-REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 134 OF 2009
BETWEEN
JOSIAH MAJANI OMWANGE ……………………………..………….. APPELLANT
AND
REPUBLIC ……………………………………………………………… RESPONDENT
(Being an appeal from the judgment of SL.M. Nafula, Senior Principal Magistrate, Ogembo dated 02/06/2009 in Ogembo SPM Criminal Case No. 692 of 2008)

JUDGMENT

1. This appeal arises from the judgment of her Honour L.M. Nafula, Senior Principal Magistrate at Ogembo Law Courts delivered on 2nd June, 2009 in Criminal Case Number 692 of 2008.

2. The appellant herein, Josiah Majani Omwange was charged with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the 30th May, 2008 at Nyandira sub-location in Gucha District within Nyanza Province jointly with others not before court while armed with rungus and iron rods, robbed Clement Ondabu Gitenga cash Kshs.2000/- and at or immediately before or immediately after the time of the saidrobbery, used actual violence to the said **Clement Ondabu Gitenga**. The appellant denied the charge.

3.The facts of the case are that on the 30th May, 2008 at about 8.00 p.m. the complainant, one Clement Ondabu Gitenga was on his way home when he was accosted by three people who stapped him, beat him up, ransacked his pockets and stole therefrom Kshs.2000/=. The complainant managed to get hold of the appellant who was one of the attackers and shouted for help. One Samwel Oichoe (PW2) then responded to the complainant's distress call and found the complainant still holding on to the appellant; but soon thereafter the appellant managed to escape when the complainant fell down. The matter was reported to police at Nyangusu. The appellant was then arrested and charged.

4. The prosecution called 5 witnesses in support of its case against the appellant. **PW1** was the complainant, **Clement Ondabu Gitenga** who testified that on the 30th May, 2008 at about 8.00 p.m., he was on his way home from Nyamache when he encountered three people who ordered him to kneel down and also demanded to know where he was coming from. When PW1 tried to resist the trio started beating him up and ransacking his pockets. PW1 stated that he managed to get hold of one of his attackers as he screamed for help. A struggle ensured, but that with the help of torchlight from a torch which one of the attackers had, PW1 managed to recognize the man he had got hold of as Majani whom he used to see as he went about his business. PW1 stated that he knew Majani, the appellant because they used to eat together sometimes. PW1 stated that the appellant hit him on the head, back and right lower leg causing a dislocation in the leg. PW1 stated that during the struggle, he fell down and let go of the appellant who then fled away together with the others. PW1 also testified that thereafter he went to Ram Hospital for treatment before reporting the matter at Nyangusu Police station whereat he was issued with a P3 form which was duly filled on 1st July, 2008. He also said that because of the injuries he had sustained he could not have helped in the arrest of the appellant earlier than 6th July, 2008. He was confident that the appellant was among the three people who attacked PW1 on the material day, having identified him using the torch light which the appellant's accomplices directed at the appellant. PW1 also said that Samwel

Oichoe found the appellant still struggling with him before he fell down and the appellant escaped.

5. PW2 was **Samwel Ismaeli Oichoe** from Nyamira sub-location. His testimony was that at about 8.00 p.m. on 30th May, 2008, he was travelling from Kisii to his home. He alighted at Nyamache and as he walked home, he heard PW1 screaming for help and also saw that he was pinned down by three people. PW2 testified that he got hold of one of the men whose face was not covered and that at that time, the other two people whose faces were covered moved a distance from where the struggle was, and threw a stone at PW2, hitting him on the buttocks. On being hit with the stone, he fell down and at that moment the person he had got hold of escaped.

6. PW2 further stated that the person he had held on to was the appellant who was well known to PW2 from childhood. After this, PW2 said he went and reported the matter to Nyangusu Police station and also recorded his statement. During cross-examination, PW2 stated that he recognized the appellant very well on the night of the attack as Omwange's son. PW2 also stated that he had no previous differences with the appellant.

7. William Kenyatta Marita testified as **PW3**. He was a clan elder at Bogichoncho and a neighbor of the appellant. He testified that on receipt of a warrant of arrest from the police for the appellant, he made three first futile attempts to arrest the appellant but that on the fourth attempt, he went to the house of the appellant and found him hiding under a bed. PW3 stated that the appellant had turned the bed upside down and had covered it with clothes. PW3 said he assisted in arresting the appellant before taking him to Nyangusu police station.

8.The appellant, who had refused to participate in the trial on grounds that the prosecutor always talked with the complainant and that he had also vowed to have him convicted, did not put any questions to PW3.

9. **PW4** was **Joseph Mokua Nyangau**, a Clinical Officer attached to Gucha District Hospital. He testified that he examined one Clement Ondabu (PW1) who presented a history of having been assaulted by thugs known to him on 30th May, 2008 at about 8.00 p.m. using bolted rungus, causing him injuries on the left lower leg resulting in swelling of one third of the fibula bone. He carried out the examination on the 1st July, 2008. Prior to this examination; PW1 had been treated using antibiotics and painkillers and had also been immobilized in a plaster of Paris. PW4 said he assessed the degree of injury to PW1 as grievous harm. He produced the P3 form duly filled and signed as **P. Exhibit 1**. The appellant also declined to cross-examine this witness.

10. **No. 38721 Police Constable Benson Ndiva** of Nyangusu police station testified as **PW5**. His testimony was that while on duty at the station on 1st July, 2008, he received a report from PW1 to the effect that he had been attacked and robbed by three armed people on the 30th May, 2008 at about 8.00 p.m. PW5 stated that PW1 had informed him that one of his assailants was Josiah Machani Omwange, the appellant herein. PW5 also told the court that he issued PW1 with a P3 Form and, also issued an arrest warrant addressed to the Chief of the area for the appellant's arrest. PW5 also testified how the appellant was later arrested and escorted to the police station where he was re-arrested and charged.

11. At the time PW5 testified, the appellant had voluntarily chosen to go back to the cells and did not thus cross-examine PW5.

12. The court found that the prosecution had established a ***prima facie*** case against the appellant who was put on his defence. The appellant chose to give sworn evidence when the defence case came up for hearing on the 11th May, 2009.

13. When put on his defence, the appellant stated that he was a stranger to the allegations that were made against him. He stated that on the 30th July, 2008, he went to Nyamache hospital and on his return home, he fell asleep on the bed leaving the door open. He said that it was raining and that a short while after he heard people knocking on his door. The appellant testified that those people took him to the

Assistant Chief's office and later to Nyangusu police station and he was charged.

14. The appellant further stated that it was while at the police station that he was informed that he had robbed someone. Though the appellant initially denied that he had recorded any statement with the police, he later admitted that he had indeed recorded a statement with the police. The appellant also admitted that he knew PW1 well as he used to work for him as a casual labourer sawing timber. The appellant also testified that the two had disagreed when PW1 refused to pay him some dues which were paid upon intervention of a clan elder. The appellant also testified that though there were no differences between him and PW1, PW1 had threatened before the clan elder to do something bad to the appellant.

15. In her judgment, the learned SRM found that the prosecution had proved its case against the appellant beyond any reasonable doubt. That the appellant had been clearly identified by both PW1 and Samwel Simaili Oichoe (PW2). The court also found that PW2 had corroborated the evidence given by PW1 as to the identification of the appellant. The trial court proceeded to convict the appellant for the offence of robbery with violence and to sentence him to death as by law provided.

16. Being aggrieved by both the conviction and the sentence, the appellant has come before us seeking a reprieve from the conviction and sentence of death. The grounds of appeal, as set out in the Petition of Appeal are the following:-

"1. The learned trial magistrate erred in law and fact in failing to take cognizance of the fact that the things mentioned in connection with the alleged offence which included *inter alia* a torch, kshs.2,000/= rungus and iron metals were not recovered from the Appellant who was arrested right at his home and in his house.

2. The learned trial magistrate erred in law and fact is (sic) not appreciating the fact that if indeed the complainant sustained injuries during and out of the alleged robbery which included a dislocation to his left lower leg, then the evidence of an outpation(sic) that is a medical doctor who has specialized in the study of bones from a recognized university was crucial.

3. The learned trial magistrate erred in law and fact in failing to take note of the contradictions and inconsistencies arising out of the evidence of PW1 and PW2 on the issue of their perception at the scene of which PW1 contended that as PW2 was arriving at the scene, he fell down thus making the Appellant to flee (sic) from the scene as opposed by PW2's contention that he found the Appellant flee from the scene and got hold of him until when the other two moved a distance from the scene and hit him a stone (sic) on the buttocks making him to fall down too letting go the person he had held.

4. The learned trial magistrate erred in law and fact in relying on the evidence of PW2 who testified that the other two assailants could not be identified because they had covered their faces, something PW1 did not testify to despite PW1 and PW2 having been at the scene at the same time and place and in particular how he was able to see their covered faces.

5. The learned trial magistrate erred in law and fact in failing to take into account that it would not be possible for PW2 to have recognized the appellant by the voice when PW1 never testified to that fact that the appellant ever spoke at the scene.

6. The learned trial magistrate erred in law and fact in basing her
conviction on the evidence of PW3 a clan elder who had gone to arrest the Appellant at his home and who to the contrary testified that he had gone to arrest the appellant in connection to the allegation of an attempted robbery.

7. The learned trial magistrate erred in law and fact in basing her conviction on the evidence of PW5 the investigating officer who casually and briefly stated that he received a complaint, issued P3 form, warrant of arrest, re-arrested the appellant and proceeded to charge him as present without giving the necessary details pertaining to the investigations he carried out and actually how he arrived at the conclusion that the appellant had committed the offence.

8. The learned trial magistrate misdirected herself in actually allowing the investigating officer to testify in the absence of the Appellant contrary to the principles of natural justice.

9. The learned trial magistrate erred in law and fact in totally disregarding the defence of the Appellant in particular when he indicated that the prosecution was impatient with him and threatened to have him convicted and more so when he also brought to the attention of the court that the complainant had once said that he would do something bad to him after they disagreed over some payment of timber."

17. At the hearing of this appeal, the appellant was represented by Mr. Moracha, learned counsel who informed the court that the appellant was not pursuing ground 9 of the appeal. Regarding grounds 1 and 2 of the appeal which were argued separately, Mr. Moracha submitted that the trial court fell into error in convicting the appellant when none of the items allegedly stolen from PW1 were recovered from the appellant who was arrested at his home, and secondly that the trial court erred in relying on the evidence of a clinical officer (PW4) who was not an expert in the study of bones.

18. Counsel further submitted that the trial court was wrong in convicting the appellant in the face of glaring contradictions between the evidence of PW1 and PW2 as to whether PW2 found the appellant at the scene or found when the appellant had already fled. Counsel also faulted the trial court for relying on the evidence of PW2 who admitted to his inability to identify the other two assailants who had apparently covered their faces. Counsel submitted that PW1 did not allude to the fact of the appellant's accomplices covering their faces.

19. In ground 5, the appellant complained and counsel submitted that voice recognition alone, which PW2 said assisted him to identify the appellant was not sufficient to identify the appellant. It was also counsel's submission that the trial court erred in relying on the evidence of PW3 who merely arrested the appellant; that PW3 never gave any evidence linking the appellant to the alleged offence and further that the trial court should have disregarded the evidence of PW5 whose testimony did not link the appellant with the alleged offence. Counsel also submitted, with regard to ground 8 of the appeal, that it was wrong for the trial court to take the evidence of PW5 in the absence of the appellant.

20. This court was urged to quash the conviction and set aside the sentence of death imposed upon the appellant and make such other order as would meet the ends of justice.

21. Mr. Mutuku, Senior Principal State Counsel appeared for the Respondent. While admitting that the offence with which the appellant was charged took place around 8.00 p.m. Mr. Mutuku submitted that the conviction was well founded on the evidence of both PW1 and PW2. That PW1 was able to recognize the appellant with the help of torch light from a torch which the appellant's accomplices shone on PW1 and the appellant as the two struggled. Mr. Mutuku also submitted that PW2 recognized the appellant, both physically and by voice. Mr. Mutuku submitted that the issue of identification of the appellant by way of recognition was made even clearer when PW1 informed PW5 at the time of reporting the attack that the appellant was among PW1's attackers. Counsel also submitted that it was very clear that during the attack, PW1 was injured as confirmed by the evidence of PW4, the clinical officer who classified the injury as grievous harm.

