a number of decisions, including *Paul Etole and another vs. Republic* Nairobi CACRA No. 24 of 2000, that recognition is more reliable than identification by a stranger, but even then the court should remind itself that mistakes in recognition are sometimes made. Consequently the trial court should examine the circumstances in which the identification or recognition was made. If it is alleged that there were security lights or even moonlight the brightness or intensity of the light should be inquired into. In the absence of such inquiry, evidence of recognition may not be held to be free from error.

14. We have noted that the trial court did not caution itself before convicting the accused on the evidence of a single witness where it was wholly depending on the identification of the appellant by that single witness. We have also noted the trial court did not examine closely the circumstances in which the identification came to be made. The alleged recognition cannot therefore be said to be free of error.

15. We note that the alleged attack occurred at 11.00 pm in the night somewhere in the open. The complainant alleged that there was light from nearby security lights. It is not indicated how far the alleged security lights were from the point of attack. The brightness or intensity of the security lights was not stated. There is also allegation that there was moonlight, yet the complainant did not tell the court about the brightness or intensity of the said moonlight. We also note that the complainant was at a bar and was leaving at 11.00 pm. This issue was not interrogated at the trial and the trial court did not address its mind to it. It is not stated what he was doing at the bar. It is not stated whether or not he had been drinking.

16. It would have helped if there was evidence that when the complainant made his report to the police he mentioned the appellant as one of his assailants. He told the court that he gave the name of the appellant to the police, yet when the sole police witness testified he did not corroborate that aspect of the complainant's evidence. The police occurrence book was not presented to court to establish the fact that in the first report the complainant named the appellant as his attacker. We are guided by the decision of the Court of Appeal in *Simiyu & another vs. Republic* (2005) 1 KLR 192, where it was held that where the complainants allege that they had recognised their assailants, but fail to mention their names to the police, the omission to mention the attackers to the police should go to demonstrate that the complainants were not sure of the attackers identity.

17. On the evaluation of the evidence recorded by the trial court, this court forms the opinion that the offence charged was not proved to the required standard and the trial court ought to have acquitted the appellant of the same. In view of everything we have said above, the conviction of the appellant of the offence of robbery with violence cannot stand. We allow the appeal, quash the conviction and set aside

the sentence of death imposed on the appellant. He shall be set free unless he is otherwise lawfully detained.

J. A. MAKAU **W. M.MUSYOKA**
JUDGE **JUDGE**

Dated, delivered and signed on this 3rd December,day of 2013.