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REPUBLIC OF KENYA

IN THE HIGH COURT OF KINYA AT BUNGOMA

CRIMINAL APPEAL 72 OF 2011

(Appeal from the conviction and sentence by the Senior Resident Magistrate Hon. R. O. Oigara in Kimilili court in criminal case no.886 of 2010)

DENNIS WASILWA WANJALA :::::::::::::::::: APPELLANT

~VRS~

REPUBLIC :::::::::::::::::: RESPONDENT

JUDGMENT

The Appellant was convicted of robbery with violence contrary to section 296 (2) of the Penal Code whose particulars were that on 8/9/2010 at about 2.00 a.m at Lutonyi village in Kimilili rural location in Bungoma District of the Western Province he jointly with others not before the court robbed Martin Wanjala Tabani (PW2) of cash Ksh.27,000/= and one mobile phone make Nokia 1100 worth Ksh.8,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said PW2. He was sentenced to death. He was aggrieved by the conviction and sentence and preferred this appeal. Mrs Leting for the State opposed the appeal.

The prosecution evidence on which the Appellant was convicted was that on 7/9/2010 PW2 drunk in various bars at Kimilili up to about 12.30 a.m. when he decided to walk home. He was alone. His wife Seline Rose Atero (PW3) was at home when he got to the verandah he was held from behind by two people. He turned and grabbed one of them whom he recognized to be the Appellant who was commonly known as "Boyi". The Appellant was a "boda boda". When he was hit on the head with a metal he released the Appellant and became unconscious and a neighbor Enock Ochi Nyabera (PW4) came and took him to Kimilili District Hospital. The attackers had taken his cash Ksh.27,000/=, ATM card and identity card. The evidence of PW3 was that she came out of the house at about 1.30 a.m when she heard commotion outside. She had contacted PW4. When she opened the gate the attackers, including the one who was holding PW2, ran away. But she had recognized one of them, the Appellant. PW4 did not recognize the attackers. PW2 and PW3 recognized the Appellant by use of security lights. They later arrested him and took him to police station where he was charged. According to the P3 (exhibit 1) PW2 suffered a cut wound on the head, he had redness to the left eye, chest pains, swollen right shoulder, dislocated wrist joint and swollen and bruised knees. He suffered "harm".

The Appellant gave unsworn defence. He admitted to be a "boda boda" operator but denied that he committed the offence. He stated that he met two passengers who wanted to be taken to the Police Station and on reaching there he was arrested and charged. He did not call any witnesses.

There was no dispute that PW2 and PW3 knew the Appellant as a "boda boda" operator at Kimilili. The question that the trial court was called upon to decide was whether the two had positively recognized him that night as one of the attackers. The court accepted the prosecution evidence that he was recognized and discounted his denial. It is the responsibility of this court to independently re-consider and

re-evaluate all the evidence to determine whether the conviction was based on sound evidence **(Okeno v. R. [1972] EA 32).** The court appreciates that it did not have the advantage of seeing and hearing the witnesses.

PW2 testified that he was attacked at the verandah and that the place was lighted by security lights. According to PW3 the incident was outside the gate. It is when she opened the gate that the attackers ran away. She stated that at the gate were security lights. The prosecution did not seek to clarify whether the attack was at the verandah or outside the gate.

Secondly, PW2 had been drinking from before 7.30 p.m. that evening. He went from bar to bar up to about 12.30 a.m before he decided to go home. He must have taken quite some beer. He was not asked by the prosecution what his capacity was. His judgment was certainly impaired by this lengthy drinking. That leaves only the evidence of PW3. That would be the evidence of a single witness. In **Odhiambo v. Republic [2002] 1 KLR 241, 247** the Court of Appeal had this to say:

“The law on identification is not in doubt. It has been stated and restated in several Judicial decisions by this Court and by the High Court. The court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification. Where evidence of identification rests on a single witness, and the circumstances of identification are known to be difficult, what is needed is other evidence either direct or circumstantial, pointing to the guilt of the accused persons from which, the court may reasonably conclude that identification is accurate and free from the possibility of an error.”

Regarding recognition (because that is the case here) in **R. v. Turnbull [1976] 3 ALLER 549 at page 552** Lord Widgery**,** C.J said as follows:

“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

We are concerned that the trial court did not warn itself of the danger of convicting solely on the evidence of visual recognition at night and did not proceed to examine such evidence with care to minimize any case of mistake, or exclude any possibility of error. PW3 stated that she saw the Appellant by use of security light at the gate. She was, however, not asked to say how strong the light was, whether it fell on the face of the Appellant and for how long. Given the discrepancy between her evidence and that of PW2 on whether the incident was at the verandah or outside the gate, and given that the Appellant was not found with any of the stolen property and there was no other corroborating evidence regarding his participation, we find that the conviction was not safe.

It is for these reasons that we allow the appeal. The conviction is quashed and the sentence set aside. The Appellant is ordered to be set at liberty forthwith unless he is otherwise being lawfully held.

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

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