**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL NO.89 OF 2010**

**VINCENT JARED OGUTU …….APPELLANT**

**VERSUS**

**REPUBLIC …….RESPONDENT**

**[Appeal from Original Conviction and Sentence of Chief Magistrate's Court: K. MUNEENI- P.M. in Criminal Case No.27 of 2008.]**
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**J U D G E M E N T**

This is an appeal preferred by the appellant **VINCENT JARED OGUTU** from the judgment of the Principal Magistrate **K**. **Muneeni** in CMCR.C. No.27 of 2008 delivered on the 11th of June, 2010. The appellant had been charged with 2 counts. The first count was robbery with violence contrary to Section 295 as read with section 2962) of the Penal Code. The particulars of this offence being that on the 25th of December, 2009 at Riat Market, in Kisumu East District of the Nyanza Province, jointly with others not before court while armed with pangas and stones robbed off **CHARLES OMONDI AMOR** one video deck make Sony, one mobile phone make Nokia 1110, one radio cassette and two speakers all valued at Kshs.20,000/= and at or immediately before or immediately after the time of such robbery used actual violence on the said **CHARLES OMONDI AMOR.** The second count was Assault causing Grievous Bodily Harm contrary to Section 251 of the Penal Code the particulars of this offence were that the appellant **VINCENT JARED OGUTU**, on the 25th of December, 2009 at Riat Market aforesaid jointly with others not before the court, unlawfully assaulted **PAUL OSODO ODUOR** thereby occasioning him actual bodily harm.

The appellant pleaded not guilty to the 2 counts and the matter proceeded to trial, he was convicted of the 2 offences and sentenced to both counts. Being dissatisfied with the judgment he has preferred this appeal on the following grounds:

**1. The learned trial magistrate misdirected himself by finding that the appellant was involved in the robbery;**
**2. The learned trial magistrate erred in both law and facts when he failed to observe that the alleged offence was not proved beyond reasonable doubt;**
**3. That the learned trial magistrate misdirected himself in both law and facts by failing to appreciate that the prosecution side did not prove their case;**
**4. That the learned trial magistrate did not consider the place and time of my arrest;**
**5. That the learned trial magistrate erred in both law and facts when he rejected the appellant's**

**alibi defence which sufficiently affected the strength of the prosecution case;**

At the hearing of the appeal the appellant relied on written submission whose salient features are; the charge sheet was defective with regard to the appellant's arrest, charge and trial as the charge against him was brought under **Section 295** as opposed to **Section 296(2)** of the Penal Code, there was possibility of mistake in the recognition of the appellant as one of the assailants; statements of witnesses were not availed to the appellant which forced him to remain silent during the defence case; he was arrested 2 weeks after the alleged incident.

The state through state counsel **Mr. P. Gumo** opposed the appeal on the grounds that, the appellant robbed and injured **PW2**. He stole **PW2's** phone and 2 speakers. He also poured boiling porridge on him, scoulding him seriously; that evidence of identification and recognition was corroborated by that of **PW1** and the trial court cannot therefore be faulted for arriving at a conviction of guilt; the Medical report by **PW3** showed injuries by both victims and that the appellant failed to offer a defence.

He urged the court to disallow the appeal.

In his response the appellant argued that the evidence of **PW1** and **PW2** was contradictory as to the date of medical examination.

Having considered the submissions by appellant and the prosecution, the issue for determination is whether the counts of robbery with violence and grievous harm were proved against the appellant to the required standard.

This being the 1st appellate court it has the duty of re-considering the evidence on record a fresh,. Examining and analyzing the same in order to arrive at an independent decision. See **OKENO VRS REPUBLIC (1972) E.A**. at **page 32.** In this regard we shall consider the brief facts of the case and the evidence.

The brief facts as laid down by the prosecution is that on the 25th of December, 2009 at Riat Market at about 8 p.m. **PW1** sent his brother **PW2** to a kiosk to buy chips. After about 5 minutes he heard **PW2** crying and calling out his name. He responded to the distress call and found **PW2** under attack. **PW2** managed to escape to the house and the attackers pursued him one of whom **PW1** recognised as the appellant. **PW1** relied on electricity light to identify the appellant who was armed with a knife. He proceeded to rob **PW1** and to pour porridge on him. Earlier he had injured **PW1**.

Salient features of the evidence was as follows:

**PW1 CHARLES OMONDI OWUOR**:

- **On 25th December, 2009 he was in his house with PW2, his wife PW3 and a child;**
- **PW2 left to buy chips and after 5 minutes he heard screams;**
- **He went out and found people cutting him;**
- **He pushed them and PW2 managed to escape to the house;**
- **PW2 was bleeding on the head;**
- **While in the house with the light (electricity) he saw Ogutu (appellant) Tobby and Ken;**
- **He had known the appellant for a long time;**
- **The appellant had a stone and knife;**
- **The appellant hit and broke a T.V.;**
- **He then took a music system, phone Nokia 1110 and 2 speakers;**
- **The appellant then poured boiling porridge on him;**
- **The appellant was later arrested by villagers on 8th January, 2010;**

**PW2 PAUL ODUOR OSODO**

- **On 25/12/09 at about 8,30 p.m. he went out to buy chips;**

- **He was attacked by 7 people;**
- **One was the appellant;**
- **Appellant hit him with a stone and cut him on the head and left arm with a panga;**
- **There was light from a nearby house. A fluorescent tube light 10 metres away;**

**PW3 DAVID ACHIENG AMOR**
- **A clinical officer at Kisumu East District Hospital;**
- **On 28/12/09 he examined PW1 and filled a P3 form. He observed blood stains on a khaki trouser, burn wounds on left chin and left side of neck, lacerated wound on right cheek, superficial burns on the left chest wall left arm;**
- **Injuries 3 days old;**
- **Injury caused by sharp object and hot fluid;**
- **PW2 had a blood stained jacket; T-shirt and trouser. His head and neck had a cut wound and the forehead;**
- **4 stitches had been applied;**
- **Cut wound on right hand 3 stitches applied;**
- **Cut wound on left index and 3rd fingers;**
- **Injuries 3 days old;**
- **Sharp object used**
- **Degree of injury harm**.

**PW4 SELINA ANYANGO**
- **Sells chips at Riat Market;**
- **On 5/12/09 at 8 p.m. some rioters boys attacked her;**
- **She saw Morris and Ochieng;**
- **She witnessed PW1 being attacked;**
- **In the morning she learnt that PW2 had also been attacked. She saw the wounds;**
- **She knows the accused**
- **She did not see him among the boys;**

**PW5 P.C. STEPHEN MUCHENEE**
- **Police constables No.72602;**
- **Is the investigating officer;**
- **Recorded witness statements and visited the scene;**
- **On 1/1/2010 got information from the chief that a suspect had been arrested;**
- **He proceeded to the scene and found accused tied with a rope;**
- **He was severely injured;**
- **He re-arrested him;**
- **He recovered a damaged TV.**

**PW6 LILIAN ACHIENG**
- **On 25/12/2009 at 8 p.m. while in her house she heard screams;**
- **Wife to PW1;**
- **They opened the door and saw many people with pangas;**
- **Accused had a knife;**
- **She saw Kevin was injured;**
- **Ken had a panga;**
- **Accused carried some things from her house and damaged a TV;**

At the close of the prosecution case the accused was put on his defence and he chose to remain silent.

The learned trial magistrate identified 3 issues for determination in this matter as follows:

**(i) whether there was robbery with violence within the meaning of section 296(2) of the Penal Code;**
**(ii) whether accused person was positively identified as one of the robbers;**
**(iii) whether PW2 was assaulted by the accused;**

We do concur with the trial magistrate that indeed those are the issues for consideration and we proceed to consider the same.

From the evidence of all the key prosecution witnesses save one the appellant was spotted carrying stones and a panga on the material night in the company of others. They first attacked **PW2** then **PW1** who had gone to rescue **PW2.** They entered PW1's house. It was the testimony of **PW1** & **PW6** that the appellant damaged a T.V. set, took away a Sony Music player, two speakers and a phone belonging to **PW1.** PW1 further stated that appellant then poured porridge on **PW2** had been cut with a panga.

**PW1** stated that he knew the appellant, he had been seeing him in the area. He was able to recognise him as there was light inside his house.

On his part **PW2** said the appellant was one of his attackers. There was fluorescent light from a nearby house he recognised him. He however did not seem to have witnessed the robbery.

**PW6** wife of **PW1** did not however allude to injuries received by **PW1** and **PW2.** She states one Kevin was cut. It is not clear whether Kevin is the same as **PW2.**

The **P3** forms produced by **PW3** corroborates the evidence of injuries as alluded by **PW1** and **PW2** in their evidence. Of **PW1** this is what is in the P3 forms:

**"He had blood stained khaki trouser, burn wounds on left chin and left side of neck, lacerated wound on right cheek, superficial burns on the left chest wall and left arm injuries were 3 days old. Hot liquids/fluid and sharp objects created the injuries."**

Of **PW2** he stated

**"He had blood-strained jacket T/shirt, trouser on. His head and neck had a cut wound. Four stitches had been applied. He had a cut wound on right hand with stitches, cut wound on left index third fingers. Injuries 3 days. A sharp object used."**

In **FRANCIS KARIUKI NJIRU & 7 others vrs Republic Criminal Appeal No.6 of 2006 (ur)** the Court of Appeal stated:

**"The law on identification is well settled, and this court has from time to time said that the evidence relating identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R vrs Turnbull (1976) 63 Cr. App. R.132). Among the factors the court is require to consider is whether the eye witness gave a description of his attacker or attackers to the police at the earliest opportunity or at all."**

The current case is not just one of identification but recognition which is the best form of identification. We take not of the possibility of error but find that with fluorescent light the circumstances were favourable for positive identification.

The offence of robbery with violence was well defined in **GANZI & 2 OTHERS VRS REPUBLIC (2005) 1 KLR 52** at **53** as noted by the trial court, by the (Court of Appeal) as follows:

**"the offence of Robbery with Violence under Section 296(2) of the Penal Code is committed under Section 296(2) of the Penal Code in any of the following;**

**(a) The offender is armed with any dangerous or offensive weapon or instrument or;**

**(b) The offender is in the company with one or more other person or persons; or**

**(c) At or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses other personal violence to any person."**

There is evidence that the accused carried stones **(PW2),** he was also armed with a knife **(PW1**& **PW5).** He poured porridge on **PW1 (PW1)** he was in a group of attackers **(PW1,PW2 & PW5).** He took items from **PW1'**s house **(PW1**& **PW5). PW2** injured (**PW1** & **PW3**).

In our view therefore the offence of robbery with violence was proved as required by the law. The evidence linking the accused is overwhelming. We therefore find the conviction by the trial court sound

but we fault the sentencing though, as the appellant was not given an opportunity to arrest the death sentence under section **324** & **329** of the Criminal Procedure Code. We shall later in this judgment make reference to the said sections

The appellant did not testify in his appeal he urges that he did not follow the proceedings. From the record the proceedings were conducted in Dholuo which means there was translation in a language he indicate at the beginning he understood. He remained silent throughout his proceedings even when invited to give his defence. This as was observed by the trial court is within his rights, we do concur further. We find that there was, no alibi for the trial courts consideration. It remains that there is none for our consideration either.

As regards the second count, we find that there was sufficient evidence that the accused together with others not before court injured **PW2**. We therefore find the conviction safe. The appellant was fined Kshs.5,000/= or in default 3 months imprisonment. We find the sentence reasonable. It was put in abeyance in view of the earlier sentences we concur with the position of the trial court.

As regards the death sentence we are minded of the decision of the Court of Appeal in:

In **Kenga Foto Mangi** vrs **Republic –** Criminal Appeal No. 259/06 where the court stated;

**"Before we leave the appeal, there is some matter which we must point out to trial judges dealing with capital offences. The judges, as the learned judge herein did, convict and then straight away pass the sentence of death without complying with the provisions of Section 324 of the Criminal Procedure Code. The provisions gives an accused person the right to move a motion in arrest of judgment which in short really means that though there is only one penalty for the offence of murder, namely death, yet an accused person may nevertheless show that he or she ought not to be sentenced to death."**

In the case of **Godfrey Ngotho Mutiso** versus **Republic Criminal Appeal No.77/08** the Court of Appeal dealt with the question of the death penalty.

The Court of Appeal in the case stated:

**"……..on our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that Section 204 of the Penal Code which provides for a mandatory death sentence is anti-ethical or the constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that Section 204 shall, to that extend that it provides that the death penalty is the only sentence in respect to the crime of murder is inconsistent with the latter and spirit of the constitution……"**
**"…….we doubt if different arguments could be raised in respect of other capital offences such as treason under Section 40(3), robbery with violence under section 296(2) and attempted robbery with violence under section 297(2) of the Penal Code……"**
**"……..the learned judge of the Superior Court simply imposed the death penalty upon convicting the appellant.**

**In doing so the learned judge was in error because under Section 329 of the Criminal Procedure Code, he was entitled, before passing sentence, to have received such evidence as he thought fit in order to inform himself as to the correct sentence to pass."**

We take the view that section 324 & 329 of the Criminal Procedure Code allows mitigation against the death sentence. The appellant having be

en found guilty of the first count ought to have been given an opportunity to mitigate to enable the court consider the appropriateness of the death sentence. This did not happen.

We shall at this point this case accord the appellant an opportunity to mitigate against the sentence to enable us see the appropriateness or otherwise of the same before we give our final verdict.

**DATED and delivered this 1st day of November 2011**

**ALI-ARONI** **H. K. CHEMITEI**
**JUDGE** **JUDGE**

**In the presence of:**
**……..State counsel**
**……counsel for appellant**