



REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL NO. 197 OF 2010

DOMINIC MAKOKHA WANDAVI 1ST APPELLANT

EMMANUEL KHAEMBA WEKESA 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

***(Being an Appeal from the original conviction and sentence by Honourable D. ALEGO
Principal Magistrate, dated 20th December, 2010, in Eldoret Chief Magistrate's Court
Criminal Case No. 5268 of 2009)***

JUDGEMENT

1. The two appellants *Dominic Makokha Wandavi* and *Emmanuel Khaemba Wekesa* were jointly tried and convicted of the offence of robbery with violence contrary to *Section 296(2)* of the *Penal Code*. They were sentenced to death.
2. The particulars of the offence alleged that on 23rd August, 2009 at Musemwa sub location in Lugari district within Western province, the appellants jointly with another not before the court, being armed with offensive weapons namely panga and an axe robbed *Ebby Lihanda* of his cash Kshs. 5,000 and at or before the time of such robbery threatened to use actual violence on the said *Ebby Lihanda*.
3. Both appellants were aggrieved by their conviction. They filed their respective appeals to the High Court on 24th December, 2013 and on 1st October, 2015, the court under *Section 350* of the *Criminal Procedure Code* granted then leave to file amended grounds of appeal.
4. In their amended grounds of appeal, the appellants raised largely similar complaints. They claimed that the learned trial magistrate erred in law in finding that they were positively recognized during the robbery while the circumstances prevailing were not favourable to positive identification; that they were convicted on the basis of uncorroborated evidence which was not sufficient to prove the offence beyond reasonable doubt. The 2nd appellant (Emmanuel) in addition contended that the trial magistrate erred by convicting him on the evidence of bad character adduced by the investigating officer contrary to *Section 57(1)* of the *Evidence Act*.
5. At the hearing, both appellants prosecuted their appeals in person. They relied entirely on home made written submissions which they submitted to the court.
6. The appeal is contested by the state. Learned prosecuting counsel *Ms Oduor* in her submissions averred that the prosecution had proved all elements of the offence beyond any reasonable doubt; that the

appellants were positively recognized as the robbers by PW1 and PW2 who were their neighbours; that the appellants were properly convicted and their appeals should be dismissed for lack of merit.

7. This is a first appeal to the High Court. I am alive to the duty of the first appellate court which is to re-examine and re-evaluate all the evidence presented to the lower court to make my own independent determination while giving allowance to the fact that unlike the trial court, I did not see or hear the witnesses.

See: **Kiilu & Another V Republic (2005) KLR 175; Soki V Republic (2004) 2 KLR 21.**

8. I wish to start my determination by addressing the 2nd appellant's claim that the trial magistrate erred by basing his conviction on evidence of bad character adduced by the investigating officer.

I have read the judgment of the learned trial magistrate and I have not come across any indication that any evidence of the 2nd appellant's alleged bad character featured anywhere in the trial court's analysis of the evidence presented before it or on the reasons on which his conviction was premised. That ground of appeal therefore fails.

9. Having considered all the evidence on record and the lengthy submissions made by both the appellants and those made on behalf of the state, I find that the main issue that falls for my determination is whether the appellants were positively identified and or recognized as the persons who robbed the complainant of cash Ksh. 5,000 at the time alleged and whether the evidence on record was sufficient to prove the charges beyond any reasonable doubt.

10. A reading of the trial court's judgment reveals that the appellants' convictions were based on their alleged identification and recognition by PW1 and PW2 as the culprits who committed the offence. They claimed that they were able to see and recognize the appellants who were PW1's former pupils and neighbours. In order to determine the issue of whether or not the appellants were properly identified and recognized as part of the persons who robbed the complainant, it is important to summarise the identification evidence that was adduced at the trial.

11. According to the evidence of PW1, she was asleep in her house together with her daughter (PW2) and granddaughter when at around 12.30 a.m, three men stormed into their bedroom. She immediately slipped under the bed. She recalled that it was a dark night and the robbers were armed with a sharp spotlight. Her house did not have electricity lights but on the robber's demand, a candle was lit. She claimed that this is when she was able to see and recognize the appellants as her neighbours whom she knew by name. The robbers were armed with pangas. They left after stealing her Kshs.5,000. She reported the matter to Matunda police station and the appellants were arrested on the same night after her brother identified them to the police.

12. PW2 on her part testified that she was only able to see the robbers after a candle was lit. They were three but she identified two of them as the appellants who were their neighbours. She did not mention whether or not they were armed. She did not also claim to have seen the robbers with a spot light as alleged by PW1.

13. On my reappraisal of the evidence, I find that the evidence on identification was fraught with several gaps. To start with, it is not disputed that it was a dark night. PW1 and PW2 were awoken from sleep and it is clear from their evidence that the only source of light that allegedly aided them to see and identify the suspects was a candle.

14. Given this evidence, it is not clear to me how PW1 was able to see and identify the culprits or even recognize them from such a poor source of light from under her bed where she had hid when the robbers struck. If indeed the two witnesses had properly identified their assailants and were certain about their identity, they would have given their names to the police and described their homes to facilitate their arrest when they reported the incident at Matunda police post in the course of the same night. It would not have been necessary for PW1's brother to identify them to the police for purposes of effecting their

arrest. Besides, PW1's brother was not present when the offence was committed and he did not testify in this case. It is not clear how he identified the appellants as the suspects in the absence of both PW1 and PW2.

15. The learned trial magistrate in her judgment did not address her mind to whether the circumstances prevailing during the robbery were conducive to a reliable and correct identification of the suspects. She did not seek to establish whether the source of light used to identify the suspects was bright enough to enable the witnesses to see the suspects clearly and identify them without the possibility of making a mistake given that the robbery occurred at night.

16. In *Maitanyi V Republic (1986) KLR 198* the Court of Appeal held that failure of a trial court to consider the circumstances under which identification in difficult circumstances was made amounted to an error of law. The court stated as follows;

“when testing the evidence of a single witness, a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description of the accused. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction”.

17. Similarly in *Wamunga V Republic (1989) KLR 424* the same court held that;

“It is trite law that where the only evidence against a defendant is 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 the possibility of error before it can safely make it the basis of a conviction”.

18. In this case, both appellants denied having committed the offence. It was not upon the appellants to prove their innocence. It was the duty of the prosecution to establish their guilt as charged beyond any reasonable doubt.

19. From the evidence on record, I am not satisfied that the appellants were sufficiently and positively identified as being part of the three people who robbed the complainant. The evidence on record regarding their alleged recognition was not water tight. It was not free from the possibility of error.

20. In the result, I have come to the conclusion that the appellant's convictions were not safe. I therefore find merit in the appeal and it is hereby allowed. The appellant's convictions are hereby quashed and their sentences set aside. They shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 30th day of March 2017.

In the presence of:-

Both appellants

Ms Oduor for the state

Mr. Lobolia court clerk