IN THE COURT OF APPEAL

AT KISUMU

[CORAM: OKWENGU, SICHALE & KANTAI, JJA]

CRIMINAL APPEAL NO. 59 OF 2015

BETWEEN

BENSON SAMWEL ERALU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma

(Ombija & G.B.M Kariuki, JJ) dated 25th June, 2008, in Bungoma H.c. Cra. No. 15 OF 2005)

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JUDGMENT OF THE COURT

The appellant, **Benson Samwel Eraku,** was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on **23rd August, 2003** at Gendero Village, Namboto Location, of the then Busia District in the then Western Province jointly with others not before court while armed with dangerous or offensive weapons namely, rungus, pangas and iron bars robbed **John Okochi Mulondo**, one TV set make Sanyo, two mobile phones make Sagem 3020 and Nokia 3310, one wall clock, one brief case, one black travelling bag containing clothes, cash Kshs 14,500.00, one purse all valued at Kshs 80,500.00, the property of **John Okochi Mulondo** and at or immediately after the time of such robbery used actual violence to the said **John Okochi Mulondo.**

The appellant pleaded not guilty to the charge and in a trial conducted initially by **Maloba,** the then Senior Resident Magistrate (SRM) Busia and later by **Nyarima,** the then Senior Resident Magistrate (SRM), Busia, the appellant was found guilty of the said charge and sentenced to death as by law then prescribed.

The appellant was dissatisfied with the conviction and sentence and his first appeal to the High Court of Kenya, Bungoma, was dismissed by **Ombija & G.B.M Kariuki, JJ**.

Undeterred, the appellant has filed this appeal before us challenging both conviction and sentence. The appellant's counsel, **James Abande** filed a Memorandum of Appeal dated **6th April, 2018** as well as a Supplementary Memorandum of Appeal dated **23rd July, 2019**. In both Memoranda, the appellant raised a total of five grounds. These were that the learned Judges of the High Court erred in:

(i) failing to find that the appellant was not identified and recognized by **John Okochi Murondo** (P.W.1) and **Mary Okochi** (P.W.2

(ii) failing to subject the entire evidence to fresh evaluation;

(iii) failing to consider the appellant's defence;

(iv) failing to find that the prosecution did not prove the charge against the appellant beyond reasonable doubt, and finally, by,

(v) imposing the death penalty.

On **31st July, 2019**, the appeal came up before us for plenary hearing. **Mr. Abande** highlighted the appellant's written submissions filed on **23rd July, 2019**. On identification by recognition, counsel posited that the time was 2.00 am (hence during hours of darkness); that the light

used to identify the appellant was torchlight; that the intensity of the torch light was not interrogated; that P.W.1 was asleep and was woken up from his sleep; that P.W.1 & P.W.2 had last seen the appellant ten (10) years prior to the incident; that P.W.1 did not know the type of clothing the assailant wore on the material night and that P.W. 1 & P.W.2 were uncertain as to the type of weapon the assailant used. It was counsel's conclusion that the conviction of the appellant was not safe.

On sentence, counsel relied on the Supreme Court of Kenya decision of **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR** for the proposition that the mandatory nature of the death sentence is unconstitutional and that the appellant's mitigation ought to have been considered during sentencing.

In opposition to the appeal, **Mr. Sirtuy**, the learned Public Prosecution Counsel (PPC) contended that the two courts below carefully analyzed and re-evaluated the evidence and came to the concurrent findings that recognition of the appellant was well established. It was his view that there was sufficient lighting that afforded positive identification.

On the sentence, the learned PPC left it to the Court to decide on the matter in view of the decision of **Francis Karioko Muruatetu & another vs. Republic** (supra).

We have anxiously considered the record, the appellant's oral and written submissions, the respondent's submissions and the law.

As this is a second appeal, we are enjoined by the law under ***Section 361 (1) (a)*** of the ***Criminal Procedure Code*** to consider issues of law and not revisit matters of fact that have been tried before the trial court and evaluated on the first appeal by the High Court. Our examination of the facts of the case is confined to our satisfying ourselves whether the two courts have carried out their mandate as required by law. This position was reiterated in the decision of **David Njoroge Macharia vs. Republic [2011] eKLR** wherein it was stated:

> ***"Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (****see also* ***Chemagong vs. Republic [1984] KLR 213)."***

Similarly, in ***Kaingo versus Republic [1982] KLR 213*** it was held as follows:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karoti S/O Karanja versus Republic [1956 17 EALA 146]."***

The evidence on record shows that on the night of **23rd August, 2003**, at about 2.00 a.m. P.W 1 was asleep in his house together with one of his wives, P.W 2 when they were attacked by robbers. Two people entered their bedroom and according to P.W.1, he identified the appellant as he had been his student. P.W 1 narrated that the appellant was armed with a torch and a club. Four other people got into the bedroom and P.W. 1 was taken to the sitting room and forced to lie facing down. A number of items were stolen from their house that night. In the meantime, P.W.2 who was able to escape said she had identified the appellant who was wearing a cap and was holding a metal bar, besides the torch. P.W.2 ran to inform **Brenda Nadongo Okochi,** (P.W 3), her co-wife who sought help from a neighbour, **Johnstone Omollo** (P.W4). During the attack, P.W.2 was injured on the thigh and leg. She was treated at Busia District Hospital and issued with a P.3 form. On **2nd December, 2003,** P.W.2 presented herself before **Glorious Oyugi Odhiambo**, (P.W.5), a Clinical Officer at Busia District Hospital who assessed her injuries as harm and produced the P.3 form.

The last prosecution witness was **P.C. George Otieno Obare** (P.W.6) of Funyula Police Post who took over the investigations from **I.P. Benson Shikuku** who had since been transferred to Mandete Police Post. He also took possession of several items which were produced as exhibits.

In his sworn statement of defence, the appellant denied commission of the offence. As far as he was concerned, he was arrested for no reason.

As submitted by the appellant's counsel and as borne by the evidence reproduced above, there were only two eye witnesses, P.W.1 & P.W.2.

It is not disputed that the time of the attack was during the night. P.W.1 & P.W.2 said they identified the appellant by recognition as he had been a pupil in a school where they both worked as teachers. The only available light that enabled them to identify the appellant was light from a torch in possession of the appellant. The evidence of P.W.1 was that:

> ***" …. I was in a deep sleep. ….. I saw the lights from a torch … the accused had a torch and a club … they forced me to lie down facing down…."***

On cross-examination, P.W.1 stated:

> ***"You had a cap. I did not see your clothing very well".***

P.W.2's evidence was that:

> ***" …. I know the accused for he was my pupil. …. I saw the torches flashing in …. He was wearing a cap. He was holding a***

metal bar."

It follows that whereas P.W.1 told the trial court that the appellant was armed with a club, P.W.2's evidence was that the appellant was armed with a metal bar. Whereas it is possible to mistake a metal bar for a club, especially when one is woken up from deep sleep as P.W.1 stated, and more so given the fact that P.W1 and P.W 2 faced immense danger, we note that P.W.1 told the trial court that he could not tell the appellant's ***"clothing well***". Could it also be possible that he could not have seen his assailant (who was said to be the appellant)? In **Cleophas Otieno Wamunga vrs. Republic Criminal Appeal No. 20 of 1989,** this Court stated as regards a situation where the only evidence is identification.

> ***"It is trite law that where the only evidence against a defendant is evidence 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 possibility of error before it can safely make it the basis of a conviction".***

The trial court was of the view that P.W 1 & P.W 2 identified the appellant using the torch light. However, the intensity of the torch light was not interrogated. In **James Chege Wanja & Another vs. Republic, Nyeri Criminal Appeal No. 323 of 2011,** this Court stated:

> ***"On the intensity of the torch light and the lantern lamp, it is our considered view that the judges did not interrogate and evaluate the intensity of the light from the torch and the lantern lamp that P.W1, P.W2 and P.W 3 alluded to. The time of the alleged offence was 3.30 a.m. No evidence was adduced to show where P.W2 was positioned in relation to the lantern which she said was on, how much light it produced and whether it was behind or before her when the assailants entered her house. If she opened the door to the assailants as she states, the lantern lamp would be behind P.W 2 and she would have obstructed the light that should have shone on the faces of her attackers to enable her identify or recognize them. See Stephen Mbondola & 2 others vs. Republic, Mombasa Criminal Appeal No. 162 of 2000)".***

In our view, it is very possible for P.W 1 and P.W 2 to have been honest but mistaken. The situation is not helped much by the fact that although several items stolen from P.W.1's house were produced as exhibit, the court was not told where they were recovered from.

The upshot of the above is that we find that the charge against the appellant was not proved beyond reasonable doubt. We express some doubt and the benefit of this doubt should be construed in favour of the appellant. Accordingly, we quash the appellant's conviction and set aside the sentence that was imposed upon him. The appellant shall be released forthwith unless he is otherwise lawfully held.

It is so ordered.

Dated and Delivered at Kisumu this 31st day of January, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR