



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 99 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

BERNARD GITONGA KAILILIA.....1ST APPELLANT

PETER MUTWIRI2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of

Hon. A. G. Munene, SRM dated 5th September 2017 at Chief

Magistrate's Court at Maua in Criminal Case No. 3578 of 2014)

JUDGMENT

1. The appellants, **BENARD GITONGA KAILIKIA** and **PETER MUTWIRI** were charged with the offence of robbery with violence contrary to **section 246 (2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on 1st August 2014 at Nkalietwa village, Kiromwathi Sub-location, Antubetwe Kiongo Location in Igembe North District within Meru County, they jointly with others not before the court robbed **ISALAH BAARIO M'IMPUI** of his miraa worth Kshs. 8,000/= and at the time of such robbery used personal violence against him. The accused were convicted and sentenced to death. They now appeal against conviction and sentence.

2. The singular issue in this appeal is that of identification. Our courts have urged caution when the circumstances of identification are difficult. The court is enjoined to examine all the circumstances surrounding the case and ensure that the identification is positive and free from error before returning a conviction. Even in case of recognition, caution is urged because mistakes can be made. The Court of Appeal has also held that where it is a case of recognition, the first report and the fact that the person was named are of critical importance in weighing the evidence of recognition.

3. I have evaluated the evidence in this case and it is that the complainant (PW 1), on the night of 21st August 2014, heard movements in his shamba. When he went to check he saw both appellants as he had a torch. As he was able to see them, he tried to hit the 1st appellant but he was hit instead and injured. When cross examined by the 1st appellant, he told the court that he reported to Maua Police Station on the same morning at about 3.00am but recorded his statement on 27th August 2014 because he was ailing.

4. The prosecution only called one witness and closed its case. The 1st appellant told the court in his sworn defence he did not commit the offence while the 2nd appellant also denied the charge. He stated that he was framed.

5. From the outline of the evidence, the prosecution only relied on the testimony of PW 1. The other witnesses were not called including the investigating officer. PW 1's testimony was not tested by other evidence although I understand from *Abdalla Wendo v R [1953] 20 EACA 166* that the testimony of one witness would be sufficient to sustain a conviction. The charge sheet shows that the appellants were arrested on 20th August 2014. If the first report was made on the night of the robbery and the appellants were from the area, why were they not arrested earlier? The fact that no other witnesses were called in my view, casts doubt on the prosecution case, as the evidence of identification was not properly tested.

6. I find the conviction unsafe. The conviction and sentence quashed the appellants are set free unless otherwise lawfully held.

DATED and DELIVERED at MERU this 30th day of May 2018.

D.S. MAJANJA

JUDGE

Appellants in person.

Mr Mwathi, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.