



REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL NO. 43 OF 2016
CONSOLIDATED WITH
CRIMINAL APPEAL NO. 44 & 47 OF 2016
CORAM: D.S. MAJANJA J.

BETWEEN

SAIDI ATAKO TABU.....1ST APPELLANT

MARCUS SHISIA ESHITEMI.....2ND APPELLANT

VINCENT OKUMU JUMA.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.T. Odera, PM dated 8th April 2016 at the Principal Magistrates Court at Mumias in Criminal Case No. 691 of 2015)

JUDGMENT

1. The appellants, SAIDI ATAKO TABU (A1), MARCUS SHISIA ESHITEMI (A2) and VINCENT OKUMU JUMA (A3) were charged with three counts of the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code (Chapter 63 of the Laws of Kenya)* for a series of robberies that took place on 3rd September 2015 at Wetaba “B” Village, Mayoni Sub-location in Matungu Sub-County within Kakamega County.

2. The first count was that on the material night, the appellants jointly with others not before the court, while armed with dangerous weapons namely pangas, rungus and axes robbed **ALEXANDER ANGONA MAKOKHA** of cash Kshs. 37,500/-, a mobile phone make Nokia worth Kshs. 3,900/-, a wallet worth Kshs. 300/-, a national identity card, equity and co-operative bank plates worth Kshs. 1,000/- all valued at Kshs. 47,700/- and at the time of the robbery used actual violence against the said **ALEXANDER ANGONA MAKOKHA**.

3. The second count was that on the material night, the appellants jointly with others not before the court, while armed with dangerous weapons namely pangas, rungus and axes robbed **NICHOLAS OTUMA OTSIENO** of cash Kshs. 2,200/- and a mobile phone make Nokia worth Kshs. 4,800/-, a wallet worth Kshs. 300/-, a national identity card all worth a total of Kshs. 7,300/- and at the time of the robbery used

actual violence against the said **NICHOLAS OTUMA OTSIENO**.

4. The third count was that on the material night, the appellants, jointly with other not before the court, while armed with dangerous weapons namely pangas, rungas and axes robbed **DICKSON SHIBUKO OTSIENO** of cash Kshs. 650/- and a mobile phone make Nokia worth Kshs. 2,500/- all to worth Kshs. 3,150/- and at the time of such robbery used actual violence against the said **DICKSON SHIBUKO OTSIENO**.

5. The appellants denied the charges were all convicted on the three counts after trial. They were sentenced to death but the death sentence in respect of the 2nd and 3rd counts was held in abeyance. The appellants now contest conviction and sentence.

6. The common thread in their respective petitions of appeal and written submissions is that the circumstances under which the robbery took place did not favour a correct or positive identification or recognition of the appellants and that the trial court failed to evaluate the evidence carefully and came to the incorrect conclusion that the appellants were involved in the robbery. The appellants contend that the evidence against them was contradictory and could not support the conviction. The appellants further contend that the trial court failed to give consideration to their respective defences and this came to the wrong conclusion that they were involved in the robbery.

7. The State counters that the entirety of the circumstances were favourable for positive identification particularly since the appellants and witnesses were well known to each other. Counsel for the respondent urged the court to dismiss the appeal.

8. The nature of this appeal requires the court to carefully examine the evidence before the trial court. As this is the first appeal, 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).

9. The prosecution case was that on the night of 3rd September 2015 at about 8.30pm, Alexander Angona Makokha (PW 1) testified that he was attacked outside his home by assailants who chased him assaulted him and stole his wallet which had Kshs. 37,500/- in cash and his mobile phone. The assailants injured him on his head and right leg. He did not see the any of the assailants. When he raised alarm, his neighbours responded. Nicholas Otuma Otieno (PW 2) was one of the neighbours who armed himself and went out to rescue PW 1. While on the trail of the robbers, PW 2 was confronted by the assailants whom he identified as the appellants who also attacked and injured him and took off with his mobile phone, wallet and Kshs. 2,200/-.

10. The key witness on this issue of identification was PW 2. He testified that it was a dark night as there was no moonlight. As he was going towards PW 1's house, he heard the assailant's approach and when they were 15 metres away from him, he flashed the torch at them and he was able to see A1, A2 and A3. He moved closer to A2 who pretended that he too, was going after the robbers and PW 2 asked him whether they were going after the thieves. After a brief exchange words, PW 2 asked them to accompany him to the scene of the incident but instead A3 hit his torch while A2 hit him on the forehead. A1 hit him on the eye with the panga after saying that he was eye witness. In the meantime, the appellants lit their torches while raining violence on him with their pangas and rungas while he struggled with them. He managed to run away. PW 2 also testified that he was able to take police officers to the appellant's homes although they were only able to find the 1st appellant.

11. Dickson Shibuko Otsieno (PW 3) also responded to the alarm, got out of his house to rescue PW 1. He saw PW 2 ahead of him screaming while being assaulted. He proceeded to rescue him and one of the assailants also attacked him. He was able to identify A1 before he was cut and lost consciousness. Maurice Makokha Wangalu (PW 7), also responded to the alarm and went to assist his brother, PW 1 and as he went there he was able to see 4 assailants emerge from another brother's house. When he reached them he asked where the robbers were and he heard the voice of A1 who was ahead. A1 assaulted him and he collapsed. He was rescued and taken to hospital where he saw the other injured persons.

12. PW 1 managed to get home where he found assistance and was taken to Matungu Sub-County Hospital, where he found many of his neighbours who had been injured among them, PW 2 and PW 3 who had been rescued. PW 2 was admitted to hospital for 5 days and later discharged while PW 3 was admitted and later taken to Kakamega County Hospital for further treatment. Catherine Khatimba Misikhu (PW 6), a Clinical Officer at Matungu Sub-County Hospital, examined PW 1, PW 2 and PW 3 and confirmed that they had been injured on the night of 3rd September 2015 and were admitted to the hospital and treated for injuries they had sustained on the material night. She produced the respective P3 form medical reports.

13. The appellants denied involvement in the robberies in their respective unsworn statements. The all denied involvement in the offences. A1 said nothing of what took place on 3rd September 2015 but gave an account of his arrest on 11th September 2015. A2 also gave an account of his arrest on 12th September 2015 while A3 gave account of his arrest on 14th September 2015.

14. 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**).

15. From the facts I have outlined, I have no doubt that the prosecution established the offence of robbery with violence through the clear and credible testimonies of PW 1, PW 2, PW 3 and PW 7. Their respective testimonies confirm that more than one assailant attacked each of them armed with weapons and stole their personal property. The injuries they sustained were confirmed by PW 6. I therefore find and hold that the prosecution proved that the elements of robbery with violence.

16. I now turn to the key issue in this appeal which is whether the appellants were identified as the assailants. This question revolves around identification of persons in difficult conditions. In a plethora of authorities; ***Maitanyi v Republic* [1986] 2 KLR 75**, ***Karanja & Another v Republic* [2004]2 KLR 140** and ***Wanjohi & Others v Republic* [1989]KLR 415** and ***Tom Peimo Ombura & Another v Republic* NAI CA Civil Appeal No. 98 of 1992 (UR)**, the Court of Appeal has held that the court must examine all facts and weigh the evidence in order to determine whether the identification is free from error. These cases underpin the principles laid down in ***Regina v Turnbull* [1976] 3 ALL ER 549** where it was held that;

First, wherever 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 to 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. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. 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 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 the actual appearance.

17. 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.*” At the end of the day, that reliance on such evidence of identification must be “*absolutely watertight*” to justify conviction as was held in ***Kiarie v Republic* [1984] KLR 739**.

18. Turning to the evidence, it is clear from the evidence that this was not a case identification of strangers as the evidence discloses that the appellants and witnesses were all from the same locality. The key witness, PW 2, stated that A1 was his neighbour and had been in the area for some time, A2 was born in the area and A3 was his neighbour. Likewise, PW 3 confirmed that the appellants were his neighbours and did not live far away. The appellants did not deny this familiarity in the respective defences. This was therefore a case of identification by recognition.

19. PW 2 gave an account on how he met the appellants when he went to rescue PW 1. He believed that they were also going to rescue PW 1 and they exchanged words. PW 2 told the court that he had a torch which he lit when he got close to the assailants. When cross-examined by A2, he stated that the torch was electric with 12 bulbs which he had charged on that day. Further PW 1 testified that before they assaulted him, the appellant lit their torches. The fact that PW 2 had a torch was confirmed by PW 3 who had followed PW 2 and saw his torch on. Both PW 1 and PW 3 also confirmed that the appellants had their torches on. On his part, PW 3, he told the court that he found PW 2 and A1 struggling and he was able to see him because the assailants had torches which they shone before A 1 cut him and he lost consciousness. PW 7 recognised A1 when he shone his torch on his face and A1 hit him with the rungu.

20. The totality of this evidence is that PW 2 was able to recognise A1, A2 and A3 for they were in close proximity. PW 2 talked to the appellants who initially put him at ease by pretending that they were also pursuing the robbers. Both the appellants and PW 2 had torches and they interacted very closely. PW 3 saw A1 clearly when he arrived at the scene where A1 and PW 2 were struggling while PW 7 recognised A1 who assaulted from close proximity after he shone the torch on his face. These circumstances were, in my view, favourable for positive recognition. Since the appellants were well known to the PW 2, he had no difficulty in reporting their names to the investigating officer, Corporal Jacob Kerich (PW 8) when he took his statement. After PW 2 had been discharged from hospital, he assisted Corporal Moses Wafula (PW 5) to arrest the appellant by pointing out the home of A2 who was found in his house. While A2 was not at home. A3 was arrested and brought to the police by members of the public.

21. The sum of the evidence is that the appellants set out together on robbery spree where they attacked PW 1 first and when in the course of being rescued, they attacked PW 2, PW 3 and PW 7 who had responded to the alarm. The credible evidence of the witnesses shatters the appellant's unsworn statements that they were not involved in the robbery.

22. Based on all the evidence of positive and affirmative identification of the appellants at the scene of the robbery, I find the conviction safe and it is affirmed.

23. In light of the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* SCK Pet. No. 15 OF 2015 [2017]eKLR, the mandatory death sentence for the offence of murder was declared unconstitutional. In the case of *William Okungu Kittiny v Republic* KSM CA Criminal Appeal No. 56 of 2013 [2018]eKLR, the Court of Appeal applied the *Muruatetu* decision *mutatis mutandis* to the provisions of section 296(2) of the *Penal Code*. I therefore quash the sentence of death imposed on the appellants. I now invite the appellants to mitigation before imposing the final sentence.

SIGNED AT KISUMU

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KAKAMEGA this __16th__ day of April 2018.

R. N. SITATI

JUDGE

1st and 3rd appellants in person.

Mr Migosi, Advocate instructed by the 2nd appellant.

Mr Ng'etich, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.