22. In response to the appellant's complaint that the trial court erred in taking the evidence of PW5 in the absence of the appellant from court, Mr. Mutuku submitted that the appellant had, since 12th April, 2009, persistently sought to have the case heard ***de novo*** or be transferred to another court and that when the court refused to grant the appellant's request, the appellant chose to exclude himself from the proceedings in court. It was counsel's submission that there was no violation of the appellant's constitutional rights because the appellant made a deliberate choice to be absent from court proceedings.

23. Counsel further submitted that despite the fact that the appellant did not attend court during the testimony of PW5, he nonetheless gave sworn evidence when put on his defence, suggesting therefore that the appellant was satisfied with the proceedings up to that point.

24. In reply, Mr. Moracha submitted that the state had admitted that there was inconsistency in the evidence and further that it was not shown in the record whether the appellant cross-examined PW5.

25. Being the first appellant court, we have now reconsidered and evaluated the evidence afresh as it is our duty to do so. See **Okeno –vs- Republic [1972] E.A 32**. We have also examined the judgment by the trial court, and the task that is now before us is to determine whether the findings reached by the trial court were well founded. For us to be able to establish whether these findings were well founded, we shall look at each ground of appeal in light of the evidence that was placed before the lower court and the law.

26. In the first ground, the appellant has complained that the conviction was not well founded because the items allegedly stolen from PW1 were not recovered from him. It is indeed a fact that neither the mobile phone nor the sum of Kshs.2000/= allegedly stolen from PW1 was recovered from the appellant. The evidence on record shows that the attack took place on 30th May, 2008 at about 8.00 p.m. The appellant was not arrested until after the 5th July, 2008.

According to the evidence of PW4 and particularly the P3 form, PW1 suffered a fractured leg and had his left lower leg fixed with plaster of Paris. It was not until 1st July, 2008 that PW1 was able to go to the police station and make a report; mentioning to PW5 that the appellant was among the three people who had attacked him on the night of 30th May, 2008. We are of the view that the appellant, if we later in this judgment find that he was positively identified, could not have been holding those items in his hands waiting to be arrested with them. And in any event, it is not a requirement under **section 296 (2)** of the **Penal Code** that the stolen items must be recovered from the suspect to warrant a conviction. There are other factors to be considered and we shall look at those later in this judgment. We are therefore of the humble view that the first ground of appeal has no substance and the same must fail.

27. In the second ground of appeal, the appellant complains that an orthopaedic surgeon ought to have been called as a witness instead of PW4 to confirm that PW1 suffered the injuries which he is alleged to have suffered. Our view is that this is not a civil case where the evidence of the expert is required to fix the quantum of damages. This is a criminal case where PW1 said he was attacked by a gang of three people who beat him and broke his leg. The evidence of PW4 clearly confirms that PW1 suffered such injuries and that as a result thereof, PW1 was immobilized using a plaster of Paris on the affected left leg. We note that after PW4 testified, the appellant who was present in court refused to cross-examine him, though it is our view that whether the witness was a specialized bone doctor would not have changed the fact that PW1 was attacked, robbed and injured during the attack. The only relevant issue is whether the appellant was positively recognized/identified as one of PW1's attackers. We therefore dismiss the second ground of appeal for lacking merit.

28. The third ground of appeal raises the issue of inconsistencies in the evidence of PW1 and PW2, the main contention being that whereas PW1 alleged that as PW2 was arriving at the scene, PW1 fell down thus making the appellant to flee, PW2 stated that he found the appellant fleeing from the scene. PW1 stated thus in part of his evidence in chief:-

"I continued struggling with the one I had held, looking at him using the light from the torch. I realized it was Majani, the accused herein. I used to see him as I went about my business. We even used to eat together at times. He was known to me. I did not recognize or identify the others. They hit me on the head, back and my right lower leg, the lower leg got dislocated. It is accused who hit me using a rungu on the leg. He hit me to free himself. He also had an iron metal. At that moment, someone came from the direction I had come from, on seeing him they fled from the scene. It is Samwel Oichoe who came, he found me still holding onto the accused herein. I fell down freeing accused herein. He fled from the scene."

Part of the testimony of PW2 touching on the issue at hand in ground 3 of the appeal is as follows:-

"… I found the complainant having been pinned down by three people, he was screaming for help. I got hold of one of them, the other two had covered their faces. They moved a

distance from the scene and struck me using a stone on my buttocks. I fell down and let go of the person I had held, it was accused herein. I knew him previously. He spoke saying that he was being left alone behind. I have known the accused herein since his childhood when I fell down, accused herein managed to escape from the scene."

29. From the above evidence given by PW1 and PW2, we do not find any inconsistency complained of by the appellant. What we decipher from the said evidence is that as PW1 struggled with his attackers, PW2 arrived at the scene. It was same moment that PW1 was screaming for help that the appellant is said to have hit PW1 on the leg. It was the same time that the appellant's accomplices hit PW2 on the buttocks and he too lost grip of the appellant who then escaped from both PW1 and PW2. The story as given by PW1 is consistent with that given by PW2, and the only issue for determination is whether that person who escaped from the scene of the attack, in the presence of both PW1 and PW2 was the appellant or another person altogether. It is our task to unravel that mystery based on the evidence that was placed before the lower court and on the circumstances prevailing at the material time.

30. Ground 4 of the appeal raises the issue of identification though the same concerns the other two assailants who were said to have covered their faces. It is correct that PW1 does not say anything about the faces of the other 2 assailants being covered. PW2 however came to the scene when PW1 was already on the ground, and PW2 was able to see that two of the assailants had covered their faces and he could therefore not identify them. It is our view, however, that PW1's evidence does not contain to such contradictions as would affect the prosecution's case against the appellant. The alleged contradiction is not relevant to the appellant's case. In any event, PW2 did not say that he saw the faces of these other people. What PW2 said was this:-

"I did not identify the other two as they had covered their faces."

31. We have considered ground 5 of the appeal and find that like ground 4, that ground has no basis. We have considered the law on voice recognition and are satisfied that though PW1 did not mention that the appellant ever spoke while at the scene, PW2 was able to recognize the appellant's voice because he (PW2) had known the appellant since the appellant was a little child. In the case of **Choge – vs- Republic [1985] KLR 1,** it was held, ***inter alia,*** "that evidence of voice recognition is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary, to ensure that it was the accused person's voice; that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it."

32. We have also carefully considered the evidence of PW3, the clan elder who told the court that he looked for the appellant for a number of days before he finally discovered him hiding under the bed that had been turned upside down and covered with clothes. Our understanding of those circumstances, and which circumstances are relevant to this case, is that once the appellant became aware that he was being looked for, he did everything possible to ensure that PW3 would not find him. The trouble that the appellant took to turn the bed upside down and to have it covered with clothes was a clear indication that the appellant was not an innocent man. Innocent man, going about their normal duties do not turn their beds upside down have them covered with clothes and then sleep thereunder.

33. In any event, the warrant for the arrest of the appellant was issued and addressed to PW3 by PW5 after PW1 had made a report on 1st July, 2008 that he had been attacked and robbed by the appellant. There is that circumstantial link established by PW3's evidence that cannot be wished away. In the case of **Liadah Kariuki - vs - Republic** , Criminal appeal No. 232 of 2007 at Nyeri, the Court

of Appeal upheld the superior court's reliance on circumstantial evidence to sustain a conviction. The view held by the Court of Appeal that circumstantial evidence can prove with precision the commission of an offence if it can be established therefrom that there is a chain linking the person with the commission of the offence. We find such a chain in this case.

34. The appellant has faulted the evidence of PW5 who is said not to have given any particulars of investigations carried out leading to the arrest of the appellant. It was thus submitted that PW5 had no basis for concluding that it was the appellant who had committed the offence, and that accordingly the trial court should not have relied on the said evidence by PW5. It is our considered view that PW1 having given the name of one of his assailants as Josiah Machani Omwange, the appellant herein, PW5 did not have much else to do but to cause the arrest of the appellant, which he did.

35. As regards ground 8 of appeal, the appellant has complained that by taking the testimony of PW5 in his absence, the trial court breached the principles of natural justice. The Respondent does not think so. We have ourselves considered the lower court record from the 22nd April, 2009 when from the blues, and after the testimony of PW1 and PW2, the appellant asked that the case start ***de novo***. Reason? That the appellant did not have the witness statements. Before that date the appellant prayed for adjournment of his case when the same came up for hearing on 17th November, 2008 though no reason was given for the adjournment, the same was granted. It also seems from the "court Order" that the appellant required medical attention. Then again on the 15th December, 2008, when the matter came up for hearing, the appellant asked for adjournment saying that he was not ready to proceed. That application was rejected and the case proceeded in the afternoon of that day. The case was then fixed for further hearing on 24th February, 2009. On that day however, the case did not proceed at the instance of the prosecution and further hearing was fixed for 22nd April, 2009 with a mention on 27th March, 2009.

36. On the 27th March, 2009 the appellant asked for witness statements. The case was fixed for hearing on 31st March, 2009 to enable the prosecutor supply the witness statements but on the 31st March, 2009 to, the prosecution did not avail the statements, leading to an order remanding the appellant at Nyangusu police station for production on 1st April, 2009 together with the police file. When the appellant appeared in court on that date, he confirmed to the court that he had been supplied with witness statements. The case was confirmed for further hearing on the 22nd April, 2009. On that date, the appellant sought to have the case start afresh on grounds that the case had hitherto proceeded when he did not have the witness statements. The appellant also said that he had been unwell previously.

37. The application to start the case ***de novo*** was rejected on grounds that the appellant had given no viable reasons for seeking to start the case afresh. It was the view of the court that the appellant simply wanted to delay the case.

38. After the court refused to grant the appellant's request to have the case start ***de novo***, the appellant applied to have the case transferred to another court for reasons that the prosecutor usually talked with the complainant and that he had also sworn to have the appellant convicted. The prosecution opposed the application for transfer; on grounds that there was no evidence placed before the trial court to show that the prosecutor had threatened the appellant. The appellant still maintained that he would proceed only if his case started afresh. The court refused to grant the prayer to have the case transferred on grounds that the reasons given by the appellant for seeking the transfer were baseless.

39. After that the case proceeded with the trial court taking the evidence of PW3 and PW4. Though the appellant was in court, he refused to cross examine these two witnesses. After the testimony of PW5, the court stated the following:-

"Court – No cross examination as the accused has of his own violation chosen to go back to the court cells."

40. What is however missing from the court record is that between the testimony of PW4 and that of PW5, there is no record as to what transpired before the court noted that the appellant had on his own volition chosen to go back to the cells. Did the appellant apply to be allowed to go back to the cells, and if so, why was there no record? Or did the appellant simply walk out, and if so, why did the trial court not make a note of it either before PW5 testified or in the course of PW5's testimony?

41. We are therefore of the view that the trial court, was in breach of the rules of natural justice in not

indicating properly on the record the sequence of events leading to the appellant not being in the court room during the testimony of PW5. We take judicial notice of the fact that an accused person, does not just walk in and out of court when his/her case is in progress. Thus, the failure by the trial court to keep a record of how the appellant left the court room for the cells when his case was going on led to a miscarriage of justice although the appellant eventually defended himself by giving a sworn statement. This flaw in our considered view, was fatal to the proceedings which led to the conviction of the appellant.

42. We have however considered all the evidence that is on record, the time that has elapsed since the appellant's arrest, the serious nature and frequency of the offence, we think that this is a proper case to go for retrial.

43. In the premises, we allow the appeal, quash the conviction and set aside the sentence of death but we shall not release the appellant. We refer this case to the lower court for fresh trial before a different magistrate from the one who heard the case last time.

44. To expedite the process of retrial, the appellant shall appear before the Principal Magistrate's court at Ogembo within 7 (seven) days from today for the retrial to commence.

45. Until then, the appellant shall be remanded in custody.

46. It is so ordered.

Dated and delivered at Kisii this 24th day of February, 2011.

ASIKE MAKHANDIA
JUDGE.

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Moracha for Nyamwange (present) for the Appellant
Mr. Mutai (present) for the Respondent
Mr. BibuCourt Clerk