IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO 199 OF 2016

BETWEEN

JOHN WAMBINGWA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(*An appeal from the judgment of the High Court of Kenya at Bungoma (Ombija & G.B.M.Kariuki, JJ)*

in H.C.CR. A No 29 of 1998)

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JUDGMENT OF THE COURT

Background

[1] **John Wambingwa** (the appellant), was charged before the Senior Principal Magistrate's Court at Bungoma with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that on the night of 26th May 1996 at Marrel area in Bungoma District jointly with others not before the court, he robbed, **Charles Wakholi (Charles),** the complainant herein of cash Kshs 80,000.00, two radio cassettes and one bicycle; and at the time of such robbery he threatened to use actual violence on the said **Charles.**

[2] The evidence was that on 26th May 1996, **Charles** and his wife **Everline Mukholi (Everline)** were asleep in their home when the door was forced open and some people entered the house. One of the intruders poured salt in the eyes of Charles and his wife and beat them. Charles was rendered unconscious by this beating, while **Everline** was forced to get under the bed. **Rose Nafula (Rose)** who was sleeping in the kitchen was woken up by the commotion. She went outside and saw two people standing near the kitchen. She then heard Charles screaming and tried to go into the house to check on what was happening, but someone ordered her to go back to the kitchen. She recognized this person as the appellant. The person was six (6) paces away from Rose. He was holding a stone and a torch, and was wearing a blue shirt, a black coat, trouser and gum boots. Rose had seen the appellant wearing the same clothes before. She saw some assailants come out of the house, carrying among other items, a bicycle. **Rose** testified that there was moonlight on the material night.

[3] The robbery was investigated by **PC. Chris Gesora (PC Gesora)** who was at the material time attached to the Sangalo patrol base. He testified that he received the report from **Everline** about the robbery and went to the scene of the crime. PC Gesora further testified that one of the witnesses claimed that she had identified the appellant. Based on this evidence, PC Gesora went to the appellant's home and arrested him.

[4] In his defence, the appellant denied committing the offence he was charged with. He testified that the complainant was his brother; that he had gone for medical treatment at Bungoma District Hospital after which he visited his wives and then went to bed at 5:00 am. until 7.00am. when he returned to the hospital and that on 27th May 1996, he was at his home all day; that he was informed that his brother, the complainant had been assaulted; and that he went to see him at the hospital and returned to his home. **[5]** After reviewing this evidence, the trial court was satisfied that the appellant was properly identified as one of the people who robbed the complainant and convicted him accordingly.

[6] The appellant was aggrieved with that decision and filed an appeal to the High Court. The appellant faulted the trial court for relying on the evidence of a single identifying witness yet the conditions for identification were difficult; that the evidence relied on with respect to the

single identifying witness was inconsistent; and for failing to take into consideration that the appellant's alibi had not been displaced.

[7] The High Court, (Ombija and G.B.M. Kariuki, JJ) after re-evaluating the evidence tendered before the lower court, found that the appellant was recognized by **Rose** which displaced the appellant's alibi defence. The court concluded that the evidence as a whole established that the appellant was among the robbers who attacked the complainant. His appeal was therefore dismissed.

[8] The appellant was undeterred and filed this second appeal in which he faults the first appellate court for erring in law and fact by: relying on the uncorroborated evidence of one identifying witness; relying on the evidence of recognition when the circumstances of recognition were not clear, and for upholding the conviction of the appellant.

Submissions

[9] The appeal was argued by **Mr Angu Kitigin,** learned counsel for the appellant. Counsel submitted that the trial court fell into error in accepting the evidence of recognition when the circumstances were not favourable for positive identification as the witness was in shock and in the circumstances would not have had the opportunity to properly observe what was happening around her; that she was at least six (6) paces away from the person whom she identified as the appellant. In his view, since the conditions for recognition were unfavourable, there was doubt the benefit of which should have been given to the appellant. Counsel further submitted that the appellant had an alibi which was dismissed by the two courts below when in fact, the onus to disprove the alibi fell on the prosecution. Counsel argued that since the prosecution did not tender evidence to displace the appellant's alibi, the evidence remained uncontroverted and therefore the conviction was in error.

[10] **Mr Omwega**, the Senior Assistant Director of Public Prosecution opposed the appeal on behalf of the respondent. He argued that the circumstances were favourable for positive recognition as it was clear that there was moonlight on the material night and **Rose** knew the appellant; that **Rose** had adequate time to look at the appellant, and was able to point out the specific clothes that the appellant was wearing on the material night; that both the trial court and the first appellate court appreciated the need to warn themselves of the danger of relying on the evidence of a single witness and were satisfied that her evidence was credible before accepting it. Counsel urged us to find that the first appellate court properly conducted its duty of re-evaluating the evidence and arrived at the correct decision. Counsel urged us to dismiss this appeal.

Determination

[11] This is a second appeal. Accordingly, we are enjoined both by **section 361** of the Criminal Procedure Code as well as previous decisions of this Court to consider only matters of law. In ***DWM v Republic*** ***[2016] eKLR (Criminal Appeal 12 of 2014)*** this Court stated:

> ***"This Court is restricted to addressing itself to matters of law only. It 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."***

[12] The first issue of law that arises is whether the evidence of recognition was properly accepted by the trial court. Evidence of recognition ought to be carefully considered, particularly where it is that of a single identifying witness. In ***Wamunga versus Republic*** ***[1989] KLR 424*** at 426 this court rendered itself on this caution in the following terms:

> ***"…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."***

[13] This caution, is repeated in ***Tipapek Kimiti alias Ole Lemurinka v Republic*** ***[2006] eKLR (Criminal Appeal 2 of 2006)*** in the following terms:

> ***"It is now trite law that when the evidence before a court of law is mainly that of a single witness on identification, the court has to be extra careful before entering a conviction. That need for extra care is not reduced even when the evidence is that of recognition for there may be cases where even people who know each other very well may still make mistakes. In such circumstances, the court needs to see if there is other evidence to lend assurance as to guilt of the suspect before it, before it can enter conviction."***

[14] We have carefully considered the evidence of the identifying witness, **Rose**, who clearly stated that she saw the appellant, who is her uncle. **Rose** was even able to describe the clothes that the appellant was wearing on the material night; it was her testimony that she had previously seen the appellant wearing the same clothes.

[15] **Rose** testified that there was moonlight on the material night. The learned trial magistrate in his judgment found as follows:

> ***"The court is satisfied that the existing circumstances were such as could enable positive recognition … the court is however satisfied that the said witness (Rose) told the court the truth and she was not mistaken at all. The testimony of the investigating officer, PC Gesora was that one of the witnesses claimed that she had identified the appellant and gave the name of the appellant. On the basis of this evidence the appellant was arrested."***

[16] Having evaluated the circumstances surrounding the identification of the appellant, we are satisfied that they were favourable for recognition, and that the trial court and the first appellate court did not err in relying on **Rose's** evidence.

[17] The second issue of law relates to the appellant's alibi defence. The appellant claimed that he was at his home at the time of the robbery. It is trite law that the burden of disproving an alibi rests on the prosecution. In the case of ***Kiarie Vs Republic [1984] KLR*** this Court rendered itself on this point in the following terms:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons."***

[18] In ***Victor Mwendwa Mulinge v Republic [2014] eKLR Criminal Appeal 357 of 2012*** this Court stated that the burden of proving if an alibi is false rests on the prosecution. The Court, relying on ***Karanja v Republic [1983] KLR 501*** further expressed itself as follows:

> ***"…a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."***

[19] We have considered the appellant's alibi defence, and like the two courts below, we find that the prosecution evidence placed the appellant at the scene and hereby, displaced the appellant's alibi.

[20] Regarding sentence, in the recent Supreme Court decision in **Francis Kariako Muruatetu & Another vs Republic [2017] eKLR, Petition No. 15 of 2015**, (**Muruatetu decision**) the Supreme Court held that although the Constitution recognizes the death penalty as being lawful, the mandatory nature of the death sentence as provided under sec. 204 of the Penal Code rendered the section unconstitutional as it took away the discretion of the court in determining the sentence that should be imposed.

[21] Section 204 is similar to Section 296 (2) of the Penal Code that provides a mandatory death sentence. The **Muruatetu decision** has been applied to cases of robbery with violence under Section 296 (2). (**William Okungu Kittiny vs Republic,** Civil Appeal No. 56 of 2013 (unreported), where applying the **Muruatetu decision**, we held as follows:

> ***"…the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to section 296(2) and 297(2) of the Penal Code. Thus, the sentence of death under section 296(2) and 297(2) of the Penal Code is a discretionary maximum punishment. To the extent that section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the sections are inconsistent with Constitution."***

[22] For this reason, we find it appropriate to interfere with the death sentence imposed by the trial court. In our view, given the circumstances of the offence, a sentence of twenty (20) years imprisonment would be appropriate.

[23] For the foregoing reasons, the appeal against conviction is dismissed. However, the appeal against sentence is allowed. The sentence of death is set aside and in substitution therefor the appellant is sentenced to serve twenty (20) years imprisonment to take effect from 11th March, 1997 when the appellant was sentenced.

Those shall be the orders of the court.

[24] In the result, we find that this appeal has no merit, and we hereby order it dismissed.

Dated and delivered at Eldoret this *6th* day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.