REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO.126 OF 2011

DOUGLAS BUTETE KHAMALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the judgment in Bungoma SRM CR.C.No.1069 of 2010

delivered by R.O. Oigara SRM on 1st August 2010)

J U D G M E N T

1. This Court is asked to decide whether or not Douglas Butete Khamala (the Appellant) was properly convicted for the offence of Robbery with Violence contrary to Section 296 (2) of The Penal Code. The Appellant was convicted and sentenced to death on the allegation that, on the 20th day of November 2010 at Kimilili township location in Kimilili Bungoma District within the Western province, he alongside five (5) co-Accused and with others not before court while armed with dangerous weapons namely a slasher and iron bars robbed of PETER GABUGI MWANGI one NOKIA 1680 cell phone and a torch all valued at ksh.3,280/= and at immediately before or immediately after such robbery, used actual violence on the said PETER GABUGI MWANGI.

2. There was a 2nd Count in which it was alleged that on the same day they, while armed with dangerous weapons namely a slasher and iron bars, robbed CHRISTOPHER SIMIYU ksh.4,000/= and at immediately before or immediately after such robbery, used actual violence on the said CHRISTOPHER SIMIYU.

3. Peter Gabugi Mwangi (PW1) is such a loyal friend to Simon Mwili (PW2) that he would place his life on harms way in response to a distress call from his friend. So on the night of 20/21 November 2010 at about 1.00a.m as PW2 was watching “movies” in his house at Booster Estate, Kimilili he heard movements outside. When he looked through the window he saw two people. He then sent an SMS (short message) to PW1. He asked him to come to his aid. Shortly thereafter PW1 got to the gate.

4. There PW1 met a group of 8 people who attacked him using a metal bar and slasher. He tried to get away from his fate but he fell down and his attackers ordered him to sit down. He says he recognized one of them by voice and using a spotlight from his mobile phone. He was cut on his head and robbed of among other items his mobile phone 1680. As the attackers left, PW1 sought help from his neighbours who administered first aid on him. He later got treatment at Webuye District Hospital. As PW1 was attacked PW2 was at his house, he later came out and saw people walk away from the scene.

5. Earlier on the same night, at about 10.00p.m Christopher Simiyu (PW3) was walking towards Lutonyi village. After he passed Mburuwa, he met the Appellant. The Appellant refused to respond to his greetings. Suddenly more than 5 people emerged from a bush. He was held from behind and one of the five people cut him on the head and snatched his wallet from the pocket. That the wallet had cash of ksh.4000/=. After the robbery, the Appellant ordered him to walk away without looking back.

6. Joakim Millions Lubulia (PW4) was at the material time a Police officer at Kimilili Police Station. He and P.C Nyangau were directed by The Officer Commanding The Station to proceed to Posta area where a crime had been committed. When he got there, he received information from members of the public who gave him the names of Kitete and Vincent as some of the suspects. Led by members of the public to the house of the Appellant, he was able to arrest him and Vincent. The two led them to six other suspects who they also arrested.

7. Oscar Mukata (PW5) was a Clinical officer at Kimilili District Hospital. He attended to PW1 and examined him on 21st November 2010. He noted that he had multiple cut wounds on his scalp and face. He also had soft tissue injuries on his shoulder and forehead rears. He returned an opinion that the probable type of weapon that caused the injury was a sharp object (a slasher).

8. In his short unsworn evidence the Appellant told Court that he was arrested on the night of 20th November 2010 while he was at his house. On the next day he was arraigned in Court and charged with the current offence. He denies any wrong doing.

9. In a judgment delivered on 1st August 2011 the Trial Court found the Appellant guilty of the offence of Robbery with Violence in respect to the first Complainant. His co-accuseds were acquitted. While in respect to Count 2 the Trial Magistrate returned an acquittal in respect to all accused persons.

10. In the Memorandum of Appeal presented to the High Court on 10th August 2011, the Appellant raises 9 grounds. These are:

1. That the trial magistrate erred in law and fact in conducting proceedings that violated the rights of I, the appellant as per the provision of the constitution of Kenya hence null and void.

2. That the trial judge erred in law and fact in convicting I the appellant basing on evidences that were full of contradictions and without analyzing the evidence hence the decision was unlawfully delivered.

3. That the trial court mis-interpreted the law in misleading himself in degrading the abili by I, the appellant that I adduced during my defense due to the fact that I am in different initials compared to those the complainant reported to the police.

4. That the trial magistrate erred in law and facts in considering extrane0ous factors was not before court and misled him to an impugned pundit decision.

5. That the trial magistrate erred I law in arriving a decision which is against the weight of the evidence on record.

6. That the trial magistrate erred in law and fact in considering evidences on record which does not support the charge sheet.

7. That there was misinterpretation of the law by the trial court.

8. That the trial magistrate erred in law and fact in convicting I, the appellant on a charge sheet that was defective.

9. That the sentence upon I, the appellant by the trial court is harsh and excess in the

circumstances."

11) This Court has narrated the evidence it must re-evaluate in detail so as to draw its own conclusion. That is what we are obliged to do as a first Appellant Court but keeping in mind that we did not have the advantage of seeing and hearing the witnesses testify first hand and we must therefore take account of that (**Republic –vs- Okeno [1932]E.A. 32**).

11) At the hearing of the Appeal, the Appellant supplemented his written submissions with a short address. The Appellant argued that PW1 did not positively recognize him as he gave the Police incorrect names. He also added that the voice recognition could not be relied on as he last met the Complainant 11 years prior to the incident: In a further attack to the voice evidence, the Appellant argued that DW1 failed to give the pitch of his voice and the language used by him at the time of attack. Lastly, the Appellant thought that the Trial Magistrate had failed to give his alibi due consideration.

12) For the State, it was argued that the Appellant was positively identified with the use of a spotlight from PW1s mobile phone. It was also argued that the Appellant was well known to the Complainant prior to the incident as they were school mates and that they had engaged in a conversation at the time of the incident. The State also argued that the stolen items were recovered from the Appellant. Perhaps we need to point out right away that no items were recovered from the Appellant and the State Counsel may have misapprehended the evidence when he submitted to the contrary.

13) The reason for the Appellants conviction is summarized in the following passage from the judgment:-

> **"Count one, in respect to accused 1 the complaint(sic) who was his only witness clearly confirmed to the court that he recognized accused 1w both by appearance then was moonlight and voice since he was complainant's school mate. This piece of evidence was not shaken even at cross examination."**

14) PW2 did not identify the persons who were outside his house. On his part PW3 says that on the night of 20th November 2010 at about 10.00 pm he was attacked by over 5 people who included the Appellant. But he never told Court how he came to the decision that the Appellant was one of his attackers. Although he says that he knew the Appellant well, it was not clear from his evidence that he recognized him on that night. This Court cannot therefore fault the trials Court finding that,

> **"The Complainant in this case however did not demonstrate how he saw and recognized Bernard Kitete (Accused 1) at 10.00 p.m or whether Benard Kitete was and known as Douglas Kitete therefore."**

15) As the circumstantial evidence provided by PW3 was in doubt, the success or failure of the Prosecution case turns solely on the evidence of PW1. His evidence was that of both voice and visual recognition. On voice recognition the witness says,

> **"I recognized one by voice and using spotlight. The person was known to me. We went to school together."**

Later he adds,

> **"I studied with him. We stayed together ……I studied with you at Kimilili D E P between 1994 – Std 3."**

On this crucial evidence, something is missing. There is no evidence as to when, prior to the incident the Complainant had last heard the Appellant speak. If it was in 1994 when they were in school, that would be at least 15 years before the attack. Would it be safe enough to say that in the distressed circumstances the Complainant positively recognized the Appellant's voice? In resolving this question we take heed of the caution sounded by the Court of Appeal in **Mbelle v Republic** [1984] KLR 626. The Court

cautioned:

> **"In relation to the identification by voice, care would obviously be necessary to ensure (a) that it was the accused person's voice, (b) that the witness was familiar with it and recognized it, and (c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to which was said and who said it**."

We are of the view that the Prosecution needed to do more so as to give a foundation for a safe conviction. There was need for more cogent evidence as to the witnesses' familiarity with that voice. And if that was all to the evidence then the Prosecution case would certainly have failed.

16) But what are we to make of the evidence of visual recognition? PW1 says that he saw the Appellant because he shone a spotlight on him. Even under cross-examination he maintained his evidence. It needs to be remembered that the Appellant was not unknown to the Complainant as they had been schoolmates. The Complainant at the first opportunity with the Police gave, the name of the Appellant as his attacker. Whether he gave the names as Douglas, later Leonard Libale or Bernard Kitete, the witness was certain that he was referring to the Appellant. Given that he named the Appellant, it does not seem to us that this was an afterthought. Although the evidence of identification by voice may not have been strong, in the circumstances of this case, that evidence augments the evidence of visual recognition.

17) We take the view that the Trial Court was entitled, on the evidence before it, to convict the Appellant of Count 1. We accordingly dismiss the Appeal against both conviction and sentence.

F. TUIYOTT **A. MABEYA**

J U D G E **J U D G E**

COUNTERSIGNED, DATED AND DELIVERED AT BUNGOMA THIS 12TH DAY OF NOVEMBER 2014.

IN THE PRESENCE OF:

GILBERT WAYON'GO……COURT CLERK

IN PERSON…….FOR APPELLANT

MR OIMBO…….FOR STATE

J U D G E