IN THE COURT OF APPEAL

AT KISUMU

(CORAM: AZANGALALA, GATEMBU & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 251 OF 2012

BETWEEN

BULIBA MURUNDU ..... APPELLANT

AND

REPUBLIC ….....RESPONDENT ***(Appeal from a Judgment of the High Court of Kenya at Kakamega,***

(D. Onyancha & I. Lenaola, JJ) dated 25th January, 2012

in

HCCRA NO. 172 OF 2009)

****

JUDGEMENT OF THE COURT

It was about 7:00 p.m. on 1st October, 2008 when **E O (PW1) (E)**, a teacher at a school in her locality who also doubled as a shopkeeper, was on her way home from school. On nearing the gate to her house she thought she heard footsteps from behind but before she could turn to have a look a man grabbed her violently and gagged her mouth with a piece of cloth meaning that she could not scream for help. He demanded for money. The sound of his voice surprised E because the voice was that of the appellant, her neighbour who frequently bought cigarettes at her shop. She firmly informed him that she had no money which infuriated him and he threw her to the ground and started strangling her while also removing her clothes. She believed he was about to rape her. He reached her biker, an inner cloth where he found Shs. 6,000/= which she had hidden there. He grabbed it. E was all along holding a mobile phone which had a spotlight which she now switched on and shone on his face and this confirmed her worst fears that it was indeed her neighbour, the appellant, who was attacking her. When she shone the torch on his face he promptly produced a knife and threatened to kill her if she did not surrender the phone. She flung the phone away which was a smart move because it made the appellant let go of her and he went for the phone instead. She got the opportunity to scream for help and this made the appellant to flee from the scene and neigbhours came to her help.

E believed that the appellant had had every intention to rape her and only stopped when he came by the money hidden in her inner clothes.

These were the facts that were established by the trial court and confirmed by the first appellate court.

The appellant was therefore charged before the Senior Resident Magistrate's Court, Butere, on two counts – the first being of robbery with violence contrary to Section 296 (2) of the Penal Code and the second count being attempted rape contrary to Section 4 of the Sexual Offences Act No. 3 of 2006. Particulars of the first count were that on 1st October 2008 at 7:00 p.m at [particulars withheld] village in Kisa Central Location of Butere while armed with a dangerous weapon namely a knife he robbed the complainant of Kshs. 6,000/= and a mobile phone Nokia 1100 all valued at Kshs. 11,900/= and that at or immediately after the time of such robbery threatened to use actual violence to the said complainant. Particulars of the second count were that on the said day at the said time and place he unlawfully attempted to have carnal knowledge of the complainant without her consent.

A trial took place before the learned Senior Resident Magistrate (B. O. Ochieng) who in a judgement delivered on 13th November, 2009 convicted the appellant on the first count and sentenced him to death. There were no findings made in respect of the second count. The appellant was dissatisfied with those findings and filed an appeal at the High Court of Kenya, Kakamega. The appeal was heard by D. A. Onyancha and I. Lenaola, JJ, and in a judgement delivered on 25th January, 2012 dismissed the appeal. That dismissal provoked this appeal which is premised on four grounds of appeal as set out in the Memorandum of Appeal drawn by learned counsel for the appellant, Miss Florence Anyango. The grounds are:

> **"1. The Superior Court erred in law by failing to quash the conviction and sentence of the Appellant on the basis of Article 50 (2) (h) of the Constitution of Kenya.**
>
> **2. That the Superior Court erred in law by confirming the conviction on the basis of a defective charge sheet.**
>
> **3. The charge of Robbery with violence under Section 296 (2) of the Penal Code was never proved beyond reasonable doubt as required by the law.**
>
> **4. The Superior Court erred in law by upholding the death sentence."**

The position in law is that in a second appeal like this one our concern is to deal only with issues of law but not matters of fact which have been established by the trial court and confirmed on first appeal. We respect those factual findings unless it can be shown that there has been a misdirection on the treatment of facts or the findings of fact are not based on evidence. That is the essence of Section 361 (1) (a) Criminal Procedure Code. This Court has pronounced on this in many of the decisions that have come forth such as **Njoroge v Republic [1987] KLR 19; Thiongo v Republic [2004] IEA 333 and Aggrey Ochieng Aguch & Anor (Kisumu) Criminal Appeal No. 367 of 2008 (ur).**

The case for the prosecution was essentially what we set out as we began this judgement. E gave that testimony adding that she reported the matter to a village elder, **Joseph Sande (PW2) (Sande)** and to Khwisero Police Station.

No. 53012 P. C. Wanyama (PW3) testified that he received a report from Elizabeth who was accompanied by Sande and upon investigating the matter he arrested the appellant on 28th November, 2008 and charged him with the offences set out.

The trial Magistrate found that there was a case calling upon the appellant to answer and in the unsworn statement that the appellant elected to make the appellant denied committing the offences reminding the court that nothing had been recovered from him. The trial magistrate considered the whole case and convicted him. The first appeal was dismissed.

Miss Anyango, the learned counsel for the appellant in urging the appeal before us abandoned the first ground that related to alleged breaches of Article 50 of the Constitution. That ground was abandoned

after it became apparent to learned counsel that the said Article of the Constitution of Kenya 2010 could not have had application in the trial that began in 2008 and ended in 2009. The other grounds were then taken together with counsel submitting that the prosecution evidence was insufficient and should not have led to a conviction. Counsel reminded us that neither the knife nor the stolen items were found at all and cited **Daniel Njoroge Mbugua v Republic [2014] e KLR and Samson Orwerwe v R [2014] e KLR** in support of the proposition that ingredients to satisfy a charge of robbery with violence had not been proved.

Mr. C. A. Abele, the learned Assistant Director of Public Prosecutions supported conviction and sentence. Counsel submitted that it was enough for the prosecution to establish only one but not all the three ingredients to prove a charge of robbery with violence to lead to a conviction. Although only the complainant was an eye-witness to the robbery counsel submitted that the evidence was so overwhelming against the appellant that the conviction was safe.

We have considered the whole record, the Memorandum of Appeal and submissions made to us by learned counsel on both sides.

On the alleged defective charge sheet learned counsel for the appellant submitted that the charge sheet was defective because it was not supported by the evidence contrary to Section 214 of the Criminal Procedure Code.This submission appears to cover grounds 2 and 3 of the Memorandum of Appeal.

The charge sheet on count 1 was on robbery with violence contrary to Section 296 (2) of the Penal Code with particulars being those we have already set out in this judgement .

E, the complainant, testified how she was walking home from school when she was attacked by her neighbour, the appellant, who took her money and mobile phone after threatening her with a knife.

The ingredients of the offence of robbery with violence were considered in **Daniel Njoroge Mbugua v Republic (supra)** which quoted **Oluoch v Republic [1985] 549 KLR** where it was held that robbery with violence is committed in any of the following circumstances:

> **"(a) the offender is armed with any dangerous and offensive weapon or instrument; or**
>
> **(b) The offender is in company with one or more person or persons; or**
>
> **(c) 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 ..." (*emphasis added.)"***

These ingredients which form the said offence are exclusive and the prosecutions duty is to prove one but not all of them.

In the instant case it was proved to the required standard that the appellant, while armed with a knife attacked the complaint. He proceeded to rob her of the money and a mobile phone. The complainant knew the appellant very well as a neighbour who lived a mere 200 metres from her house and he used to buy cigarettes at her shop. The appellant spoke to the complainant during the robbery while demanding money and the phone and the complainant not only recognized his voice but saw him clearly when she shone the spotlight on her phone upon his face. The complaint by the appellant has no basis at all as he was clearly recognized by the complainant as he struggled with her.

The final ground of appeal is an attack on the first appellate court which upheld the sentence of death imposed by the trial court. We were not addressed on this ground by counsel at all.

The offence that faced the appellant in respect of count 1 was one which carried a death sentence upon conviction of a person charged with such an offence. The trial court did its duty upon conviction and we can see no error in law in the first appellate court upholding that sentence. The death sentence is not

illegal in Kenya at all.

On our own consideration the first appellate court carried out its duty of re-evaluating the evidence and came to proper conclusions on hearing the first appeal.

The upshot of our findings is that the appeal lacks merit and we accordingly dismiss it.

Dated and Delivered at Kisumu this 19th day of September, 2014.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

K. GATEMBU

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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