



vii. *That the learned trial magistrate erred in both point of law and in facts (sic) in totally misunderstanding and or failing to appreciate his sworn statement of defence thereby coming to a wrong conclusion.*

### **The appellant's submission**

3. At the hearing of the appeal, the appellant relied on his written submissions summarized as follows:-
  - i. *PW1's evidence was at variance with the charge sheet with regard to the weapons used during the robbery;*
  - ii. *The court did not caution itself about the dangers of convicting on the evidence of a single identifying witness;*
  - iii. *The conditions were not conducive for a positive identification;*
  - iv. *PW1 did not mention the assailant's names to the persons who responded to her distress call;*
  - v. *The charge sheet does not include the appellant's alias name "Moi" which PW1 gave to the police;*
  - vi. *There is uncertainty as to when the offence occurred as PW5 testified that it happened on the night of 28<sup>th</sup> September, 2010 whereas PW1 said the robbery transpired on the midnight of 27<sup>th</sup> September, 2010; and*
  - vii. *It is not clear as to who treated PW1 as PW6 contradicted himself.*

### **The respondent's submissions**

4. Mr. Omwenga, learned counsel for the respondent submitted that the appellant was properly identified. PW1 testified that on the night she was attacked there was light in her house from a lantern. The robbers had torches which increased the intensity of the light in the house, thus enabling positive identification. PW1 when screaming during the attack, kept on calling out the appellant's nickname "Moi". She knew the appellant who hails from the same location as her. PW1 told the police that she had been cut by a boy that she knew who came from her village. This shows that the appellant was known by PW1.
5. In PW1's testimony, she said that she was cut on the head by the appellant. She went for medical assistance to the hospital at Tigoï where her P3 form was filled. This was produced in court which proves that she was injured.
6. PW2 testified that PW1 was taken to hospital and further that PW1 told her that it is the appellant who attacked her. PW3 stated that PW1 told him that she knew one of the attackers. The fact that the appellant was known by PW1 was not challenged at the trial court. PW6 testified in the trial court that PW1 had suffered injuries and had said that she knew her assailants. Mr. Omwenga also submitted that the offence of robbery with violence was proved in the trial court. It was shown that the appellant was armed and used violence against PW1. Identification was by way of recognition.

He prayed that the appeal be dismissed.

7. In response, the appellant submitted that PW1 lied to the court that she identified him at the scene of crime.

### **The duty of the 1<sup>st</sup> appellate court**

8. The first appellate court is duty bound to reconsider the evidence, evaluate it and draw its own conclusions in deciding whether or not to uphold the judgment of the trial court. In **Pandya Vs. R. [1957] EA. 336 at 337**, the predecessor to the current Court of Appeal stated that:-

***"On first appeal from a conviction by a judge or magistrate sitting without a jury the appellant is***

*entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision. It has the duty to rehear the case and reconsider the witnesses before the judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made by the judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."*

9. We will now analyze and re-evaluate the evidence tendered by both the prosecution and defence and make our own decision in this matter.

### **The Prosecution's case**

10. PW1, Grace Andisi testified that she was at home on the night of 27<sup>th</sup> and 28<sup>th</sup> September, 2010 when at around midnight, she realized that the door was broken. She was still awake. Three (3) people entered into the house. She was in the sitting room where there was light from a tin lamp. One of the invaders had a panga, and the other two had torches. PW1 testified that one of the persons cut her on the head. The others took two phones and a radio from the house. The Nokia was model 1202 and the motorolla CII3.
11. It was PW1's evidence that she identified the appellant herein whom she knew as "Moi". She knew him because of the clothes he was wearing and the light that shone on his face and head. She informed the court that her lamp had enough light. Moi was known to her prior to the incident and the assailants had not covered their heads. She further testified that Moi was dressed in a familiar way and he is the one who cut her with a panga. When she was taken to hospital at Lyanaginga and Tigoi, she said that she knew one of her assailants. PW1 was issued with a P3 form MF1- 2 and treatment notes, MFI – 1.
12. PW1 reported the incident at Mahanga and Vihiga. She informed the court that after the robbery, the appellant went home at 10.00a.m. and told her in-law that she would be the next. At that time PW1 was at Vihiga. It was her evidence that Moi, the appellant, comes from the same location as her.
13. On cross examination, PW1 was steadfast in her evidence that she saw the appellant when she was attacked. Members of the public went to her aid after she screamed. She told them that she knew the person who had cut her. She gave the same information to the police and added that the boy (assailant) was from their village. She informed the court that she knew the appellant by the name Moi. She told her friend (PW2) that one of the attackers was the appellant when she was taken to hospital. PW1 further stated that she was calling out the appellant by name as he was running away.
14. PW2, Rhoda Amimo testified that on the night of 27<sup>th</sup> and 28<sup>th</sup> September, 2010, she heard her neighbour PW1 screaming. She went out and saw people running from PW1's house which is 30 metres away from her house. PW2 and others went to PW1's house and found her bleeding from her face. She told them that the people who ran away are the ones who cut her on the face and stole two phones and a radio. She told PW2 that she was cut by Moi. PW2 knew Moi, who is commonly known by that name. She informed the court that Moi was the appellant.
15. PW3, APC James Songwa adduced evidence that on 29<sup>th</sup> September, 2010, he was called by PW4, the Asst. Chief of Vigulu sub-location who told him that the appellant had surrendered to

her. PW3 arrested the appellant and took him to the AP camp. PW1 had said that she had been robbed by the appellant whom she identified as Moi, in the company of 2 others. PW3 escorted the appellant to Vihiga police station.

16. PW4, Jemima Muluku, was the Assistant Chief of Vigungu village. At about 1.30 a.m. on the night of 28<sup>th</sup> September, 2010, she was sleeping when she received a call from the village elder PW5, who informed her that PW1 had been attacked. She went to PW1's house in the morning and saw that she had injuries on her head. PW1 informed her that she was robbed of 2 phones and a radio. She told PW4 that she knew one of her assailants as Mugesani alias Moi. They started looking for Moi. On 29<sup>th</sup> September, 2010 the village elder, PW5, took the appellant to her house. PW4 called Administration Police Officers from Mahanga who took the appellant to Vihiga Police Station. She identified Moi as the appellant in court.
17. PW5, Tom Kafuga, a village elder at Lianaginga village was asleep on the night of 28/9/2010 at 3.00 a.m. when he heard some noise outside his house. He went out and saw 4 ladies including PW1 who was bandaged on her head. PW1 informed him that she was attacked by 3 people one of whom she identified as Moi and was robbed of two phones and a radio. PW5 called and informed PW4 the Assistant Chief of the same. They went to PW1's house the following day and she repeated that one of her attackers was the appellant.
18. PW5 testified that the appellant went to his home and asked to be taken to PW4 as he wanted to talk to PW1 about her complaint. The appellant was arrested on being taken to PW4's home. On cross examination, PW5 reiterated that PW1 told him that the appellant had robbed her.
19. PW6, Dennis Chirchir, a clinical officer at Mbaja Health Centre examined PW1 who had been assaulted at midnight on 27<sup>th</sup> September, 2010. She sustained injuries on her forehead. She had a bandage on her left forehead and cut wound on the left forehead. The wound had seven stitches. He filled the P3 form on 30<sup>th</sup> September, 2010. PW6 got information to fill in the P3 form from treatment sheet which he produced as Pexh. 1 and P3 form Pexh. 2. On cross examination, PW6 said that he treated PW1 and filled her P3 form.

### **The defence case**

20. The appellant gave sworn evidence to the effect that he was a charcoal burner at Linaginga village. He recalled that on 29<sup>th</sup> September, 2010 he was at home when his colleague Benson Keya told him that he had heard that the appellant is a thief. The appellant went to the village elder's home who confirmed having heard the same but he was not sure. The two went to the sub-chief's office who never talked to him but entered her house and called in the village elder. A police officer went to the sub-chief's home and told the appellant to accompany him to Mahanga police post. The appellant was taken to Vihiga Police Station and arraigned in court for the charges facing him. He denied the offence.

### **Determination of the Appeal**

21. The issues for determination in this appeal are:-

- i. If the circumstances were ideal for positive identification;
- ii. If the prosecution proved its case beyond reasonable; and
- iii. If the sentence imposed on the appellant is lawful.

22. In determining this appeal, we bear in mind the appellant's petition of appeal and submissions by both the appellant and the respondent. On the issue of identification at night, it was held in the case of **Maitanyi vs. Republic [1986] KLR 198 at 200**; that:-

***“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 greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring positive identification were difficult. In such circumstances, what is needed is other evidence, whether it is 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.”***

23. An analysis of the record of the trial court shows that the evidence upon which the appellant was convicted was that of PW1, a single identifying witness. It was her evidence that she was able to identify the appellant by the aid of light from a tin lamp that was in the sitting room. It was her evidence that two of the robbers had torches. She was able to see the appellant's face and head. At the time of the attack, she was still awake. She was packing so that she could travel to Kitale the following day. She was therefore able to see her assailants clearly.

