REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOs. 4, 6 & 7 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. Stephen Nyalang'o – SRM delivered on 9th December 2016 in Makadara CMC. CR. Case No.2884 of 2013)

HESBON ASEKA OKIYA.....1ST APPELLANT

STEPHEN OLUOCH ODUOR.....2ND APPELLANT

WYCLIFFE OBICHA OWINO.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants, Hesbon Aseka Okiya, Stephen Oluoch Oduor and Wycliffe Obicha Owino were charged with two others with two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 23rd June 2013 at Mathare North Area 1 within Ruaraka in Nairobi County, the Appellants, jointly with others, while armed with knives robbed Samson Leyamyam and Butula Adan Hassan of their mobile phones, KCB ATM cards, KDF Identity Card and cash Kshs.800/- and at the time of such robbery used or threatened to use actual violence against the said Samson Leyamyam and Butula Adan Hassan (herein referred to as the complainants). When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. The 3rd Appellant Wycliffe Obicha Owino was alternatively charged with **handling stolen goods** contrary to **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on 26th June 2013 at Mathare North Area 1 within Ruaraka area in Nairobi County, otherwise than in the course of stealing, the said Appellant retained one mobile phone make Nokia Asha 200 valued at Kshs.7,000/- the property of Butula Adan Hassan, knowing or having reason to believe it to be stolen property. After full trial, the Appellants were convicted as charged on the main counts. They were sentenced to death. They were aggrieved by their conviction and sentence. They have each filed an appeal to this court challenging their conviction and sentence.

For the purpose of the hearing of this appeal, the three separate appeals were consolidated and heard together as one. The Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They were aggrieved that they had been convicted on the basis of the evidence of identification made in difficult circumstances that did not stand up to legal scrutiny. They were aggrieved that they had been convicted on the basis of the evidence that did not establish their respective guilt to the required standard of proof beyond reasonable doubt. The Appellants alluded to the existence of a grudge between themselves and the police officers who arrested them which the trial court allegedly failed to consider in determining their guilt. They were aggrieved that the respective defences were not taken into account before the trial court reached the verdict that they were guilty as charged. For the above reasons, the Appellants urged the court to allow their respective appeals, quash their respective convictions and set aside the sentence that was imposed on them.

During the hearing of the appeal, the Appellants presented to court written submission in support of their respective appeals. They urged the court to allow their respective appeals since the prosecution had not adduced sufficient culpatory evidence to establish their guilty to the required standard of the law. Ms. Aluda for the State conceded to the appeal. She submitted that the evidence of identification that was adduced by the complainants was not sufficient to establish beyond any reasonable doubt that it was indeed the Appellants who had accosted the complainants and thereafter robbed them. In the premises therefore, she was not supporting the conviction of the Appellants. She urged the court to allow their appeals.

The facts of this case are rather straight forward. On 23rd June 2013 PW1 Samson Leyamyam, a member of the Kenya Defence Forces went to visit his friend PW2 Sergeant Benedict Lewika. PW2 was at the material time an administration police officer based at Ruaraka Administration Police Camp. According to PW1 and PW2, on the evening of the same day, they decided to go to a nearby club to have a soft drink. They invited PW4 Butula Adan Hassan to join them. After taking the drinks, they decided to go back to the Administration Police Camp at Ruaraka. This was about 9.00 p.m. Before they reached the Camp, they were accosted by a gang of five men who threatened them

with a knife and thereby robbed PW1 and PW4 of their mobile phones and other personal belongings.

PW2 managed to escape. He rushed to the Camp, armed himself with a rifle and returned to the scene. PW2 testified that during the robbery, he was able to identify the Appellants. PW2 testified that he knew the Appellants prior to the robbery incident as he had interacted with them in the course of his duty. It was his evidence that there was sufficient light which illuminated the area where they had been accosted by the robbers. PW1 corroborated the testimony of PW2 in regard to the prevailing circumstances at the time of the robbery that enabled them to positively identify the Appellants. PW2 roped in PW3 APC Asha Otieno Rapenda to assist him arrest the Appellants. They went to the home of the Appellants where they managed to arrest them. Critically, none of the items which were robbed from the complainants were found in the Appellants' possession.

PW2 made a report to Ruaraka Police Station at 1.00 a.m. on 24th June 2013. The Report is reflected in OB No.3 of 24th June 2013. This is what was recorded:

> ***"To the station is Sgt Benedict Leweika of D.O's Office Mathare North,… accompanied by Senior Private Samson Leyamyam of DOD Military and they report that on 23/6/2013 at about 2100 hrs they were from Lexy Inn hotel within Dawanol area heading to the AP Camp and on reaching near the camp, four people emerged from the Drive-in road while armed with a knife and a bottle of spirits and stopped them. One of them drew a knife and told the Sgt to shoot him. The said Sgt then went to the camp to collect his gun leaving behind his companion struggling with the attackers. They assaulted the Senior Private on the right cheek using the bottle and he started bleeding from the mouth. Sgt Benedict went with the rifle and shoot two rounds of 7.62 mm after which they ran away after robbing Samson Leyamyam of his mobile phone make Nokia 200 valued at Kshs.7,000/-, ATM Card of KCB, Identity Card of KDF and cash one hundred shillings in a wallet. They pursued them to their houses and arrested three of them and recovered a knife who are held at the AP Camp."***

