SIMON KIPKORIR CHANGORIK……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The appellant herein was charged with the offence of **robbery with violence** contrary to **section 296 (2)** of the **Penal code**. The particulars of the offence state that on the 20th day of November 2005 at Kiploky village in Kericho District of the Rift Valley Province while armed with a dangerous weapon namely a piece of wood robbed Catherine Chesiele Towett of Kshs 200/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Catherine Chesiele Towett.

After a full trial by the Senior Resident Magistrate's Court at Molo, the appellant was found guilty, upon conviction he was sentenced to the mandatory death sentence as per the law provided. Being aggrieved by the conviction and sentence the appellant has appealed. He relied on several grounds of appeal stated in the petition of appeal. He also filed written submissions and further grounds of appeal, which we admitted during the hearing of this appeal.

The appellant challenges the judgment on the grounds that the conviction was based on evidence of identification by way of recognition without considering that the circumstances prevailing were not conducive for a positive identification. Further the trial court failed to consider the possibility of mistaken identity. The trial court was also faulted for failure to consider that the appellant was arrested from his house when he was comfortably sleeping which could not have happened had he committed a serious offence. Lastly the evidence fell short of proving the case to the required standard.

This appeal was opposed by the respondent, the learned State counsel **Mr. Njogu** submitted that there was overwhelming evidence against the appellant. The offence occurred at 6.30 p.m. when it was still daylight. The appellant was well known to the complainant as a fellow villager. The trial court was satisfied with the evidence of the complainant who recognised the appellant. The appellant used force to rob the complainant and used a plunk of wood to injure the complainant whose arm was fractured and the clinical officer confirmed the injury.

This being a first appeal this court is mandated to reconsider the evidence, re-evaluate it itself and subject the entire judgment to its own scrutiny and arrive at an independent decision on whether or not to allow the appeal. In doing this the court should always bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of **Okeno vs. Republic [1972] KLR 32**.

We now set out albeit briefly the summary of the evidence before the trial court which led to the conviction and the sentence of the appellant, which is being appealed against. **Catherine Chesiele Towett PW1** testified that on 20th November 2005 at about 6.30 p.m. she was walking home when she met one Simon Changolik, the appellant in this matter. PW1 testified that the applicant was carrying a plunk of wood, which he put under his armpit and stretched out his hand as if he wanted to great her. PW1 stretched out her hand to reciprocate the greetings by the appellant but instead he forcefully grabbed her searched her pocket and removed Ksh 200/=.

PW1 protested and the appellant used the plunk of wood to hit her three times on the left arm. The appellant then threw the plunk of wood at her. She reported the matter to the Police and for the injury she was treated at Londiani hospital. A P3 form was filled by **Moses Ngetich,** a clinical officer testified that upon examination of PW1, he found the left upper limb was fractured. The complainant was treated and the arm was plastered. He formed the opinion that a blunt object inflicted the injury. He assessed the injury as grievous harm. PW1 was categorical that she knew the appellant very well as her neighbour in the village. She even knows the name of the father. After this robbery the appellant disappeared from the village for sometime until the 12th February 2006 when the appellant sent for the Police. **Cpl. Japheth Jumbo (PW2)** testified that he was informed that the appellant who had robbed the complainant and disappeared was in his house. He visited the appellant's house at about 5.00 a.m. arrested him and took him to Londiani Police Station. He was charged with the offence.

Put on his defence the appellant denied that he was at the scene of the robbery. He gave a sworn statement of defence and testified that on the 20th November 2007 he was working 15 km away from the scene until the 13th February 2006 when he had just gone home. During cross-examination he confirmed that he knew the complainant who was a respected person from his home area. He had never quarrelled with her.

The trial court evaluated the evidence and found that the charge was proved against the appellant to the required standard. The complainant was able to identify the appellant. The robbery took place at 6.30 when it was daytime. The injury sustained by the complainant was confirmed by the medical report. The trial court dismissed the defence by the appellant, and proceeded to convict and sentenced the appellant.

This appeal raises the issue of identification of the appellant and whether the evidence before the trial court proved beyond reasonable doubt that the appellant committed robbery with violence as charged. The evidence before the trial court was by the complainant. It is trite law that evidence of a sole identifying witness is always considered with the greatest care. There is a long line of authorities in this regard which includes the ancient case of **Abdullah Bin Wendo and Another Vs Republic [1953] 20 E.A.C.A page 166**: -

*"**Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error**."*

The trial court found that and I quote:

"***But the complainant knows him very well, a fact he never disputed, and she saw him clearly as the incident took place before it was dark. She knows him and his family and she even talked to him. She also gave a consistent and detailed account of what happened, saying the accused even offered to work for her in exchange for forgiveness. She also informed PW2 and PW3 she was attacked by somebody known to her. She also appeared truthful in her testimony and had no reason to lie against the accused"***

We find the trial court properly evaluated the evidence by the complainant regarding the identification of the appellant. Upon considering both the evidence by the complainant and the defence by the appellant although the appellant was under no obligation to offer a defence in his defence he admitted that he knew the complainant. The trial magistrate was therefore satisfied that the evidence of recognition by the complainant was not shaken. It is also trite law that evidence of recognition is more reliable than any other form of identification. See the case of **Anjononi & others vs. Republic [1980] KLR 59** the Court of Appeal held that:

"***Recognition of an assailant is more satisfactory, more assuring and more reliable than identification***

of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

The appellant was armed with a piece of wood, which he used during the robbery. He hit the complainant until she sustained a fracture of the upper limb. The injury was confirmed by PW3. The next issue to consider is whether the charge of robbery with violence was proved. Under section **296 (2) of the Penal Code the offence of robbery** is committed when:

§ ***The offender is armed with any dangerous or offensive weapon or instrument.***

§ ***Or is in the company of one or more than person or persons***

§ ***Or if at or immediately before or immediately after the time of robbery he wounds, beats, strikes or uses any other personal violence to any person.***

From the above description of what constitutes the offence of robbery with violence we find that the evidence before the trial court established that the appellant was armed with an instrument which he used to strike and he wounded the complainant when he robbed her of Kshs 200/=. For the above reasons we find no merit in this appeal which is dismissed. The conviction of the appellant and the sentence imposed by the learned trial magistrate is confirmed.

Judgment read and signed on 14th day of May 2009

M. KOOME

JUDGE

M. MUGO

JUDGE