24. PW1 was consistent in her evidence that it was the appellant who cut her with a panga. She saw him well and she knew him by the name, Moi. He hails from the same location as her. PW1 informed PW2, PW4 and PW5 soon after the robbery that the appellant was one of the robbers who stole from her and that he was the one who cut her with a panga.

25. In his defence, the appellant denied the offence and indicated that he surrendered himself to PW5 as a colleague of his had told him that he had heard that the appellant was a thief. He was then arrested when he was taken to the sub-chief, PW4.

26. We have carefully analyzed the defence put forth by the appellant against the prosecution evidence and we find that it casts no doubt whatsoever on the prosecution evidence. The appellant's act of surrendering to PW5 is not in our view, tantamount to innocence on his part but goes to support the fact that PW1 had mentioned his name to PW4 and PW5.

27. It is our considered finding that the circumstances prevailing at the time of the robbery were ideal for positive identification, in that there was sufficient light in the room where the robbery was committed. As to whether the appellant was properly identified, we bear in mind the decision in **Wamunga vs. Republic [1989] KLR 424** at page 426 where the Court of Appeal held:-

***“..... it is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can make it the basis of a conviction.”***

28. Having found that there was sufficient light in the sitting room which enabled PW1 to identify her attackers, we hold that the issue of mistaken identity does not arise. In this case identification was by way of recognition as the appellant was known to PW1 as a “boy” from the village. PW1 knew him by his nickname “Moi”. It was the evidence of PW1 that when the appellant cut her on the face, she screamed mentioning his name. The appellant was arrested based on the information that PW1 gave to PW2, PW4 and PW5, that the appellant was one of her assailants.

29. In the case of **Anjononi & Others vs. Republic (1976-80) 1 KLR 1566** at page 1568, 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 on the personal knowledge of the assailant in some form or other.”***

We are satisfied that the learned trial magistrate was correct in holding that the appellant was positively identified.

30. On the appellant's submission that PW6 contradicted himself in his evidence, we found no such

contradiction. We also find that there was no contradiction as regards the date when the offence was committed. It was on the night of 27<sup>th</sup> and 28<sup>th</sup> September, 2010.

31. The fact that the appellant's alias name was not included in the charge sheet does not vitiate the fact that he is commonly known by the name Moi, in the village
32. On whether the ingredients of the offence of robbery with violence were proved, the Court of appeal held in the case of **Daniel Muthoni M'arimu vs. Republic [2013]eKLR** that proof of any of the three elements of the offence of robbery with violence would be enough to sustain a conviction under the provisions of section 296 (2) of the Penal Code.
33. In the instant case, the appellant was in the company of two others, he was armed with a panga which he used to inflict injuries on PW1 and they robbed PW1 of her two mobile phones and a radio. The facts of the case did support the ingredients of the offence of robbery with violence contrary to section 296 (2) of the Penal Code. We therefore find that the appellant was properly convicted.
34. The learned trial magistrate sentenced the appellant to life imprisonment. This was unlawful. The only sentence provided under the provisions of section 296 (2) of the Penal Code is the death sentence. The trial magistrate did not have the discretion to sentence the appellant to life imprisonment. The decision by the Court of Appeal in **Joseph Njuguna Mwaura & 2 Others vs. Republic [2013] eKLR** held that the only penalty provided under the provisions of section 296 (2) of the Penal Code, is mandatory death sentence.
35. In the circumstances, we invoke the provisions of section 354 (3) (iii) of the Criminal Procedure Code and set aside the sentence of life imprisonment and substitute thereof, the death sentence as by law prescribed. The appeal fails in its entirety.

The appellant has 14 days right of appeal.

It is so ordered.

**DELIVERED, DATED and SIGNED** in open court at **KAKAMEGA** on this .....1<sup>ST</sup> ... day of .....**MARCH**,.....2016.

**RUTH N. SITATI**

**NJOKI MWANGI.**

**JUDGE**

**JUDGE.**

**In the presence of**

..... Appellant.

..... for the Respondent.

.....Court Assistant.