IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 11 OF 2014

BETWEEN

JOSEPH OGUTU……....……..APPELLANT

AND

REPUBLIC…… RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kisumu (Muchelule & Chemitei, JJ.) dated 10th December, 2013

in

H.C.CR.A. No. 50 OF 2012)

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JUDGMENT OF THE COURT

1. **JOSEPH OGUTU**, the appellant, together with two others, were charged with two offences. The first one was robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of that charge were that during the night of 14th September 2011 at Nyalenda Estate in Kisumu District (now Kisumu County) jointly, while armed with dangerous weapons namely pangas, they robbed Nelson Wanjala (the complainant) cash Kshs.3,000/= and at or immediately before or immediately after that robbery they applied actual violence to the said Nelson Wanjala. The second count was malicious damage to property contrary to Section 339(1) of the Penal Code. The particulars of that charge were that during same night and at the same place, the appellant and his confederates wilfully and unlawfully damaged one window and one door both valued at Kshs.8,000/=, the property of the said Nelson Wanjala.

2. After trial they were convicted on both counts and sentenced to 15 years' imprisonment on count 1. One of the accused persons was discharged under Section 35(1) of the Penal Code on the second count but the appellant and the other one were apparently not sentenced on count two. The appeals of the appellant's confederates were allowed by the High Court but that of the appellant was dismissed and his sentence on count 1 was enhanced from 15 years' imprisonment to death. The appellant has now come to this court on a second appeal.

3. In his memoranda of appeal, the appellant faults the learned Judges of the High Court for failing to properly re-evaluate the evidence on record; failing to note that the trial court shifted the burden of proof

to the appellant; and enhancing the sentence without notice.

4. Presenting the appeal before us, Ms Nabifo, learned counsel for the appellant, submitted that had the High Court properly re-evaluated the evidence on record, it would have realized that there was no sufficient evidence to support the appellant's conviction. As the intensity of the light at the scene was not stated, counsel argued that the appellant's identification was doubtful. On sentence, she submitted that without notice to the appellant, the enhancement was unlawful.

5. Mr. Ketoo, learned prosecution counsel, opposed the appeal. He submitted that this was a case of recognition and the appellant was therefore properly identified. On sentence, he argued that as the High Court simply set aside an illegal sentence and imposed the lawful one, there was no need for notice to the appellant.

6. We have considered the grounds of appeal, the rival submissions by counsel on both sides and carefully read the record of appeal. The prosecution case was that Simon Agola, PW4, is the appellant's father who owns 25 rental units at Nyalenda Estate in Kisumu. He and the appellant occupied one unit each. The complainant was one of PW4's tenants. Prior to the robbery, which gave rise to this appeal, the appellant and his confederates had assaulted one Peter who took refuge in the complainant's house. That assault was reported to police and the prosecution of the appellant and his confederates was imminent.

7. After mid-night on the material day, the complainant and his wife, PW2, testified that they heard a voice demand "fungua mlango," that is, "open the door". The Complainant said he identified the voice as that of the appellant whom he knew well. They did not open the door. The appellant and his confederates, however, broke and entered the house and asked the complainant to put on some light and the witnesses lit a kerosene lamp. That enabled them to see the intruders clearly. The intruders then started looking for the P3 form the police had issued to the said Peter whom they had assaulted. In the course of that illegal search, they also robbed the complainant of Kshs.3,000/= after assaulting him.

8. The appellant's father, PW4, testified that upon hearing noise in the complainant's house, he peeped through the window and saw the appellant, who is his son, and two other people breaking into the complainant's house. Another neighbour, one Arthur Otieno, PW6, answered the complainant's distress call and also saw the appellant.

9. On that evidence, we are satisfied that the appellant's identification was not in doubt. The complainant and his wife as well as PW6 knew him well. They lived in the same estate with the appellant and the complainant was living on the same plot. The appellant and his friends took time looking for Peter's P3 form and with the light from the kerosene lamp, the complainant was able to see them well. There is of course no question of PW4 mistaking his own son for someone else. He said there was moonlight which enabled him to see the appellant and his confederates.

10. On this evidence, we are satisfied that this was a case of recognition and the appellant's identification was flawless. In the circumstances, we find no merit in the appeal against conviction.

11. The appellant was convicted of capital robbery which carries a mandatory death sentence. The sentence of 15 years' imprisonment imposed on him was therefore illegal. In correcting an illegal sentence, there is no need of giving the appellant notice of enhancement.

12. For these reasons, we find no merit in this appeal and we accordingly hereby dismiss it in its entirety.

DATED and delivered at Kisumu this 12th day of February, 2016.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR