IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA (P), KIAGE & ODUNGA, JJ.A.)

CRIMINAL APPEAL NO. 287 OF 2018

BETWEEN

JOHN ONCHONGA MONARI.....APPELLANT

AND REPUBLIC

.....

RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at Kisii (**R. N. Sitati and R. L. Korir, JJ.**) delivered on 25th October 2012*

in

Criminal Appeal No. 164 of 2011)

****

JUDGEMENT OF COURT

1. On 25th October 2012, the learned Judges (***R. N. Sitati and***

R. L. Korir, JJ.) delivered a judgment in Kisii High Court Criminal Appeal No. 164 of 2011, which was the appellant's first appeal from the judgement of the Senior Resident Magistrates' Court in Keroka in Criminal Case No.304 of 2011. Before the trial court, the appellant was charged with one count of robbery with violence contrary to ***Section 295*** as read with ***Section 296(2)*** of the ***Penal Code***. The particulars of the offence were that

on the 11th

day of March 2011 at Nyambunwa area in Masaba District within Nyanza Province, jointly with another not before the court, while armed with dangerous weapons, namely iron bars, they robbed Stephen Nyaigoti Ohachi of cash Kshs.10,000/= and two mobile phones make Nokia china and Nokia 1100 both valued at Kshs.7500/= and immediately before or immediately after the time of such robbery used actual violence to the said Stephen Nyaigoti Ohachi.

2. The appellant having pleaded not guilty to the offence, the prosecution called 3 witnesses from whose testimonies the facts and the evidence of this case emerge. Briefly, on or about 11th March 2011 at about 9.00 p.m., PW1, Stephen Nyaigoti Ohachi, (Stephen) alighted from a motor vehicle at the Birongo junction. He found the appellant alias Colonel, in the company of one Misati alias Nyaome (Misati), both of whom he knew well as he often used their motor cycle (boda boda) services. He sought to know if they had a motorcycle which could take him home. The appellant and Misati assured Stephen that there would be a motor cycle

soon and invited Stephen to walk with them as they were expecting the motorcycle any time. The three walked for about 1 km and after passing a place called Nyambunwa, the appellant suddenly held Stephen's hands from behind while Misati held his mouth with a piece of wood. Misati then took Stephen's Kshs.10,000/= and 2 Nokia phones after which the appellant and Misati ran away into the night, leaving Stephen at the scene.

3. Stephen managed to reach home and on 13th March 2011, he went for treatment at Masaba District Hospital and then reported the incident at the AP camp at Muturumesi on 14th March 2011. The appellant and his accomplice, however, disappeared from home and the appellant was not arrested until 26th March 2011 when he was apprehended and taken to Muturumesi AP camp by members of the public on suspicion that he had violently robbed somebody else. At the AP camp, the appellant was received by PW2, APC Samuel Thuranira. PW2 subjected the appellant to interrogation in relation to the earlier robbery with violence report made by Stephen on 14th

March 2011 after which PW2 re-arrested the appellant from the members of the public and escorted him to Keroka police station.

4. At Keroka Police Station, the appellant was received by Cpl.

Simon Munyao (PW3) and after re-arresting him, handed the appellant over to the investigating officer. The appellant was then charged with subject offence.

5. At the close of the prosecution's case, the trial court placed the appellant on his defence. The appellant gave sworn evidence in which he testified that he was arrested at Birongo Bar on or about 20th March 2011 by an Administrative Police Officer. Upon arrest, he was taken to the AP Camp at Muturumesi and soon thereafter he was charged. It was his evidence that on 11th March 2011 he was at his home from around 4.00 p.m. with his 3 brothers. He initially denied knowledge of Misati or Stephen claiming that he only saw him in court but later claimed that the sole reason why Stephen took the matter to court was because Misati snatched a girl from him

during an encounter at a bar but that the two had reconciled their differences.

6. The trial court found that the prosecution had proved its case beyond any reasonable doubt, convicted him and sentenced him to ten (10) years in jail. Aggrieved, the appellant appealed to the High Court against both conviction and sentence on the grounds that the learned trial magistrate erred in: convicting him on evidence of recognition/identification under difficult circumstances; failing to appreciate that the prosecution did not prove its case beyond reasonable doubt; failing to appreciate that no exhibits were recovered from the appellant; and failing to appreciate that the case against the appellant was a frame-up because of differences between the appellant and the complainant. He prayed that the appeal be allowed, the conviction quashed and the sentence to ten (10) years' imprisonment be set aside.

7. At the hearing of the appeal, the learned Judges warned the appellant three times of the consequences of proceeding with his appeal, being that should the court

find that there was sufficient evidence laid before the trial court to sustain the conviction under ***section 296(2)*** of the ***Penal Code***, the court could enhance the sentence to one of death. Despite the warning, the appellant insisted on proceeding with the appeal.

8. After hearing the appeal, the learned Judges appreciated their duty as set out in ***Pandya v R [1957] EA 336*** and ***Okeno v Republic [1972] EA 32***, to subject the evidence to fresh scrutiny, evaluate it and arrive at their own conclusions, taking into account their handicap in not having seen the witnesses and heard them testify. They also took note of the holding in the cases of ***Abdalla bin Wendo v R [1953] 20 EACA 166*** and ***Maitanyi v Republic [1968] EA 198***, regarding the test where identification/recognition is based on the evidence of a single identifying witness. The learned Judges were however, satisfied that there was no mistaken identity about the appellant and found no merit in the appellant's contention that the case was a frame-up because of an existing grudge between him and Stephen and that the fact

of the robbery was established by the credible and true testimony of Stephen.

9. On sentence, the learned Judges noted that the trial court did not explain the reason for imposing a term of imprisonment after finding the appellant guilty of the offence of robbery with violence and not the prescribed sentence of death. In the exercise powers under ***Section 354*** of the ***Criminal Procedure Code***, the learned Judges

set aside the sentence of 10 years imprisonment and in its place, substituted death sentence as provided by law.

10. Undeterred, the appellant is before this Court on second appeal in which the appellant contends: that the learned Judges erred in law by finding that the prosecution had proved the ingredients of robbery with violence beyond reasonable doubt whereas the same were not sufficiently proved; and they upheld the appellant's conviction and the enhanced sentence by the first appellate court went against the weight of evidence as adduced by the prosecution.

11. When the matter came before us for plenary hearing on 1st September 2025, learned counsel, ***Ms Omondi***,

appeared

for the appellant while learned Counsel, ***Mr Solomon Njeru***, appeared for the respondent. Both counsel relied entirely on their written submissions. While the appellant's case was hinged on the submissions filed by Ms ***Omondi*** **dated** 20th August 2025, the State relied on the submissions by ***Kitoto Victorine,*** Principal Prosecution Counsel, dated 29th August 2025.

12. On behalf of the appellant, it was submitted: that the prosecution failed to prove the first element of the offender being armed with a dangerous or offensive weapon; that the ingredient on the use of any form of violence on the complainant in the robbery attack was not alluded to or proved contrary to requirement of ***section 296(2) of the Penal Code;*** that although Stephen testified that he went to hospital for treatment on 13th March 2011 and later reported the matter to the police station where he was issued with a P3 form, the said P3 was not produced in court to confirm if any form of violence was meted on him; that although it was the complainant's evidence that he was robbed of Kshs 10,000 and 2 mobile phones, there was

no evidence adduced by the prosecution to confirm whether the said items were actually in his possession at the time of the robbery and that no receipts to confirm their ownership; and that without proof of such vital evidence by the prosecution, the High Court erred by upholding a conviction on the offence of robbery with violence.

13. The appellant thus prayed that the conviction upheld by the High Court be quashed and the sentence imposed set aside.

14. On behalf of the respondent, it was submitted: that it is not a requirement that all the elements under ***section 296*** of the ***Penal Code*** must be proved since the offence is proved if one of the elements is satisfied; that from the evidence, the element of violence as contemplated by ***section 296(2)*** of the ***Penal Code*** was proved; that the complainant knew the appellant and his accomplice by their pseudo and or legal names prior to the offence and that on the material night of the offence, he talked and walked with the appellant and his accomplice for about 1 Km before the two

robbed him; that the complainant set out the individual roles played by each of the perpetrators; and that there was no question of mistaken identity since the appellant was known to the complainant.

