REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.38 OF 2013

JACOB OMONDI NYAGUNDI.....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

[Appeal from Original Conviction and Sentence from Siaya Principal Magistrate's Court by R. B. NGETICH – Ag. C/M

in Criminal Case No.75 of 2012.]

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J U D G M E N T

On the night of 29/2/11 at about 1 a.m. PW1 was asleep in his house when the door was kicked open suddenly by a person who came in and pulled the blanket he was covering himself with. The intruder demanded money saying the complainant had sold land. When told that there was no money, he attacked PW1 by hitting him on the cheeks and head using the panga that he was carrying. PW1 could hear other people talking outside but in low tones. He feared for his life and gave the attacker Kshs.5000/=. The attacker took 35 tins of maize and left, but after cutting PW1 on the right leg. PW1 went to wake up his brother Joseph Nyagudi Wandera (PW2) and son Nixon Ongor Atore (PW5) who took him to Mutumbu Health Centre for treatment. The incident was reported to Yala police station.

The evidence of PW1 was that he recognised his attacker as he was his neighbour. He was the appellant. As to how he was able to recognise him, the record shows that when the attacker came in he lit a tin lamp that was on a stool next to the bed and that it was from the light that he was able to see. The tin lamp was lit before the blanket was pulled off PW1. He informed PW2 and PW5 that the appellant was his attacker. He also informed P.C. Joseph Kagiri (PW4) of Yala Police Station that he had been attacked by the appellant. When the appellant was arrested nothing was recovered from him.

The appellant gave sworn defence and did not call any witness. He denied to have been in the attack.

The trial court considered this evidence and came to the conclusion that PW1 had positively recognised the appellant as his attacker and concluded that the prosecution had proved the charge of robbery with violence c/s 296 (2) of the Penal Code beyond doubt. A conviction was entered and the appellant sentenced to death. The court considered the medical evidence contained in the P3 (Exhibit 1) that was produced by clinical officer Sadik Mwita (PW3) of Yala sub-district hospital. It showed that following the

attack PW1 was cut on the upper lip and right lower leg and had tender left ear. He had suffered harm.

The appellant was aggrieved by the conviction and sentence and filed this appeal whose main complaint was that the trial magistrate had failed to appreciate that PW1's evidence was that of a single witness in circumstances that were difficult and not conducive for positive recognition.

We have looked afresh at all the evidence as recorded. It is quite clear that PW3 was not the officer who examined PW1 and made the P3. This was done by one Josephat Owino. PW3 came to testify and produce the P3 because Owino was on leave. They were working together. The appellant was not represented. He had the right to cross-examine the maker of the P3 in this capital offence case. There is no indication on record that there was explanation to the appellant that the non-calling of the maker was going to have the effect of denying him the right. Why could the case be adjourned to allow for the calling of the maker" The record does not show that the appellant was asked and consented to PW3 producing the P3. The importance of the P3 was the medical evidence it contained. The evidence was going to prove one of the ingredients of the charge of robbery with violence. It had been alleged in the particulars that at or immediately before or immediately after the time of robbery the appellant had caused PW1 actual bodly harm. In short, we find that the P3 was improperly admitted as evidence against the appellant. Without the evidence the fact of assault was consequently not proved.

But more important, it has been variously held that where the prosecution case rests on the evidence of a single witness and the circumstances of identification are known to be difficult there has to be other evidence, either direct or circumstantial, pointing to the guilt of the accused from which the court may reasonably conclude that the identification was accurate and free from any possibility of error

(ODHIAMBO .V. REPUBLIC [2002] 1 KLR 241). This was a case of recognition as PW1 said that the appellant was his neighbour. In ANJONONI AND OTHERS .V. REPUBLIC [1976-1980] 1KLR 1566 it was observed that recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant. Nonetheless, where no stolen property was recovered, the incident was at night and the circumstances were difficult the court should exercise great care before it can convict.

The trial court does not appear to have exercised due caution when dealing with the evidence of PW1, a single witness. We consider that PW1 was suddenly woken up from sleep by the door being violently broken. He had a broken arm. The man who entered had a panga. It was dark before the man hit a tin lamp. There were other attackers waiting outside. He feared for his life and was cut and hit. He did not say what amount of light came from the lamp. He was not asked to say how long the man was in the house, and for how long the light showed his face. The attacker kept talking to PW1. However, PW1 dos not slay he recognised the voice. He says he recognised the man's face by use of light from the tin lamp. We appreciate the evidence that he told PW1, PW4 and PW5 that he saw and recognised the appellant in the attack, but also bear in mind that a witness may be honest but mistaken. We have come to the conclusion that the circumstances were difficult and could not allow for positive recognition. Since there was no other evidence, we find that the conviction was not safe and quash it. The sentence is set aside and the appellant ordered to be set at liberty immediately unless he is otherwise being lawfully held.

Dated, signed and delivered this 10th day of December, 2013.

A. O. MUCHELULE **H. K. CHEMITEI**

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