REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HIGH COURT CRIMINAL APPEAL NO 99 OF 2019

JUSTINE CHERUIYOT.....1ST APPELLANT

YUSUF SABONGA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from conviction and sentence by N. Wairimu (PM)

in Eldoret CMCRC No 1478 of 2014)

JUDGMENT

1. JUSTINE CHERUIYOT (1ST APPELLANT) and YUSUF SABONGA (2ND APPELLANT) were jointly charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code, the particulars being that on the night of 2nd and 3rd March 2014 at **KIMUMU** Sublocation within **UASIN GISHU** county, jointly while armed with dangerous weapons, namely iron bars and pangas, robbed **ALICE KAVULANI LICHODI** of her 32 inch LG television set, 2 remote controls and a DSTV decoder, all valued at Kshs. 53,000/-, and immediately before the time of such robbery used actual violence to the said victim. Both denied the offence, and after a trial in which five witnesses testified in support of the prosecution case, and the defence called 4 witnesses, the appellants were convicted and sentenced to death.

2. ALICE KAVULANI LICHODI (PW1) told the trial court that while sleeping inside her residence at about 2.00pm, she heard noise at the door and peeped out through the window, and with the aid of the intense security lights which were outside, she saw three people outside her house. She was with her sister **Mercy** and her child inside the bedroom, and they begun screaming for help, saying ***"wezi, wezi" (thieves, thieves)*** as she moved to the door. The persons outside broke the door and entered into the house, so she retreated to her bedroom. PW1 did not turn on the electricity light inside the house, but the 1st appellant followed her, and she stated that "***I saw Justine inside my bedroom. He demanded for money. He ordered me not to put on electricity light. He asked for my husband."***

3. The 1st appellant who was armed with a metal bar demanded for her mobile phone, then he lit his torch and searched all the rooms. He hit her using the metal bar and she fell down unconscious. When she came to, she realized they had stolen her television set, DSTV decoder, and two remote controls. A report was made to the police, and the appellants were eventually arrested, whereupon PW1 identified the 1st appellant at an identification parade. She had not known him prior to the incident. On cross examination, PW1 claimed to have seen Yusuf (the 2nd appellant) on the night in question. Nothing related to the robbery was recovered from the appellants.

4. MERCY MBOGA (PW2) who was in the company of PW1 told the trial court that she saw both appellants during the incident when she peeped though the window and recognised the 1st appellant as she used to see him at **Cates Cyber Café**, and she knew him as **Justin Cheruiyot aka Kamau** although she did not indicate the alias name in her statement to the police. She also recognized the 2nd appellant whom she knew as one Mr. Mahare's son (a neighbour to PW1).

5. JOSEPH CHESANAI (PW3) a health worker who attended to PW1 and assessed the degree of injury as harm, confirmed that she had blunt injuries on the temporal region which had a deep cut wound, and tenderness on the left pinnae and a swollen thumb.

According to **PC WYCLIFFE SIMATWA** (PW4) who was the investigating officer, PW1 said she did not know the persons who attacked her, but could identify them if she saw them again, and he arrested the 2nd appellant. He confirmed on cross examination that PW1 did not give the names of the suspects.

6. In his unsworn defence, the 1st appellant described how police went to his home on 7th March and arrested him, and when he was taken to the police station, PW1 went and said he had robbed her. He told the police that he knew nothing about the offence

The 2nd appellant likewise gave an unsworn statement describing how police went to his home and conducted an unfruitful search before arresting him. Later PW1 went the police station and claimed he had robbed her, yet he did not even know her. The 2nd appellant called three of his family members to support his case that he did not participate in the robbery as he was in their company at different times of that night.

7. The trial magistrate in her judgment was satisfied that the complainant was able to identify the appellants on the date of the incident and to later pick out PW1(??) at an identification parade.

Being aggrieved with the outcome, the appellants filed this appeal on amended grounds that

a) The trial court failed to find that the identification was not positive

b) The prosecution's case was marred with inconsistencies and contradictions

c) Their right to a fair trial under Article 50 (2) (g) and (h) were violated

d) Imposing the mandatory death sentence was unconstitutional.

8. The appeal was canvassed through written submissions where the 1st appellant's counsel Mr Mwaka argued that the evidence on identification was wanting and the prosecution case was marred with contradictions. That whereas PW1 claimed that she was able to identify her attackers, and even recognized the 1st appellant (whom she mentioned by name as Justine), and who followed her into her bedroom and demanded that she surrenders her phone, it was her evidence in court that she did not switch on the electricity lights inside the house, and he poses the question as to how she was able to see and identify who followed her to her room in the dark. That this is further compounded by the fact that she was not able to pick the 1st appellant from the identification parade. It is also pointed out that in cross examination PW1 said she had known the 1st appellant prior to the incident, which contradicts the evidence by the investigating officer that when PW1 reported, she said she did not know her attackers.

9. The credibility of the prosecution witnesses is also watered down by the fact that even with the evidence of there being no light turned on in the house, and despite PW2 saying she hid under the bed, she still claimed to have seen and recognised bot appellants, and the question posed is, how possible was this. It is on account of this that the appellants contend that the opportunity for positive identification was compromised and was not free from error.

10. The DPP did not address this aspect, but I must consider it. Whereas PW1 claims to have seen the people who broke and entered into her house, while they were outside, it was not stated how long she had them under her scrutiny **(see ABDALLAH BIN WENDO V REPUBLIC (1953) EA),** and this is compounded by the apparent contradiction where in one instance she claimed to have known the appellants even before the incident, yet there is evidence that when she reported to police, she said she did not know them, but would recognize them if she saw them again. Indeed, in **TEREKALLI AND OTHERS V REPUBLIC (1952) VOL 19 PG 259** the court stated that:

> ***Evidence of the first report by the complainant to a person in authority is important as it often provides good test by which the truth and accuracy of the consequent statement made may be gauged, and provide a safeguard against embellishment or a made up case. Truth will always come out in the first statement taken from a witness at a time when recollection is very fresh, and there has been no time for consultation with others.***

11. The scenario here is very close to why later in court PW1 claimed she knew her attackers and had even given police their names- the possibility of consultation cannot be ruled out. The opportunity for identification was not clearly established, and marred with prosecution's own evidence which created an improbable opportunity for identification.

This court is also urged to interfere with the sentence on grounds that the same was harsh and manifestly excessive especially in light of the emerging jurisprudence which has a found a springboard from the Supreme Court of Kenya's decision in **FRANCIS KARIOKO MURUATEU AND ANOTHER V REPUBLIC [2017] eKLR.**

12. In conceding the appeal, Miss Okok on behalf of the DPP notes that the matter was initially partly heard **by M. Wamabani (CM)** who took the evidence of PW1 and PW2, and taken over **by N. Wairimu**, but the record does not show that the court taking over complied with **section 200 (3) of the Criminal Procedure Code**. I have perused the lower court file and the typed proceedings in their entirety, actually **M. Wambani** heard the evidence of three witnesses, the last one testified on 8/03/2018. Thereafter N. Wairimu took over the matter on 11/10/2018and heard it to completion. However, there is no indication that the trial court complied with section 200(3) of the Criminal Procedure Code by explain to the appellants their trial rights, or giving them the opportunity to make a choice on how they wished the matter to proceed.

13. Consequently, I find that the conviction was unsafe as opportunity for identification was not established to have been adequate, and favourable. Secondly there was material contradiction from PW1 visa vis PW3. Then the ultimate is that the court failed to comply with the provisions of **section 200 (3) of the Criminal Procedure Code**, and this must then be resolved in favour of the appellants. There is no occasion to warrant ordering a re-trial as the evidence on identification is not only wanting, but fraught with contradictions, so either way, the appeal succeeds. The conviction is quashed and the sentence set aside, the appellants shall be set at liberty forthwith unless otherwise lawfully held.

Virtually delivered on **20th** May **2021.**

H. A. OMONDI

JUDGE

Miss Okok for DPP

Mr Mwaka for appellants

C/A Komen

Both appellants present virtually from Naivasha Maximum Prison