IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 106 OF 2011

FRANCIS KINYUA JOHN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising from the judgment of the High Court of Kenya at Meru (Lesiit & Kasango, JJ.) delivered on 31st March, 2011

in

H.C. CR. A. No. 10 of 2009)

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JUDGMENT OF THE COURT

[1] On 13th day of January, 2001, at the Senior Principal Magistrate's Court at Nkubu, **Francis Kinyua John**, the appellant was convicted of the offence of robbery with violence contrary to **Section 296(2)** of **the Penal Code**. Upon conviction, he was sentenced to death. He appealed against the conviction and sentence in the High Court Meru and on 31st March, 2011, that appeal was also dismissed. Being dissatisfied with the outcome, the appellant has appealed before this Court on the following three grounds to wit;-

1. ***The learned Judges of the High Court erred on a point of law in failing to closely examine the circumstances under which the identification by each witness was made.***

2. ***The learned Judges of the Superior Court erred on a point of law in upholding the conviction of the appellant by the trial court when all the ingredients of the charge of robbery with violence had not been proved against the appellant.***

3. ***The learned Judges of the Superior Court on a point of law in failing to subject the whole***

evidence which was tendered before the trial court to a fresh and exhaustive examination.

[2] The facts of this case are simple, on 18th March, 2006, at about 8 p.m., M K was inside her house with her son and a neighbour by the name Hellen Kagwiria (PW3) who had come to pick salt and milk but had been offered a cup of tea and stayed on to drink it. While inside the house, some people ordered K to open the door to the house but she resisted. The door was hit with a stone and some three assailants whom K named as Francis Kinyua (*appellant),* his brother Reuben and another of his relative called David forced their way into the house. The appellant demanded to be given Ksh.3,000/= which K had been paid by a Women's group. K refused to part with the money and the appellant stabbed her with a knife on the check.

[3] K fell down and lost consciousness, but after sometimes, she came to her senses and in the company of Hellen, they made a report at Mujwa Police Station.The police advised her to go to hospital the following day since they did not have a motor vehicle. She went to hospital and the P3 form regarding the injuries she sustained was completed by Dr. Macharia from Meru District Hospital; by that time the injuries were 12 days old. In his opinion, the injuries were caused by a sharp object.

[4] L K, PW 2 K,s son, a young lad described by K as a child and although his age was not established, gave his evidence on oath. He stated that he was in class 6.They were having dinner with his mother and Hellen Kagwiria when three people known to him as neighbours broke into their house and attacked his mother with blows and knives. The intruders were demanding for money which his mother had been given by a women's group. The intruders took the money from under the bed and ran away. This witness was not injured; he said he was able to see the assailants with light from a tin lamp.

[5] Hellen Kagwiria, PW3, also said she was able to identify the intruders as Reuben, David and the appellant. It was the appellant who stabbed K with a sword which he removed from his hip. At first Hellen hid behind the door when K was attacked, then she managed to run outside and hid behind a heap of timber until the intruders left the compound. Hellen and K accompanied K to the police station at Munjwa, they were advised to go to hospital. The following day is when K discovered her money was stolen and she made the second report to Police Constable Stanley Mwithya (PW4) of Mujwa Police Base. When the first report was made, the complainant said she knew the attackers were her neighbours and she mentioned their names as Reuben and David who were all related to the appellant. The appellant was arrested on 22nd February, 2006, and charged with the offence of robbery with violence.

[6] In convicting the appellant, the learned trial magistrate relied on the evidence of recognition of the appellant. He was described as a neighbour who was well known to the complainant and the two witnesses; all the witnesses were able to recognize the appellant using the light from a tin lamp: the appellant who was among the attackers used violence against the complainant; stabbed her on the right check thereby causing her serious injuries that made her lose consciousness; The appellant with his accomplices stole Kshs. 3,000/= which the complainant had received from a women's group and an additional Kshs. 800/= the proceeds of a sale of a tree.

[7] The High Court on a first appeal, correctly applied the decision in ***Okeno v R, [1972], EA 32***, in which the predecessor of this Court authoritatively set out what the duty of a Court on first appeal is. That way, the court was reminding itself of the duty which was squarely on it to re-evaluate the evidence and draw its own conclusions on the case. The High Court also cited the case of ***Anjononi & Others v R [1980], KLR*** on the question of identification. In the end, the learned Judges concluded that the appellant was properly convicted and sentenced. It is against that backdrop that the appellant has filed the present appeal.

[8] Mrs. Ntarangwi, learned counsel for the appellant relied on the following grounds of appeal found in the supplementary memorandum of appeal:

> 1. ***The learned Judges of the High Court erred on a point of law in failing to closely examine the circumstances under which the identification by each witness was made.***

2. The learned Judges of the Superior Court erred on a point of law in upholding the conviction of the appellant by the trial court when all the ingredients of the charge of robbery with violence had not been proved against the appellant.

3. The learned Judges of the Superior Court on a point of law in failing to subject the whole evidence which was tendered before the trial court to a fresh and exhaustive examination.

[9] In her address to us, she argued that the ingredients of robbery with violence were not established. A person accused of the offence of robbery with violence denotes that they must have stolen something, according to the charge sheet, a sum of Kshs. 3,800/= was stolen. This contradicts the report made to the police that Kshs. 3,000/= was stolen. This was the evidence of PW4 the police officer and also Hellen and K. Further, the complainant discovered the money was stolen one day later. The complainant did not see the attackers stealing the money, for this, the appellant could at worst be convicted with a lesser charge of inflicting serious bodily harm.

