REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 111 OF 2012

EVANS DINDI.....1ST APPELLANT

ALEX KOLOMANI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.750 of 2012 of the

Chief Magistrate's Court at Busia by Hon. B.A Ojoo–Senior Principal Magistrate)

JUDGMENT

1. **Evans Dindi** and **Alex Kolomani,** the appellants herein, were convicted for the offences of robbery with violence contrary to section 296 (2) of the Penal Code and for malicious damage to property contrary to section 339 (1) of the Penal Code.

2. The particulars in count one were that on the 15th May 2012 at Busia Urban village, Nambale sub location within Busia County, jointly with others not before court while armed with a machete robbed **Melza Makokha Ochanji** of Kshs.12, 200/=, two Nokia mobile phones and two bicycles all valued at Kshs. 26, 200/= and immediately before the time of such robbery used actual violence to the said **Melza Makokha Ochanji.**

3. The particulars in count two were that on the 15th May 2012 at Busia Urban village, Nambale sub location within Busia County, wilfully and unlawfully jointly damaged one lantern lamp valued at Kshs. 500/= the property of **Melza Makokha Ochanji**.

4. The appellants were convicted and sentenced to serve life imprisonment in count one and to serve one year imprisonment in count two. They have appealed against both conviction and sentence.

5. The appellants raised eight grounds of appeal that can be summarized as follows:

a) The learned trial magistrate erred in law and in fact by failing to appreciate that their alibi defence was plausible.

b) The learned trial magistrate erred in law and in fact by misapplying the provisions of section 32 (i) of the Evidence Act.

c) The learned trial magistrate erred in law and in fact by relying on improper identification evidence.

d) The learned trial magistrate erred in law and in fact by relying on contradictory evidence.

6. The appeal was opposed by the state through Mr. Gacharia, learned counsel who contended that the evidence connected the appellants to the offences. The appellants were served with a notice for enhancement of sentence.

7. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

8. In determining this appeal, there are two main issues for my consideration as follows:

a) Whether the learned trial magistrate had sufficient evidence at her disposal to convict the appellants; and

b) Whether the sentence meted out was illegal.

9. On the material night there was a spate of robberies and evidence is that it had rained heavily. The first appellant was linked to the offence by some wet clothes found in his house and by the evidence of purported identification by the complainant. The two, other than the purported identification by the complainant, were also recognized by one Javan at another incident of robbery.

10. In the celebrated case of **R. vs. Turnbull and Others [1976] 3 All ER 549** Lord Widgery CJ statted as follows:

> **First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear turns the judge need not use any particular form of works.**
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> **Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be make. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.**

I have quoted at length the directions by Lord Widgery for these have been followed severally with approval by our Superior courts.

11. In the instant case, I will endeavor to find how the complainant and her husband purported to identify the appellants and whether the evidence by Javan Christopher Mutire (PW3) is relevant to this case.

12. Melza Makokha Ochanji (PW1) testified that at about 8 p.m. she was in her house with her husband and children taking dinner. There was a lantern in the house and suddenly two men who had spotlights and machetes bust in. The two were not known to her and when she raised her eyes, one of the two pounced on her and slapped her twice on the face. She started pleading with them. The other man placed a machete on her husband's throat. These men proceeded to rob them and smashed the lantern before fleeing. She said that the spotlights the appellants had were powerful but she added that when the duo entered into their house, the spotlights were off. While at the police station she was able to identify the two.

13. Bernard Rovi (PW4) her husband on the other hand testified that the two men were strangers to him. Contrary to his wife's evidence, he said the two entered into their house with their spotlights on. Like his wife, he testified that he identified the appellants at the police station for their clothes were drenched in water.

14. There are two main types of lantern lamps; one that uses kerosene and another that uses electricity. Although there was no evidence that was adduced on this point, it is safe to assume the lantern that the complainant had in their house is the one that uses kerosene. This is indeed the mode of lighting where electric light is not available.

15. The prosecution did not elicit evidence on the size of the room where the complainant and her family were eating from so as to appreciate the adequacy or otherwise of the light from the lamp. Secondly and very importantly, the time taken by the robbers was so short to enable the complainant and her husband to later purport to identify the people they described as strangers to them. According to the complainant, the incident took about 3 minutes. This in my view was too short a time given the circumstances that obtained at the time of the said robbery.

16. The complainant was slapped on the face and a machete was placed on her husband's throat by robbers who had very strong spotlights.

17. The purported identification of the appellants at the police station could have had some weight had they given the descriptions of the culprits prior to their arrest. The fact that the two had their clothes drenched in water from the rain cannot be a pointer of their involvement in the robberies. Many people are caught by rains while coming from legitimate undertakings and it was wrong to conclude that because the two were wet, they must have been part of the robbers.

18. Had the appellants been arrested with some stolen items from the complainant, this could have been good evidence against them. None of them was arrested with any of the stolen items.

19. Javan Christopher Mutire (PW3) testified that the two appellants were his neighbours. At about 9 p.m. when he and his wife managed to prevent some intruders from entering into their house, he peeped out through the window and saw the second appellant who was their neighbour. He called him by name and asked him why he had attacked them. There are issues that are raised by this evidence which may not be material to this case. For instance, what light was outside and why other neighbours were not called to testify on this issue and lastly why

the appellant was not charged with offences related to that other incident. Even if we assume that the second appellant was involved in the incident testified to by Javan (PW3), his evidence is not relevant to this case unless the prosecution adduced sufficient evidence that linked him to the other offences and that the offences in the instant case formed the same transaction. This was not proved and his evidence was therefore irrelevant to this case.

20. When a magistrate finds an accused guilty of the offence of robbery contrary to section 296 (2) of the Penal Code he/she has an obligation to pass the prescribed sentence. The Court of Appeal in the case of **Johana Ndungu vs. Republic[1996] eKLR** stated:

> **If proved facts show that robbery under section 296(2) has been committed then the trial magistrate is obliged to convict the accused under this section and impose the sentence of death. Use of terms such as the one used in this case by the magistrate is not going to change facts so as to justify a conviction under section 296(1) when the proved facts show that the charge under section 296(2) has been proved. The same message also goes to the judges of the 1st appellate court who, because their judgments are binding authorities for the sub-ordinate courts to follow, have a duty to give correct guidance in strict accordance to law.**

The life sentence imposed herein was therefore illegal. Unless or until parliament amends section 296 (2) to provide for an alternative sentence, courts are called upon to be faithful in interpretation of the same.

21. From the foregoing analysis of the evidence on record, I find that the conviction of the appellants on both counts was not supported by the evidence on record. The appeal against conviction and sentence is allowed. Each appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and **SIGNED** at **BUSIA this 20th** Day of February**, 2020.**

KIARIE WAWERU KIARIE

JUDGE