IN THE COURT OF APPEAL

AT KISUMU

[CORAM: KARANJA, ASIKE-MAKHANDIA & SICHALE, JJ.A]

CRIMINAL APPEAL NO. 5 OF 2015

BETWEEN

FRANCIS OMWENGA OPIYO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Busia (D.A. Onyancha & Muchemi, JJ. Dated 8th November, 2011

in

H.C.CR.A NO. 30 OF 2011)

****

JUDGMENT OF THE COURT

The appellant, **Francis Omwenga Opiyo** who was sentenced to suffer death for the offence of robbery with violence contrary to Section 296(2) of the Penal Code had previously been charged jointly with another before the Magistrate's Court at Busia for the offence of robbery with violence contrary to Section 296(2) of the Penal Code in which it was stated that on **28th February, 2005** at Tanaka area township location in Busia District within the then Western Province, while jointly armed with offensive weapons namely pangas, they robbed **Joseph Odhiambo Odero** of a bicycle make, Hero Jet valued at Kshs 3,500.00 and at or immediately before or immediately after the time of such robbery, they used actual violence to the said **Joseph Odhiambo Odero**. They denied the charges and in a trial conducted by **W.N. Nyarima**, Principal Magistrate at Busia Law Courts, they were both found guilty of the offence and sentenced to suffer death on **3rd March, 2006**. Dissatisfied with the findings of the trial court, the appellant moved to the High Court of Kenya at Busia where the High Court Judges, **D.A. Onyancha** and **F.N. Muchemi, JJ.** dismissed the appellant's appeal in a judgment dated **8th November, 2011**, hence this appeal before us.

In support of the case against the appellant and his co-accused, the prosecution called five (5) witnesses. **Joseph Odhiambo Odero** (P.W.1) stated that on **28th February, 2003** at about 5.00 a.m.**,** while at Tanaka area in Busia town, he was riding his bicycle when he stopped over a bump to wait for a passenger; that suddenly, a person emerged from a barber shop next to the road and grabbed the bicycle. The person threatened to kill him if he would not surrender the bicycle to him. In the process, another person emerged and slapped him on the back using the bicycle lock. At that moment, P.W.1 fled leaving the bicycle to his attackers. He met with P.W.2 (**Stephen Rabuor**) and told him that he had been attacked and robbed by people known to him, that is **Okoth Tiger** (the appellant herein) and another. He alleged that he was able to recognize the appellant by voice and by facial appearance as he was familiar to him. He did not identify the appellant's co-accused. **Stephen Rabuor** (P.W.2) told the court that on **28th February, 2005** at 5.00 a.m., he met P.W.1 who told him that he had been robbed of his bicycle by people known to him. P.W.2 testified that although P.W.1 stated that he identified one of the attackers, he

did not disclose his identity to him. He carried P.W.1 on his bicycle to the police station where they reported the incident. On the same day at 11.00 a.m., P.W.1 and P.W.2 while in company of police officers searched several houses including that of **Francis Onyango** (P.W.3), a bicycle mechanic from whom a bicycle saddle belonging to P.W.1 was recovered. According to P.W.3, on **28th February, 2005** at about 10.00 a.m., his regular customer, known to him by nickname as '***Taa Mbili***' had taken to him a bicycle saddle for repair; that a few minutes later, a police vehicle arrived and on seeing the police vehicle, his customer fled leaving the bicycle saddle with P.W.3 which he handed over to the police. **Hillary Kahayi** (P.W.4) is a clinical officer at Busia District Hospital. On **1st March, 2005**, he examined and filled a P.3 form in respect of injuries suffered by P.W.1 who alleged that he had been assaulted by people known to him on **28th February, 2005** at 5.00 a.m. On examination, he found that P.W.1's chest had tenderness and that a blunt object had been used to inflict the injuries. He assessed the degree of injuries as harm and signed the P.3 form which was produced in evidence. **Cpl Wilson Inyamala** (P.W.5) of Port Victoria Police Station was the investigating officer. On **29th February, 2005** at around 10.30 a.m., he received a report that P.W.1 had been attacked and robbed of his bicycle on **28th February, 2005.** According to P.W 5, P.W.1 gave the name of one of the attackers as "*Tiger*".

P.W.1 alleged that he knew the second attacker by appearance; that while in company of other police officers, P.W.5 led by P.W.1 proceeded to Tanaka area and carried out a search whereby a bicycle and a bicycle saddle were recovered from two different houses in the area and that P.W.1 identified the bicycle and bicycle saddle as the items which were robbed from him during the robbery. P.W.5 arrested the appellant and later, the appellant's co-accused (**Wycliffe Ndombi Musibayi**). The two were charged with the offence of robbery with violence at Busia Law Courts. At the conclusion of the trial, they were found guilty and convicted for the offence.

In his defence, the appellant gave a sworn statement of defence and called no witness. He stated that on **28th February, 2005,** he went on his boda boda business and worked from morning upto 6 p.m. when he went home and slept; that on **29th February, 2005**, he woke up in the morning and went to his boda boda business but as he was not however feeling well, he went back home and sat outside his house to have some rest; that at about 10.00 a.m., police officers went to his home and he was arrested and taken to Busia police station. He was later arraigned in court and charged with the current offence which he denied. On the other hand, **Wycliffe Ndombi Masilibayi** (D.W.2) also gave a sworn statement and did not call any witness. He alleged that he is a radio repairer apprentice and that on **24th February, 2005**, he had traveled to Uganda to buy radio spare parts and that he was arrested at Busia upon his return to Kenya while preparing to board a vehicle. According to him, it was alleged that the radio had been stolen from the bus stage. He was taken to Busia Police Station and later charged with an offence he did not commit. He claimed that at the police station, he was told that a person with a similar name had been arrested and discharged and that the officer insisted that he was the one who had committed the offence which he denied. However, the appellant and his co-accused were found guilty as charged. The learned magistrate dismissed the appellants' defences as mere denials. He then sentenced the appellants to suffer death.

The appellant was dissatisfied by those findings and moved to the High Court at Busia on grounds that there was no positive identification; that the ingredients for the offence of robbery with violence were not proved; that some important witnesses were not called; that his defence was rejected without consideration and that the doctrine of recent possession was not established.

As stated earlier, **D.A. Onyancha** and **F.N. Muchemi, JJ.**) dismissed the appellant's appeal. Still dissatisfied, the appellant moved to this Court on a second appeal and in a Supplementary Memorandum of Appeal dated **10th May, 2019,** he faulted the learned judges for failing to consider or subject the evidence to a fresh scrutiny, re-evaluate and analyze the evidence to the required standard; failing to find that the voice identification relied upon for conviction was inconclusive and unreliable; and that all the ingredients for the offence were not proved.

The appeal came up for virtual hearing before us on **21st October, 2020**. **Miss Anyango**, holding brief for **Mr. Lugano**, counsel for the appellant relied entirely on the appellant's written submissions dated **30th**

July, 2019. The appellant contended that in a conviction based on voice identification, care must be taken to ensure that the voice is that of an accused person and that the offence of robbery with violence was not proved as the ingredients of the offence of robbery were lacking. It was the appellant's further submission that there was no proof that P.W.1 was the owner of the bicycle recovered from P.W.3.

Mr. Kakoi, learned counsel for the respondent relied on the respondent's written submissions dated **23rd July, 2019**. In opposing the appeal, the respondent contended that contrary to the appellant's assertion, the 1st appellate court re-analyzed and re-evaluated the evidence of the trial court; that the essential ingredients of the offence of robbery with violence were proved; that the appellant was well known to P.W.1 as he knew him by name, him being a fellow bicycle rider and that there was moonlight at the time of the robbery, that P.W.1 knew the appellant's home and mentioned the appellant to P.W.2 immediately after the robbery; that the appellant's alibi defence was considered and finally, that the sentence imposed was then the mandatory sentence.We have considered the record, the rival written submissions and the law. The appeal before us is a second appeal and hence this Court's mandate is restricted to addressing itself to matters of law only. This Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence or they are based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in making the findings. See the case of ***Kaingo versus Republic [1982] KLR 213*** at page 219 wherein this Court stated thus:-

> ***"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]."***

Firstly, the 1st appellate court discounted the respondent's evidence on voice identification. It stated:

> ***"The defence counsel Mr. Masiga argued that the voice identification was unreliable because the actual words said by the aggressor were not quoted. We are aware of the law on voice identification and it is required that the exact words uttered be cited. The trial magistrate did not deal with the requirement. We come to a conclusion that voice identification was not established".***

The 1st appellate court having discounted the evidence on voice identification, the appellant ought not to have raised it as a ground of appeal as the 1st appellate court agreed with him. However, as regards the identification/recognition of the appellant, we find that although the time was about 5 a.m. and hence dark, P.W.1 testified that there was moonlight and he was able to see the appellant who was his colleague in the bicycle taxi business. He told P.W.2 that he knew one of the attackers. Subsequently, the appellant led the police to the house of the appellant where, although nothing was recovered therein, a bicycle and a bicycle saddle were recovered from the house of P.W.3. These items were taken to P.W.3 by the appellant's co-accused, who was known to P.W.3 as "**Taa Mbili**".

In our view, P.W.1 positively identified the appellant as the appellant was his colleague in the bicycle taxi business. P.W.1's identification of the appellant was made possible by the presence of moonlight.

As for the appellant's complaint that the ingredients for the offence of robbery with violence were not established, we find that the appellant's evidence during the trial showed that all the ingredients for the offence of robbery were established. He stated:

> ***"Someone emerged from the barber shop/shade and flashed a torch at me. I asked the person why he was doing that but he did not stop. The person grabbed the bicycle and asked me to decide whether they let me dine (sic) or I surrender the bicycle. He said I should either choose to be killed or leave the bicycle behind. He was holding the carrier while I held the handle bars. As we pulled the bicycle either way, another person came and slapped me on the back using the bicycle lock. I let go the bicycle and fled. The one armed with the panga chased me as the other one went away with the bicycle towards Tanaka hospital".***

In ***Oluoch vs. Repubic [1985] KLR*** it was held:

> ***"Robbery with violence is committed in any of the following circumstances:***
>
> ***The offender is armed with any dangerous and offensive weapon or instrument; or the offender is in company with one or more person or persons; or***

At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ... " *(our own emphasis)*

The appellant herein was in company of another. They were armed with a panga and they threatened to kill P.W.1. Indeed they even assaulted P.W.1 and robbed him of his bicycle. In our view, all the ingredients for the offence of robbery with violence were satisfied.

Accordingly, we are satisfied that the 1st appellate court properly re-evaluated the evidence tendered in the trial court and came to the conclusion, rightly so in our view that the appellant's conviction was safe. The appellant's appeal against conviction is dismissed.

However, as regards sentence, the appellant was sentenced to death on **3rd March, 2006**. When asked to mitigate, the appellant offered no mitigation. This may well have been so given the fact that at the time, death sentence was mandatory and the appellant's mitigation, if any would not have altered the sentence to be imposed. Luckily for the appellant, the Supreme Court of Kenya in the decision of ***Francis Karioko Muruatetu & another vs. Republic [2017] eKLR*** has since held that the mandatory nature of a death sentence is unconstitutional. Our perusal of the record does not indicate whether the appellant was a 1st offender or not. We think this was an omission on the part of the trial court as it failed to call for a certificate of conviction of the appellant.

Be that as it may, we take into consideration that the appellant did not harm P.W.1, and that during the robbery, the item stolen, a bicycle was recovered. We also take into consideration the fact that the appellant has been in custody since his arrest on **27th April, 2005** and the subsequent conviction and sentence on **3rd March, 2006**.

Consequently, we find it befitting to reduce the appellant's sentence to the term already served.

It is so ordered

Dated and Delivered at Nairobi this 18th Day of December, 2020.

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR