



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 199 OF 2015**

**BETWEEN**

**EDWIN WALUKANA NYONGESA.....1<sup>ST</sup> APPELLANT**

**PAUL WAFULA JUMA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the conviction and sentence of Hon. D.O.Onyango (SPM) on 28.10.15 at Senior Principal Magistrate's Court at Kimilili in Criminal Case No. 567 of 2014)**

**JUDGMENT**

1. On 28.10.15, the Appellants and another who passed on during the pendency of this appeal were convicted of two counts of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* and were sentenced to death with the sentence in the second count being held in abeyance.
2. The principal issue raised by the appellant is that of identification. The Appellants contended that they were not at the scene of crime and that they did not go to the school with the 1<sup>st</sup> complainant as he alleges and could therefore not have been identified and that the learned magistrate failed to find that the conditions and surrounding circumstances could not allow positive identification. They also urge the court to find that the sentence passed against them is harsh and unlawful.
3. In considering the issues raised by the appellant, I am enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether I should uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify (see **Okeno v Republic [1972] EA 32**).
4. The prosecution case was narrated by the principal witness, **PW1 PETER OKEMU SOITA** who recalled that on the night of 23.04.14 at about 01.00 am, he was awoken by a loud band and torches flashing in his bedroom. He stated that the group of about 7 persons that got into his house flashed their torches on his face. He stated that they demanded his motor cycle keys and when he stretched his hand to get it, he was cut and when he raised an alarm he was cut even more. He stated that the light reflected the house and he was able to identify the 1<sup>st</sup> Appellant who was wearing a blue paper bag on his head and who was in the same school as him and the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants who were his classmates. He stated that the Appellants stole his Motor Cycle KMDG 939B and it was never recovered. **PW2 MERCY NANJALA OKUMU**, PW1's wife who was with PW1 during the incident stated that she did not identify the persons who stole her husband's motor cycle and 100/- from her and assaulted her husband. **PW3 JANE SOITA OKINA** the complainant's mother arrived at the scene of crime after the robbers had left. **PW4 HENRY OKUMU** stated that he awoke, went out and flashed a torch towards PW1's house after he heard screams and that he saw and identified the 2<sup>nd</sup> Appellant. PW5 MICHAEL OKWANTI a clinical officer examined PW1 and found that he had suffered injuries caused by a sharp and blunt object which he classified as harm. He produced PW1's P3 form as **PEXH. 1**. PW6 PC WESLEY KORIR the investigating officer received complainants' reports on 23.04.14. He later arrested the Appellants and caused them to be charged.
5. After the close of the prosecution case, the court ruled that the Appellants had a case to answer and placed them on their defences. Each of them denied the offences. They also denied that they knew the complainants.
6. The trial court having listened to both the prosecution and defence cases found the prosecution case proved and convicted the Appellants on both counts and sentenced them to death.

## The Appeal

7. The conviction and sentence provoked this appeal. In his petition of appeal filed on 11.11.15 and written submissions filed on 24.8.17, Appellant raise the issue of identification and the constitutionality of the death sentence.
8. When the appeal came up for hearing on 05.08.19, Mr. Sichangi for the Appellants stated that the Appellants were wholly relying on the grounds of appeal and written submissions.
9. Ms. Nyakibia, learned State Counsel opposed the appeal and stated that identification was by recognition for the reason that the Appellants and PW1 went to the same school. It was also submitted that he reflection of torch light enabled PW1 to identify the Appellants.

## Analysis and Determination

10. This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal's decision in the case of Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 of 2005.
11. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the appellant and the state.
12. The gravamen of this appeal really turns on the issue of identification. The offence was committed in the middle of the night. Although PW1 stated that he went to the same school as the Appellants, he failed the state which school that was or when that was and Appellants having denied knowing PW1 cast a reasonable doubt on PW1's evidence that he knew them.
13. The circumstances in which the alleged identification was done must be considered. In this case, the incident allegedly occurred in the middle of the night. It is on record that PW1 was attacked and injured during the robbery. He stated that the light from the torches the 7 robbers had reflected the house and he was able to identify the Appellants who were his schoolmates.
14. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well-known case of R vs Turnbull [1976]3 All ER 549 at page 552 where he said: -

**'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 relatives and friends are sometimes made.'**

15. In the later case of Kiilu & another v Republic, (2005) 1 KLR 174, the Court of Appeal (Tunoi, Waki & Onyango Otieno JJA) reiterated the position as follows:

**"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."** (Emphasis added)

16. In the case of Maitanyi -vs- Republic (1986) KLR 198, the Court of Appeal held:

**".....It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into."**

17. I note that the court record shows that the learned trial Magistrate did not make an inquiry of the relevant circumstances such as the strength of the light, its size and its position relative to the Appellant that may have assisted PW1 to identify the Appellants.
18. The other evidence that the prosecution relied on in support of its case was that of PW2 who was in the same house with PW1 but she told court that it was not possible to identify the assailants since they had bright torches.
19. From the evidence on record, I think that a person of the PW1's state of mind resulting from his being badly injured may have had his ability to identify a person impaired to some significant extent. Moreover, the injured state of the PW1 posed dangers of mistaken identification because of his injury-impaired cognitive capabilities.
20. The Appellants were not arrested as a result of identification or prior description by PW2. From the foregoing, I am, accordingly, not convinced that the identification of the Appellants by the PW1 in the circumstances of this case was free from possibility of error.

21. *Having considered the evidence in its totality*, I find that the prosecution case was not proved beyond any reasonable doubt. Had the appeal not succeeded, I would have been obligated to interfere with the sentence of death imposed on the Appellant for the reason that mandatory sentences have been declared unconstitutional. (See the Supreme Court decision in Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR and Court of Appeal decisions in B W v Republic KSM CA Criminal Appeal No. 313

of 2010 [2019] eKLR, Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR and Jared Koita Injiri v Republic KSM CA Criminal Appeal No. 93 of 2014)

22. Consequently, the *appeal succeeds*. For that reason, the conviction on both counts is quashed and the sentences set aside and unless otherwise lawfully held, it is ordered that Appellant shall be released and set free forthwith.

**DATED AND DELIVERED IN BUNGOMA THIS 09<sup>th</sup> DAY August, 2019**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistant - Brendah**

**Appellants - Present**

**For the Appellant - Mr. Sichangi**

**For the State - Ms. Nyakibia**