



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 86 OF 2018

CONSOLIDATED WITH

CRIMINAL APPEAL NOS. 87 & 88 OF 2018

BETWEEN

DANIEL OGINGA.....1ST APPELLANT

ISAHIA JUMA.....2ND APPELLANT

JEREMIAH MOGAKA.....3RD APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from the original conviction and sentence of Hon. M. M. Nafula, SRM dated 28th August 2018 at the Magistrate's Court at Ogembo in Criminal Case No. 730 of 2018)

JUDGMENT

1. The appellants, **DANIEL OGINGA**, **ISAHIA JUMA** and **JEREMIAH MOGAKA** were charged with one count of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. They were convicted and sentenced to 30 years' imprisonment. The particulars of the charge facing them was that on 6th March 2018 at Nyabunwa Village in Kenyena Sub-County within Kisii County jointly with others not before the court while being armed with dangerous weapons namely pangas and clubs robbed **JOASH MUTANDE** cash Kshs. 5,800/- 3 US dollars currency equivalent to Kshs. 60,000/- and during the time of such robbery they wounded the said **JOASH MUTANDE**.
2. After the trial, the appellants were convicted and each of them sentenced to 30 years' imprisonment. They have now appealed against conviction and sentence based on their respective petitions of appeal.
3. Mr Begi, counsel for the appellants, attacked the evidence of identification on the grounds that the circumstances of identification were not favourable for positive identification. He submitted that the incident took place at night when it was raining and that the prosecution did not prove the source and intensity of light that would enable the complainant identify the assailants. He pointed out that the charge sheet was at variance with the evidence as the complainant's testimony in so far the charge did not mention the items alleged to have been stolen.
4. Counsel for the respondent, Mr Otieno, conceded the appeal on the ground that the circumstance in which the incident took place were not favourable for positive identification hence the conviction was unsafe.
5. Notwithstanding the concession, I must satisfy myself that the concession is well founded and in doing so I am alive to the duty of the first appellate court. It is that I am required to re-appraise the evidence and reach my own conclusions as to whether to sustain the conviction bearing in mind that I neither heard or saw the witnesses testify (*Okeno v Republic [1972] EA 32*).
6. The prosecution relied of the testimony on the complaint, Joash Elijah (PW 5) who stated as follows:

At about 8.30pm, it started raining. I saw the 1st accused person, 2nd and 3rd accused person as they were walking along the road.

1st accused started asking me for Kshs. 5,800/-. The accused persons asked me for money. The 1st accused person cut me using a panga on my head. They started following me. I fell down. They took away my phone and money. He put me beside the road and assaulted me thoroughly. I slept there until till 4.00am I was treated at Magena Hospital and reported the matter to Magena Patrol Base the accused persons are my relatives. I have known them for long. I could identify them. Because there was some light. My items that they stole from me have never been recovered.

7. The Clinical officer, Rita Mutisya (PW 4), who treated PW 5 and filled the P3 form medical report confirmed that he had sustained a deep cut wound on the forehead which was swollen. She noted that he had tenderness on the chest, bilateral forearm and lower limbs. She opined that the injuries were caused by a blunt object or rungu and a sharp object probably a panga.

8. Stanley Makori (PW 1) testified that he arrested the first appellant in his house on 28th March 2018 upon instruction from the area chief. He also accompanied, Nyaoga Oseko Nyanducha (PW 2) to arrest the 2nd and 3rd appellants on allegation that they had robbed PW 5.

9. The Investigating Officer, PC Dickson Ruto (PW 3) recalled that on 7th March 2018, he was at Magena Patrol Base when the appellant were brought to the Base. He recorded witness statements, issued the P3 forms and proceeded to charge the appellants.

10. The appellants denied the offence in their unsworn statements. The first appellant stated that on 6th March 2018, he was at his plot and that he was arrested on 28th March 2018 from his home at 5.00am. The second appellant told the court that he was arrested on 26th March 2018 at 4.00pm by community police while the 3rd appellant told the court that he was called from his place of work at Mara Tea factory on 28th March 2018 and when he returned home, he was arrested.

11. The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, *Oluoch v Republic* [1985] KLR 549 and *Ganzi & 2 Others v Republic* [2005] 1 KLR 52).**

12. From the totality of the evidence, the prosecution proved all the elements of robbery with violence. I am satisfied from the testimony of PW 5 that he was attacked by four men who robbed him of his money and mobile phone on the night of 6th March 2018. He was cut with a panga and received treatment from PW 4 who confirmed his injuries.

13. The success or otherwise of this appeal turns on the issue whether the appellants were positively identified as the assailants. The incident took place at night under circumstances that were not ideal for positive identification. In ***Wamunga v Republic* [1989] KLR 424** the Court of Appeal warned that;

[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.

14. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see ***Maitanyi v Republic* [1986] KLR 198** and ***R v Turnbull* [1967] 3 ALL ER 549**). The Court of Appeal was categorical in ***Kiarie v Republic* [1984] KLR 739**, that reliance on such evidence of identification must be “*absolutely watertight*” to justify conviction.

15. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see ***Anjononi & Others v Republic* [1980] KLR 59**). But in ***Wanjohi & 2 Others v Republic* [1989] KLR 415**, the Court of Appeal held that, “*recognition is stronger than identification but an honest recognition may yet be mistaken.*”

16. It is also expected that where the assailants are known to the complainant, the complainant will give their names to the police or other law enforcement authorities at the earlier opportunity. In ***Simiya & Another v Republic* [2005] 1 KLR 192**, the Court of Appeal observed as follows:

*In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or person to whom the description was given (See *R – v- Kabogo s/o Waguny* 23 (1) KLR 50). The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker’s identity. The failure by the superior court to consider this aspect of the evidence shows that the superior court dealt with the evidence in a perfunctory manner.*

17. I have re-appraised the evidence before the trial court alongside the principles of law I have set out above. In my view, the evidence of the circumstances of lighting under which PW 5 identified the appellants were less than satisfactory given that it was at night and it was raining. Although the testimony of PW 5 suggests that he was able to see the first appellant clearly as they were in close proximity but when pressed on this issue in cross-examination he stated that he recognised him by voice. PW 5 did not state the origin or nature of the light, its intensity and any other evidence that would enable the court conclude that the circumstances were satisfactory for positive identification of the other assailants. Further, even though PW 5 testified that he knew the appellants, there is no evidence to explain why the appellants were arrested on 28th March 2018 when the incident was taken place on 6th March 2018.

18. The appellant’s counsel also pointed to the fact that while the charge sheet showed that US dollars were stolen from PW 5, this did not

emerge in the testimony of PW 5 nor did the fact that the appellant's phone and identity card were stolen feature in the charge sheet yet such items were material. While I accept that the failure to include these items in the charge sheet do not inflict a mortal wound on the prosecution case, these facts taken in light of the issues I have raised on the evidence of recognition point to the fact that conviction cannot be sustained as it is unsafe.

19. I allow the appeal, quash the conviction and sentence. The appellants are set free unless otherwise lawfully held on a separate warrant.

DATED and DELIVERED at KISII this 27th day of FEBRUARY 2019

D.S MAJANJA

JUDGE

Mr Begi, Advocate, for the appellants.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.