REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

(CORAM: KIMONDO & NGENYE-MACHARIA JJ.)

CRIMINAL APPEAL NO. 218 OF 2011

PHILEMON KIPKOSGEI KIMAIYO……..…….APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 6195 of 2010 Republic v Philemon Kipkosgei Kimaiyo in the Senior Resident Magistrate's Court at Eldoret by N. Shiundu, Senior Resident Magistrate dated 3rd November 2011)

JUDGMENT

1. The appellant was convicted for the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. He was sentenced to death. The appellant has appealed against the conviction and sentence.

2. The particulars were as follows-

> **"***On the 23rd day of November 2010 at Komamu Village in Keiyo South District within the Rift Valley Province while armed with offensive weapon namely a stone robbed Joseph Cherotich of Kshs. 11,500/- and immediately before the time of such robbery used actual violence to the said Joseph Cherotich".*

3. The grounds in the petition of appeal can be condensed into five: first, that the conviction was founded on the evidence of a "single intoxicated witness" which was contradictory and not corroborated; secondly, that the charge was duplex as it was based on section 295 as read with section 296 (2) of the Penal Code; thirdly, that the ingredients of robbery with violence were not proved beyond reasonable doubt; as required by the law; fourthly, that the investigations were shoddy because the investigation officer failed to visit the scene of crime or collect the stone used to hit the complainant; and fifthly, that the learned trial magistrate failed to consider the defence proffered by the appellant thereby contravening section 169 (1) of the Criminal Procedure Code.

4. The State has contested the appeal. The case for the State is that the evidence tendered at the trial proved the charge beyond reasonable doubt. Regarding identification of the appellant, the State submitted that the appellant was known to the complainant and was positively identified. The offence took place at 10.00am in the morning. The appellant had offered to guide the complainant through a short cut only to turn against him, hit him with a stone and rob him. The case for the state is that the evidence of the four witnesses called was consistent and established the guilt of the appellant. In particular, the clinical officer corroborated the evidence of the complainant. In a nutshell, the State submitted that the appeal lacked

merit and should be dismissed.

5. This is a first appeal to the High Court. We are required to re-evaluate all the evidence on record and to draw our own conclusions. In doing so, we have been careful because we have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E.A 32, *Kariuki Karanja v Republic* [1986] KLR 190.

6. We shall first deal with the matter of identification. PW2 was the complainant. He was employed at Keiyo County Council as a revenue clerk. On 23rd November 2010 at around 10.00am he went to Kabyemit Centre to collect revenue. He collected revenue of Kshs. 12,500/-. He then decided to take a short cut to Nyaru. On the way, he met the appellant. He knew the appellant. The appellant was in the company of another person. They said they would show PW2 the short cut.

7. As they went through the forest, the appellant or accomplice hit him on the head with a stone. He fell down. The appellant snatched PW2's jacket which contained the money. The appellant ran away. When the appellant attacked him, the other person remained behind. The complainant boarded a vehicle, went to hospital and reported the matter to Chepkorio Police Post. PW2 said that the appellant disappeared from the area and was only arrested after one month in Nandi.

8. PW2 was issued with a P3 form which was filled by Michael Kipkoech, a clinical officer (PW1). It was produced as exhibit 1. PW1 examined the complainant on 24th November 2010. The face of the complainant was swollen; and so was the right eye. He formed the opinion that the injuries resulted from a blunt object. He classified the degree of injury as harm.

9. PW3 confirmed that he met the appellant on 23rd November 2010. On the way, they met the complainant. The appellant offered to show the complainant a short cut through the forest. After an hour, the complainant called PW3 informing him that the appellant had attacked him. PW4, the investigating officer, confirmed that PW2 had fresh injuries on the face when he reported the incident. The appellant was arrested by members of the public in December 2010. Nothing was recovered from the appellant. PW4 did not visit the scene of the crime because it was inside a forest.

10. Although the complainant stated he lost Kshs 12,500, the charge sheet indicated the sum stolen was Kshs 11, 500. That is the same figure referred to by PW4. The appellant has taken up issues with that discrepancy. We do not think it is a material discrepancy. In *Joseph Maina Mwangi vs. Republic* Criminal Appeal No. 73 of 1993**,** the Court of Appeal held:-

> "*In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences."*

11. The appellant was not a total stranger to PW2. The complainant said he knew the appellant. PW3 knew both the appellant and complainant. The appellant offered to help the complainant find a short cut. PW3 was there when the offer was made. It was at 10.00am in the morning. After an hour, PW2 called PW3 to inform him that the appellant had turned against him, hit him and stolen the money. From that evidence we entertain no doubt that the appellant was positively identified. It was in fact evidence of recognition. The appellant is the person who attacked the complainant with a stone, snatched the jacket containing the money and took off. The witness was steadfast under cross examination.

12. Evidence of recognition is generally more reliable than identification of a stranger, but mistakes may sometimes be made by witnesses. In *Wamunga v Republic* [1989] KLR 424**,** the Court of Appeal held as follows-

> *"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*

safely make it the basis of a conviction."

