REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 115 OF 2016

MARTIN LITUMA ABUKWE alias **MORRIS GODFREY.....APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Conviction and Sentence in Original Kimilili Court Cr. Case No.330 of 2015

delivered on 29.4.2016 by D.O. Onyango SPM)

JUDGMENT.

The Appellant Martin Lituma Abukwe was charged with robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on the 23rd day of January, 2011 at Sosio river bridge in Kaptama Division within Mt. Elgon sub-county of Bungoma County, jointly with others not before the court while armed with offensive instrument namely a wire robbed Lewis Kibot Butike of a motorcycle Reg. No. KMCN 426 J TVS STAR sport and at or immediately before or immediately after the time of such robbery used actual violence to the said Lewis Kibet Butike.

After full trial the learned Trial Magistrate found the appellant guilty of robbery with violence contrary to section 296(2) of the Penal Code and after considering the mitigation sentenced him to suffer death as per the law. Dissatisfied with the conviction and sentence the appellant preferred this appeal on the following grounds;

(1) THAT the trial court erred in law and facts in finding that the complainant was robbed by the appellant without any support from his finding.

(2) THAT the learned trial magistrate erred in law and facts when he failed to consider my mitigation.

(3) THAT, recognition and identification was not positive as the prosecution witness number 4 did not point the appellant at the scene.

(4) THAT the trial court erred in law and fact by dismissing the evidence tendered in defence by the appellant.

(5) THAT the learned trial magistrate erred in law and fact in relying on extraneous matters towards my conviction.

(6) THAT the trial magistrate erred in law and facts that evidence was inconsistent and uncorroborated.

Briefly the evidence before the trial court was Pw1 Lewis Kibet Butike testified that on 23.1.2011 at around 8pm while at work 2 men approached and one of whom he recognized to be appellant and requested to be escorted to Sosio River at a fees of Kshs.20/= each. They boarded the motorcycle and drove to Sosio River. When they arrived near the river the appellant who was seated right behind him used a wire to strangle him. He struggled and in the process released himself off the motorbike and the appellant rode off on the motorbike in the company of his colleague. Pw1 testified further that he walked to Kaptama Police Station and made a report and that on the 8th July 2015 he received a report that the appellant had been arrested at Kamukunywa Area after which he positively identified him and he was later charged in court.Pw1 testified that he knew appellant as Geoffrey or Moris.

Pw2 David Khisa testified that he is motorcycle rider and that on 8.7.2015 while at Kamukunywa he saw appellant and called Pw1 who came and identified the appellant as one who robbed him and he led others to escort the appellant to Kaptama Police Station.

Pw3 a police officer Joel Lemayo testified that on the 8.7.2015 he received the appellant who had been arrested by a motorcyclist and he testified that PW1 had made a report on 23.1.2011 that he had been robbed by appellant and another.

Pw4 is the investigating officer Alex Ndombi who took over the case and recorded statement of witnesses and had accused charged. He testified that he was instructed to collect a suspect at Kaptama Police Station and charged him.

In his defence the appellant gave sworn evidence and denied charge against him, he testified that he had disagreed with the other motorcyclists at Kamukunywa as they alleged he was a visitor at the stage. They harassed him and he was escorted by a good Samaritan to the police station.

The appellant filed written submissions in support of this appeal. He submitted that a critical analysis of the evidence on record clearly points out that there was material discrepancies in the evidence of Pw1 especially on names given. He submitted that the complainant tried to convince the court but evidence fell short of the required quality to prove his single evidence of identification by recognition. He referred this court to decision in ***Wamunga Vs. Republic (1989)KLR 426, Nzaro Vs. Republic (1991)KAR 121.*** He further submitted that evidence of identification of the appellant person was that of a single witness and not corroborated relying on decisions in ***Obwana & Others Vs. Uganda (2009) 2 EA 333.***

He submitted that the trial court failed to consider the ingredients of robbery with violence as it attracts death sentence when evidence tendered fall short of standard required and the trial court was wrong to base conviction on the weakness of the appellant's alibi defense.

Ms. Njeru for the state opposed the appeal. In her submissions in court she stated that evidence was adduced that complainant was robbed of motorbike; that the was security lights at the place he was approached by appellant to take him to the river and he was thereof properly identified by way of recognition. He submitted that appellant mitigation was considered and that it was also confirmed that he disappeared after the incident took place and therefore this appeal has no merit.

This is a first appeal. The duty of this court is well stated in the case of ***Okeno Vs. Republic 1972 EA***.

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya versus Republic [1957] EA36) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence ***(Shantilal M. Ruwala versus Republic [1957] EA 570).*** *It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings, and conclusions. It must make its own finding and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses."*

From the evidence and submissions, the issue that lends itself for determination is whether from the evidence of single witness the appellant committed the offence of robbery with violence.

The ingredients of robbery with violence are as set down in section 296 (2) of the Penal Code, as follows:

> *"**296** (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.*
>
> *(2) If the offender is armed with any **dangerous or offensive weapon or instrument**, or is **in company with one or more other person or persons,** or if, at or immediately before or immediately after the time of the robbery, **he wounds, beats, strikes or uses any other personal violence to any person,** he shall be sentenced to death." within all human probability the crime was committed by the accused and no one else."*

The appellant herein has been charged with the offence of Robbery with violence. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of **Oluoch –Vs – Republic [1985] KLR** where it was held:

> **"Robbery with violence is committed in any of the following circumstances:**
>
> *a)* ***The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> *b)* ***The offender is in company with one or more person or persons; or***
>
> *c)* ***At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ……"***

The use of the word **OR** in this definition means that proof of **any one** of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code. In this case the complainant said that he was accosted by accused in company of another person – (b). The complainant testified that the accused struggled him with a wire that he fell off his motor cycle this proved that appellant was armed with a wire which were used to strangle the complainant – Inflicting injury.

The other ingredient the prosecution must prove is that it is the appellant who committed the offence. From the evidence in the trial court the appellant was identified by the only complainant. This is therefore evidence of a single identifying witness.

In the case of **Maitianyi –Vs- Republic [1986] KLR** the Court of Appeal held that:

"Subject to well known exceptions it is trite law that a fact maybe 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 ……. "

The complainant has given a very cogent and concise account of the events of that day. He remained unshaken under cross-examination by the accused. The circumstances were optimal for a positive identification. More importantly the appellant was a person who was not a stranger to the complainant. The complainant testified that he knew the appellant by name therefore this was evidence of recognition. **Anjononi & Others** Vs. **Republic [1980]KLR** the court stated that recognition 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."** In this case the complainant was identifying a person whom he was able to recognize thus reducing further the risk of a mistaken identity.

In the instant case the appellant accompanied by another unknown person to appellant approached the complainant to take them to river Sosini. While near the river he was attempted to strangle the appellant with a wire and robbed his motorcycle. Pw1 identified appellant by stating that the accused was well known to him and after the incident the complainant visited his home and found that he was not present. The complainant also stated that there was security lights and thereof he was able to recognize the appellant.

I am therefore satisfied that notwithstanding the fact that identification was by a single witness my finding is that that the identification was positive and the circumstances favours a positive recognition of the appellant.

The trial magistrate did give due consideration to the appellant's defence which he found to be not credible and subsequently dismissed the same. 1 am satisfied that the appellant was properly convicted and I do hereby dismiss his appeal against conviction.

The appellant was sentenced to death upon conviction on 29.7.2016. since then, the Supreme Court has in Muruatetu case; ***Francis Karioko Muruatetu & Another Vs Republic [2017] eKLR***, declared the mandatory offence of death penalty unconstitutional. The court therefore declared that death sentence while remaining legal is not mandatory in Murder and by extension robbery with violence. In view of the decision, the sentence of death imposed on the appellant is set aside. The court will invite the appellant to offer Mitigation for purpose of resentencing by this Court.

Dated and **Delivered** at **BUNGOMA** this **17th** day of **October,** 2019.

S.N.RIECHI

JUDGE