[10] Mrs. Ntarangwi also faulted the conviction of the appellant based on the evidence of identification as both courts below failed to analyze the intensity of the light emitted from a tin lamp. PW3 said she hid behind the door when the intruders forced their way thus she was not in a proper position to identify the attackers. Finally, both courts failed to evaluate the defence by the appellant; it raised the defence of *alibi* and the existence of a grudge involving a land dispute between the families of the appellant and the complainant. If this aspect was considered, there was likelihood even if the trial court believed the evidence of the prosecution witnesses, the appellant would only be found guilty of a lesser charge of causing grievous bodily harm as there was no proof that the appellant robbed K of her money.

[11] On his part, the learned Senior State Counsel, Mr. Makunja, supported the conviction and sentence handed down by the trial court and upheld by the High Court. He argued that all the three prosecution witnesses gave the name of the appellant and his accomplices to Police Constable Stanley Mwithya who testified as PW4. Moreover, the appellant was properly identified by the three witnesses through recognition; therefore, it was not necessary to evaluate the intensity of the light that emitted from the tin lamp. The complainant was seriously injured, and the injuries were confirmed by the P3 form, thus on the facts alone, the ingredients of the offence of robbery as stipulated in **Section 296 of the Penal Code** were present, the appellant was in the company of two other people, he stabbed the complainant with a knife or sword on the check and she later discovered her money was stolen from where she had hidden it under the bed.

[12] We are aware that this is a second appeal, and that being so, our concern is to deal with points of law. The three grounds raised in this appeal raise both points of law and facts; the points of law raised are in turn dependent on the two courts below findings of fact. The first point which was strenuously argued by Mrs. Ntarangwi for the appellant was that the ingredients of the offence of robbery with violence were not proved by the prosecution to the required standard. In the case of ***John Mwikya Musyoka v R, CR. A. 38 of 1999***, this Court held: -

"The offender must steal something. Proof of theft is an essential ingredient of the charge of robbery with violence. The only evidence in this case as pointed out by Mr. Tindika and not seriously challenged by Mr. Gacivii was that the complainant discovered after the attack that his 800/= went missing. There was no mention as to where it was taken from him. How much money the complainant had on that day, how much he had used at the bar buying drinks for his friends, and if indeed he had any money at the time he left the bar. Who knows if he could have dropped on the ground after the attack?

In our view in the absence of sufficient evidence to establish the theft of the Kshs. 800/=, the subject matter of the charge, the offence of robbery with violence contrary to Section 296(2) cannot be said to have been proved against the appellant."

[13] When the complainant was attacked, she fell and became unconscious. After sometime, she woke

up and went to report the attack to the police. At the police station, she was referred for treatment, it was after treatment, she went back to her house and found Kshs. 3,000/= missing. This is what Police Constable Mwithya who recorded the report told the trial court:

> ***"She went and came back the following day. She came back and told us that she was attacked by her neighbours whom she knew very well.She mentioned the name of the accused and also Reuben and David who are brothers to the accused. We referred her for treatment. She was treated and she went back to her house where she found the Kshs. 3,000/= in her house missing. We wrote a further report concerning that money....."***

[14] K herself told the court that she did not know who stole her money:

> ***"I actually don't know who took my money as I was unconscious. Hellen and my son were there when the thugs came but they ran away to ask for help....."***

According to the evidence, there were two rooms, the attack took place in the table room, it would appear the money was in the bedroom and it is only K who was described as a child who testified that:

"the thugs took money from my mother's bed."

The evidence of K was challenged before the High Court, but after exhaustive analysis and review of several authorities regarding the circumstances under which evidence of a child can be admitted, the learned Judges concluded that even if the trial court did not carry out an enquiry regarding the age of K that did not prejudice the prosecution's case. That was because there was corroboration of his evidence by K and Hellen. On the issue of the stolen money, the evidence of K was not at all corroborated as Hellen was categorical in her evidence that when the assailants struck, she hid herself behind the door. She was only able to recognize the thugs, and she ran away when they entered the bedroom. It is the following day that K discovered her Kshs. 3,800/= was missing. The actual amount that was stolen ranged between Kshs. 3,000/= and 3,800/= and the only evidence that was relied on to establish that something was stolen and therefore, the ingredients of robbery with violence was proved was the evidence of K. In view of his age, and the fact that there was no corroboration regarding the actual act of stealing, this evidence is shaky. There is doubt whether the money was stolen by the appellant or others after the assailants took off and the complainant went to report the matter and then went to hospital.

[14] The evidence on the injury suffered by the complainant though challenged by counsel for the appellant was not shaken. Based on the evidence of identification through recognition and immediate naming of the appellant as one of the persons who attacked K; we are satisfied the concurrent findings by the two courts below cannot be faulted. However, had the two courts below carefully analyzed the entire evidence regarding the offence of robbery with violence, they would have come to the conclusion that there was no proof that the appellant stole the money although there was sufficient evidence to support a lesser cognizant offence. Also the element of an existing grudge between the family of the appellant and the K's, which was alluded to in the defence of the appellant was not taken into account. The complainant and appellant being neighbours, an allegation of a grudge based on a land dispute was not farfetched; it would have motivated the complainant laying a more serious charge than the one which was committed against the complainant; we consequently find this defence was not given consideration.

[15] In our considered view the offence that was clearly proved was that of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code.**

Accordingly, the appellant should have been convicted of that lesser cognate offence which we hereby do and sentence him to 5 years imprisonment. To that extent, this appeal is allowed; the death sentence is set aside and substituted with a period of 5 years imprisonment with effect from the date of conviction by the trial court.

Dated and delivered at Nyeri this 13th day of November, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

….....

JUDGE OF APPEAL

J. OTIENO – ODEK

….....

JUDGE OF APPEAL

I certify that this is a

true copy to the original.

DEPUTY REGISTRAR