13. In *Republic v Turnbull & others* [1976] 3 All ER 549, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal had this to say-

> *"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."*

14. See also *Joseph Ngumbao Nzaro v. Republic* [1991] 2 KAR 212, *Richard Gathecha Kinyuru & another v Republic* Nairobi High Court Criminal Appeal 290 of 2009 [2012] eKLR. *Obwana & Others v Uganda* [2009] 2 EA 333. We find that the complainant's evidence was corroborated by the clinical officer (PW1), PW3 and PW4.

15. The key ingredients for a robbery with violence charge are found in section 296(2) of the Penal Code. It provides as follows-

> *"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"*.

16. In this case the appellant was in the company of another person. He struck PW2 with a stone. He stole the sum of Kshs 12,500 from the complainant. In the course of the robbery, he wounded PW2 on the face. PW4, the investigating officer, confirmed that PW2 had fresh injuries on the face when he reported the incident. PW1, the clinical officer produced the P3 form indicating the degree of injury was harm. All the ingredients of robbery with violence were thus present.

17. The charge not defective by referring to both sections 295 and 296(2) of the Penal Code. The former describes simple robbery; the latter particularizes the ingredients that *aggravate* it to robbery with violence. That is why section 296 starts with the word *if*. So that *if* the attacker is accompanied by another person, or is armed with a dangerous or offensive weapon, or beats, strikes or threatens to use or uses personal violence before, during or after the act, the offence is aggravated to robbery with violence.

18. Fundamentally, no prejudice was suffered by the appellants merely by the citation of both sections in the charge. In *Joseph Onyango Owuor v Republic* Criminal appeal 353 of 2008 [2010] eKLR the court stated that section 295 of the penal code is merely a definition section and that *"sections 296(1) and 296(2) of the Penal Code deal with specific degrees of the offence of robbery and have been framed as such"*. In *Joseph Njuguna Mwaura and others v Republic* Court of Appeal Criminal Appeal 5 of 2008 [2013] eKLR, the five-judge bench said they *"agree[d] that this is the correct proposition of the law"*. Further down the judgment however, the Court stated that *"it would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296(2) as this would amount to a duplex charge"*. In the present case there is no duplex charge.

19. We have then examined the defence put forward by the appellant. He stated as follows-

> *"I hail from Kamwosor. I am a farmer I am aware of the charges I am faced with. On 23/11/2010 I had gone to look for trees to split. I then went to a drinking den. The complainant was there drinking chang'aa but I left him there and went away. They later came to arrest me that I had stolen from him which is not true."*

20. When juxtaposed against the clear evidence of the prosecution, the defence was unbelievable. But there is an important matter: the appellant was setting up a defence of an *alibi*. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. The appellants had not given any notice that they would raise it. It was being set up well after the close of the prosecution's case. It was thus open to the

trial court to weigh it against the evidence already tendered. See *Wang'ombe v Republic* [1976-80] KLR 1683.

21. The learned trial Magistrate did not believe the version of events narrated by the appellant. He found that the appellant was positively identified at the *locus in quo* which discounted the *alibi*. The defence of the appellant was thus considered. There was no deviation from the requirements of section 169 of the Criminal Procedure Code as urged by the appellant. In his judgment, the learned Magistrate stated as follows-

> *"The alleged incident occurred during the day and the complainant was able to identify the accused person. The version by the accused is therefore not believable and I dismiss it. I find that the prosecution has proved its case beyond reasonable doubt…."*

22. We are satisfied there was sufficient evidence to convict the accused. We are not persuaded that the investigations were shoddy. It would certainly have firmed up the prosecution's case if the stone had been produced. But the evidence of the four witnesses established the key ingredients of the offence. The evidence of PW1, PW2, PW3 and PW4 was credible and largely consistent.

23. From our reconsideration of the evidence, we have found that the appellant robbed the complainant of money. The appellant was positively identified. The appellant was in the company of another person. In the course of the robbery, the appellant or his accomplice struck and wounded PW2. The injuries were corroborated by medical evidence. The appellant disappeared from the area and was only arrested a month later in Nandi.

24. There is thus a clear evidential *nexus* between the robbery and the appellant. The evidence is *inconsistent* with the *innocence* of the appellant and pointed strongly to the *guilt* of the appellant. It then follows as a corollary that the key ingredients of the offence of robbery with violence were proved beyond reasonable doubt.

25. We would then go to the sentence. The appellant was charged under section 296 (2) of the Code. The mandatory sentence is death. There is no discretion. See *Joseph Njuguna Mwaura and others v Republic* Nairobi, Court of Appeal, Criminal Appeal 5 of 2008 [2013] eKLR.

26. The upshot is that the appeal lacks merit and is hereby dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 2nd day of October 2014

GEORGE KANYI KIMONDO **G.W. NGENYE-MACHARIA**

JUDGE **JUDGE**

Judgment read in open court in the presence of-

Appellant.

Ms. B. A. Oduor for the State.

Mr Kemboi, Court clerk.