IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 4 OF 2014

BETWEEN

MILTON JUMA OOKO ……..….. APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

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

in

HCCC NO. 77 OF 2013

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JUDGMENT OF THE COURT

1. This appeal was not contested by **Mr. Evans Ketoo,** Prosecution Counsel, in our view, rightly so. The appellant had been convicted by the Principal Magistrate's Court, Ukwala, of the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code.** His first appeal to the High Court was unsuccessful, hence this second appeal to this Court.

2. The prosecution had alleged that on 25th September, 2010 at about 4.00a.m. **Benedict Oduor Nyakesa,** the complainant, accompanied by one **Richard Otieno Sala, PW 3,** were coming from a disco when they met a group of people who began pelting them with stones and chased them. The complainant alleged that the appellant stabbed him with a knife. In the process of chasing the appellant the complainant lost several items, including a mobile phone Nokia 1202 and cash 2,000/=. The said items were, however, indicated in the charge sheet as having been stolen forcefully from the complainant by the appellant.

3. The complainant and PW 3 told the trial court that they were able to recognize the appellant, whom they said was a village mate, because there was moonlight.The intensity of the moonlight was not described.

4. In its short judgment, the first appellate court stated, inter alia:

"We can therefore conclude that although the intensity of the light was not clearly explained, the fact that the complainant knew the appellant lends credence to the fact that indeed the appellant was among those who attacked the complainant."

5. With respect, that holding regarding the critical issue of recognition of the appellant was unsatisfactory and contrary to the well-known principles in **R V TURNBULL [1977] QB 224** and reiterated by this Court in several decisions.

6. In **WARUNGA V REPUBLIC [1989] KLR 424** this Court held that where the evidence against an accused person is that of recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of the recognition were favourable and free from the possibility of error.

7. In **SIMIYU V REPUBLIC [2005] 1 KLR 192,** this Court held that there is no better mode of identification than by name, and when a name is not given, then there is a challenge on the quality of identification and a great danger on mistaken identity arises.

8. As regards the items that the complainant was alleged robbed of, it was not clear whether they were actually stolen by the appellant and his accomplices or they merely got lost. The complainant told the trial court that he chased the appellant and that he *"lost"* a Nokia 1202 and Kshs.2,000/= in cash. PW3 did not testify that he saw the appellant stealing anything from the complainant.

9. Mr. Ketoo, in conceding the appeal, submitted that the evidence relating to recognition of the appellant and that of stealing was insufficient to warrant a conviction for which death is the mandatory sentence. We respectfully agree with counsel.

10. Consequently, we allow this appeal, quash the conviction and set aside the death sentence that was pronounced by the trial court and affirmed by the High Court. The appellant should be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED and Delivered at Kisumu this 29th day of July, 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

…….…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.