REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL 27 OF 2012

CHARLES OTOO KAKOSA *alias* JUMA PATU.....1ST APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence by the Principal Magistrate Hon. W. N. Nyarima in Busia court in criminal case no.560 of 2002)

JUDGMENT

The Appellant was the 1st accused during the trial and was convicted of robbery with violence contrary to section 296 (2) of the Penal Code whose particulars were that on the night of 3rd and 4th April 2002 at Matayos village in Lwanya location in Busia District of the Western Province he jointly with others and while armed with dangerous weapons robbed Florengo Makhabi Wandera (PW1) of one Television set make Phillips, one radio cassette make Sony serial number 30095, one video deck make National serial number J3KT 10730, one radio speaker make Sony serial number 2993057, 20 packets of Trust condoms, 24 mini packs of meakin dry gin, 41 packets of Chelsea vodka, 2 bottles of hungers choice, 7 cans of Guinness, 8 packets of Sportsman cigarettes, 8 packets of Embassy cigarettes, one pair of boots, one green hat, one torch and cash Ksh.22,265/= all valued at Ksh.70,000/= and at or immediately before or immediately after the time of such robbery wounded the said (PW1). He was sentenced to death. He was aggrieved by the conviction and sentence and preferred this appeal which the State through Mr. Obiri opposed.

The brief prosecution case was that at about midnight on 3rd/4th April 2002 a group of armed men broke into a bar at Matayo Agip Petrol Station from which they took money, drinks and various goods. They cut and injured the watchman (PW1). At about 6.00 a.m Stephen Nyongesa Okwara (PW4), a boda boda bicycle operator, was going to work at Busia from home when he was stopped at Korinda junction by two men who had luggages. One of them asked to be carried to customs area as he was going to Uganda. He had luggage in a bag hanging from his shoulders and a T.V wrapped in a sack. When they reached the police road block he was waved to stop, but the passenger asked him not to stop and to ride fast as he was late. PW4 did not stop. The officers manning this Busia-Kisumu road block at junction to Alupe included P.C Joseph Moseti (PW3). When the cyclist did not stop, the officers boarded a vehicle

and gave chase and caught up with him at Tanaka weighbridge where PW4 and the passenger were arrested and the goods recovered. The passenger was the Appellant. His luggage included a T.V set make Phillips (exhibit 5), video deck make National (exhibit 5), lock cutter (exhibit 10), breaking gatchet (exhibit 11), hot drinks (exhibit 15), three guiness cans (exhibit 16), pair of boots (exhibit 12), torch (exhibit 3), a beret (exhibit 4), black beret (exhibit 18) pliers with A.P. Coat of Arms (exhibit 19), small speaker (exhibit 20) and panga (exhibit 9). They were in a bag (exhibit 14). The boots (exhibit 2) and torch (exhibit 3) belonged to PW1 and had been taken from him in the attack. Exhibits 5, 6, 15, 16 and 20 had been taken from the bar by the attackers. The evidence of PW1 was that he identified the Appellant as the person who had cut him.

The Appellant gave a sworn statement in defence and did not call any witnesses. He admitted that he was stopped and arrested by police officers at Tanaka at 6.30 a.m but denied that he had the goods or that he had taken part in the robbery. He stated that he was coming from Busia District Hospital to see his wife who had been admitted. He testified that when he was stopped he was riding a bicycle which his brother-in-law went with.

The trial court considered the prosecution and defence evidence. It found it proved that the Appellant was found with some of the goods taken from the bar in the robbery and also that he was found with exhibits 9, 10, 11 and 19 which were implements ordinarily used in housebreaking and robbery. The finding, the court held, was so soon after the robbery and led to the conclusion that he had taken part in the robbery. He was convicted and sentenced to death.

This appeal challenged these findings. It is our responsibility to re-examine and reconsider all the evidence received by the trial court in order to independently determine whether the conviction was grounded on firm basis, while appreciating that we did not have the benefit of seeing and hearing the witnesses **(Okeno v. R. [1972] EA 32).**

PW1 testified that he recognized the Appellant in the attack and that he was the man who cut him. However, upon the arrest of the Appellant no identification parade was conducted in which PW1 participated. His testimony as to identification consequently amounted to dock identification which was of no value **(Kiarie v. Republic [1984] KLR 739).**

PW3's evidence was that he stopped PW4 and the Appellant and found the latter with goods which turned out to belong to PW1 and which had been stolen in the robbery. In the sense that PW4 was carrying the Appellant who had the goods, he was an accomplice whose credibility had to be ascertained and his evidence materially supported before it could be the basis of a conviction **(Nguku v. Republic [1985] KLR 412).** The trial court accepted his evidence whose details agreed with that of PW3. He accepted that when stopped they passed. The Appellant urged him not to stop. He testified that the Appellant whom he was carrying was holding onto the luggage. PW3 saw the same when he waved them down and later stopped and arrested them. We accept his evidence which, in any case, was corroborated by that of PW3. The fact that the Appellant did not want to stop on being waved down by the police at a roadblock, the fact that he was carrying housebreaking tools when the bar in question had been broken into that night, and the fact that he has some of the robbed goods the same night and not far from the place of robbery, all taken together lead to the irresistible conclusion that he had taken part in the robbery. The inculpatory facts were incompatible with the innocence of the Appellant and incapable of explanation upon any other reasonable hypothesis than his guilt **(James Mwangi v. Republic [1983] KLR 327).** We find that the Appellant was convicted on sufficient evidence.

Regarding sentence, the attack was perpetrated by several people who were armed. In the process they injured PW1. He was cut on the tip of the head and was stitched seven times after that. He was injured on the left shoulder and x-ray revealed a fracture of the clavicle. Most of the stolen goods were recovered. Quite unfortunately, the trial court did not seek to find out if he had any previous record and did not ask him to mitigate. This failure would be sufficient reason to interfere with the sentence. We shall treat the Appellant as a first offender. We also consider that although death penalty is the ultimate punishment for the offence, a lesser penalty can be meted out depending on the circumstances of the case and any mitigating factors. We set aside the death penalty and in its place order the Appellant to

serve twenty (20) years in jail.

Dated, signed and delivered at Bungoma this 17th day of July 2012.

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L. KIMARU **A. O. MUCHELULE**

JUDGE **JUDGE**