The 1st Appellant and two others were arrested on the same night by PW2 and later handed over to the police at 4.00 a.m. PW2 later conducted a raid with his colleagues where they arrested the other Appellants with other suspects. It was in one of this raids that the mobile phone belonging to PW4 was recovered. The case was investigated by IP Evans Cheya of Ruaraka Police Station. Upon concluding his investigations, he formed the opinion that a case had been established for the Appellants to be charged with the offences that they were convicted.

When the Appellants were put on their defence, they denied committing the offences. They gave what in effect were alibi defences. They denied that they were at the scene of crime at the time the robbery took place. It was their case that they had been wrongly implicated in the crime. They told the court the circumstances of their arrest which in their view did not point to the fact that they were the ones who robbed the complainants. In essence, it was their defence that they were innocent and were infact victims of mistaken identity.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

In the present appeal, the issue for determination by this court is whether the prosecution adduced evidence which established the Appellants' guilt on the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also had the benefit of considering the submission made by the parties to this appeal. From the prosecution's evidence, it was clear to this court that the Appellants were convicted essentially on the evidence of identification. It is now settled that where the court relies on the evidence of identification to convict an accused person, it must warn itself of the dangers of relying on such evidence especially where the identification was made in circumstances that were not conducive to positive identification. In such circumstances, other evidence is required to corroborate the evidence of identification. The Court of Appeal in **James Murigu Karumba –vs- Republic [2016] eKLR** held thus:

> ***"…it is not in dispute that the stolen items were never recovered and the only substantial piece of evidence against the Appellant was that of identification. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In Wamunga –vs- Republic [1989] KLR 424 this court held at Page 426 that,***
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> ***"where 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 make it the basis of a conviction.""***

In the present appeal, it was clear that the evidence of identification that was relied upon by the trial court to convict the Appellants was made in circumstances that did not favour positive identification. The robbery incident took place at night. It was dark. Although the complainants testified that they were able to identify the Appellants by the street lights illuminating the area, it was not clear from their evidence what length of time it took them to identify the Appellants. It was also not clear at what distance the complainants were able to identify the Appellants. In the hectic circumstances of the robbery, this court is not certain that the complainants were in such a state of mind as to be able to identify the five robbers who assailed them.

From the first report that was made to the police, it was not apparent how PW2 was able to be certain that he identified the assailants. From that report and the evidence that was adduced before court, it was apparent that PW2 took off from the scene of robbery and rushed to the nearby AP Camp where he obtained a rifle before he returned to the scene. He shot twice in the air to scare away the robbers. The knife which the robbers used to threaten them was dropped at the scene of robbery. PW2, with the assistance of his colleagues went on a raid in the nearby residences and managed to arrest the 1st Appellant and his two friends in their house. As stated earlier in this Judgment, it is not clear how the PW1 and PW2 were able to be certain that it was the Appellants who robbed them. They did not give the description of their assailants in the first report that was made to the police. Even if this court were to believe PW2 that he recognized the Appellants during the course of the robbery, his evidence does not give confidence to this court that he was sure that the Appellants were the persons who robbed them on the material night. If that were the case, why didn't PW2 give the names of the Appellants in the first report that he made to the police? This court is not persuaded that the evidence of identification stands up to legal scrutiny. This court holds that the evidence of identification is such that this court is hesitant to rely upon it to convict the Appellants.

The other evidence that the prosecution relied on to convict the Appellants is the alleged recovery of the mobile phone belonging to PW4 in possession of one of them. From the evidence adduced, it was clear that the chain of events from the time of the robbery to the recovery of the said mobile phone was broken because the same was recovered after PW2 had received information from an informer of the whereabouts of the particular mobile phone. From his testimony, it was not clear how the recovery of the said mobile phone three days after the incident, in possession of one of the Appellant's co-accused who was acquitted by the trial court, connects the Appellants to the robbery. Having re-evaluated the totality of the evidence adduced, in light of the submission made in this appeal, this court is not convinced that the recovery of the said mobile phone sufficiently connects the Appellants to the crime that was committed. The doctrine of recent possession cannot therefore be applied in this case. The Director of Public Prosecutions, correctly in the view of this court, conceded to the appeal.

The upshot of the above reasons is that the respective appeals lodged by the Appellants have merit and are hereby allowed. The respective convictions of the Appellants are hereby quashed. The Appellants are acquitted of the charges of robbery with violence contrary to **Section 296(2)** of the **Penal Code** that were brought against them. The Appellants are ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF APRIL 2018

L. KIMARU

JUDGE