15. We were urged to find no merit in the appeal and dismiss it.

16. We have considered the above submissions. As stated at the beginning of this judgement, this is a second appeal and the law circumscribes the remit of this Court's jurisdiction by providing in ***section 361(1)*** of the ***Criminal Procedure Code*** that:

> ***A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—***
> ***(a) on a matter of fact, and severity of sentence is a matter of fact; or***
> ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.***

17. By dint of that section, the jurisdiction of this Court on a second appeal is confined to matters of law which, we appreciate, includes the failure by the first appellate court

to undertake its mandate of re-evaluating the evidence and subjecting the case to fresh scrutiny. See ***Jonas Akuno O'kubasu v Republic [2000] eKLR***.

18. In terms of factual matters, it was held in ***Stephen M'Irungi & Another v Republic [1982-88] 1 KAR 360*** that:

> "***Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.***"

19. However, in a second appeal, this Court is guided by the principle set out in ***Adan Muraguri Mungara v R [2010] KECA 131 (KLR)*** where it was restated thus:

> "***As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to***

***interfere.*"**

See also ***Njoroge v Republic [1982]KLR 388*** and ***Karani v R [2010] 1 KLR 73.***

20. In our view, the two issues that fall for our determination are whether the ingredients of robbery with violence were proved; and whether the appellant was properly identified.

21. In ***Masaku v Republic [2008] KLR 604***, the Court reiterated that:

> ***"It is now well settled that any one of the following needs be proved to establish the offence:***
>
> ***(1) If the offender is armed with any dangerous or offensive weapon or instrument; or***
>
> ***(2) If the offender is in the company of one or more offenders; or***
>
> ***(3) If at or immediately before or immediately after the time of the robbery he wounds, strikes or uses any other violence to any person.***
>
> ***In this case, the particulars of the charge stated that the appellant was with another at the time of the robbery and further that at or immediately before or immediately after the time of such robbery wounded the deceased. It is plain therefore that two of the three ingredients of the offence of robbery with violence under section 296(2) of the Penal Code were given. It should be remembered that a single ingredient is sufficient."***

22. In this case, the appellant was with another person,

Misati, when they turned against him. The complainant’s evidence

was that he was dispossessed of his money and phones by force, with the appellant holding him while Misati blocked his mouth with a piece of wood while taking his money and phones. The actions of the appellant and Misati constituted robbery. Being two people and using a piece of wood completed the act of violence in accordance with ***section 296*** of the ***Penal Code***. Medical evidence of injuries is not the only ingredient that constitute an offence under that section. Therefore, the fact that the P3 form which was alluded to by the complainant was not produced, does not, in the circumstances, render the conviction unsafe.

23. As regards identification, this was identification by recognition. According to PW1, both the appellant and Misati were known to him, having sought their services as *bodaboda* operators before. Although initially the appellant denied having known PW1 and Misati, he later changed his version by alleging that the complainant and Misati had a disagreement when Misati snatched a girl from PW1 during an encounter in a bar. This incident which was an acknowledgement that PW1 knew both the appellant and

Misati prior to the incident, was however not put to the complainant when he testified. This was therefore not a case of the appellant being merely identified but was one of identification by recognition which is appreciated "*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.*" See ***Anjononi & Others v Republic* [1980] KLR 59.**

24. Whereas the case was based on the evidence of a single identifying witness, in ***Stephen Karanja v Republic*** ***[2011] eKLR***, this Court held:

> ***"The evidence of the complainant was that the robbery took place at about 8:00 a.m. hence in broad daylight. The appellant was known to the complainant prior to that day. This makes the evidence of identification, although by a single witness, free from any possibility of error as it was, indeed, evidence of recognition."***

25. Apart from that, the complainant walked with the appellant and Misati for 1 km. In our view, PW1 had sufficient time to recognise the appellant and his

accomplice, hence there was no possibility of mistaken identity. We have no reason

to fault the findings of the trial magistrate on conviction as confirmed by the High Court and the decision of the High Court on the sentence imposed on the appellant. We accordingly find no merit in this appeal, which we hereby dismiss in its entirety.

26. It is so ordered.

Dated and delivered at Kisumu this 30th day of January, 2026.

D. K. MUSINGA (PRESIDENT)
.....
JUDGE OF APPEAL

P. O. KIAGE
.....
JUDGE OF APPEAL

G. V. ODUNGA
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR