IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)

CRIMINAL APPEAL NO. 206 OF 2013

BETWEEN

PAUL EKWAM ERENG' ……...…….. APPELLANT

AND

REPUBLIC ……..RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Eldoret,

(F. Ochieng & G.K. Kimondo, J.) dated 28th November, 2013

in

H.C.CR.A. NO. 36 OF 2011)

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JUDGMENT OF THE COURT

1. This is a second appeal. The appellant 's first appeal was dismissed by the High Court thus provoking this one.

2. The appellant was charged with the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code. The particulars of the offence alleged that on 12th October, 2010, at Mois Bridge Trading Centre in Eldoret East District of Rift Valley Province, jointly with others not before court and while armed with metal bars, the appellant and his confederates robbed Moses Mburu Musundi (the complainant) of cash of Kes.7,000/=. It was further alleged that at or immediately before or immediately after that robbery the appellant and his confederates subjected the complainant to actual violence.

3. The appellant pleaded not guilty but after trial he was convicted and sentenced to death. As we have stated, his appeal to the High Court was dismissed thus provoking this one.

4. In his memorandum of appeal, the appellant complained that he was not properly identified and that his conviction was based on contradictory evidence. Amplifying those grounds of appeal, Mr. Kitigin, learned counsel for the appellant, submitted that the appellant was not positively identified as one of the people who robbed the complainant. He argued that the intensity of the light at the

petrol station in the proximity of which the robbery was committed and the exact distance from there having not been stated, it cannot be said that the complainant clearly saw his attackers. Moreover, counsel further argued, having previously not had any dealings with the appellant, the complainant's testimony that he had known the appellant cannot be believed.

5. Counsel for the appellant further submitted that the prosecution witnesses contradicted themselves. He said the complainant did not state he was robbed of Kes.7,000/=. It is PW2 who gave that figure. While the complainant said the robbers were 10, PW2 said they were 7. Moreover, counsel concluded, the trial court did not warn itself of the danger of basing the appellant's conviction on the evidence of visual identification only. On those submissions, counsel urged us to allow this appeal.

6. Opposing the appeal, Mr. Mulati, learned Principal Prosecution Counsel submitted that the witnesses gave an approximate number of the robbers. On identification, Mr. Mulati submitted that the robbery was committed near a petrol station with bright lights which enabled the complainant to clearly see his attackers. It was out of that clear identification that the complainant was later able to identify the appellant and get him arrested.

7. We have carefully read the record of appeal and considered the grounds of appeal alongside the rival submissions made by counsel for the parties. On identification, PW1, PW2 and PW3 testified that the light from the petrol station enabled them to identify the appellant. PW3 said in addition to the light from the petrol station, there was also bright moonlight. PW1 and PW3 said PW1 was robbed *"on reaching"* the petrol station. PW1 and PW3 said they identified another person out of the 7 to 10 robbers in addition to the appellant. PW2 identified that other person as one Ojiji who has never been arrested. We find that there was sufficient light that enabled the witnesses to clearly see their attackers.

8. The appellant was not a stranger to PW1, PW2 and PW3. PW1 and PW3 said they had known the appellant for about one month. They used to see him pass outside their workshop. PW2 on his part had known the appellant for about six months and even knew his nickname of Lokodong. This was therefore a case of recognition which is more certain and more reassuring than mere identification of a stranger—**Anjononi v. Republic, [1980] KLR 59.**
9. On this evidence, we are satisfied that PW1, PW2 and PW3 clearly identified and recognized the appellant. The grounds based on identification therefore fail. Contrary to the submissions by counsel for appellant, the trial court is supposed to warn itself of the danger of basing a conviction on the evidence of a single visual identification witness-- **Ogeto-Vs-Republic, [2004] 2 KLR 14**. In this case the appellant was identified by three witnesses, PW1, PW2 and PW3.

10. The contradictions raised by counsel for the appellant related to the number of robbers and the amount PW1 was robbed of. In his testimony, PW1 said the attackers were 10 and he was robbed of some money. PW2 said the robbers were 7 and that PW1 told him he had been robbed of Kes. 7,000/=. We agree with Mr. Mulati that those were minor contradictions which did not prejudice the appellant.

11. For these reasons, we find no merit in this appeal and we accordingly dismiss it.

Dated and delivered at Eldoret this 17th day of February, 2016.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR