REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.100 OF 2014

(An Appeal arising out of the conviction and sentence of Hon. C.C. Oluoch (Mrs.) - PM delivered on 3rd July 2014 in Kiambu CM Cr. Case No.361 of 2014)

GEORGE KAROBA NYAMBURA……1ST APPELLANT

ANTHONY MBUGUA MIRING'U……2NDAPPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The 1st Appellant, George Karoba Nyambura and the 2nd Appellant, Anthony Mbugua Miring'u were charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 20th January 2014 at Raburo Village, Kasarani, Nairobi County, the Appellants jointly with others not before court, while armed with dangerous weapons namely a pistol and knives, robbed Maurice Musembi Kimeu of a motor vehicle Registration No.KBL 807 C Mitsubishi Canter valued at Kshs.1.3 million and immediately before the time of such robbery wounded the said Maurice Musembi Kimeu. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, the Appellants were convicted as charged and sentenced to death. The Appellants were aggrieved by their conviction and sentence. They have filed separate appeals to this court.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the basis of contradictory and insufficient evidence of identification. They were aggrieved that they had been convicted on the sole evidence of identification when in the first place the complainants had not given the description of their assailants. They faulted the trial magistrate for failing to take into the account their respective *alibi* defence before reaching the determination to convict them. They took issue with the fact that they were convicted on the basis of the evidence of identification yet no identification parade was conducted to confirm the visual identification allegedly made by the complainants. They were finally aggrieved that the trial court had not taken into consideration the totality of the evidence adduced before reaching the decision to convict them. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside death sentence imposed on them.

During the hearing of the appeal, this court was presented with the written submission prepared by the Appellants. They also made oral submission urging the court to find that the prosecution had not

established a case for them to be convicted of the charge of **robbery with violence**. In particular, they submitted that the evidence of visual identification that was relied on by the trial court to convict them was insufficient and incredible. They submitted that the trial court had not taken into account the fact that the complainants had not given the description of their assailants in the first report that was made to the police. Since there was no other evidence to connect them to the offence other than the evidence of identification, they urged the court to find that the circumstances under which the said identification was made was not conducive to positive identification and therefore they should be acquitted.

On her part, Ms. Nyauncho for the State opposed the appeal. She conceded that indeed the trial court relied on the evidence of visual identification. She however submitted that the evidence of identification was watertight because the Appellants were with the complainants for a period of five (5) hours during which they were able to be positive that they had identified the Appellants as members of the gang of robbers that attacked them. She submitted that the two complainants' evidence on visual identification corroborated each other in all material respects and therefore the trial court properly convicted the Appellants on the basis of that evidence. In the premises therefore, she urged the court to dismiss the respective appeals lodged by the Appellants.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses and by the defence before the trial court so as to arrive at an independent determination whether or not to uphold the conviction of the trial court. In doing so, this court should be mindful of the fact that it neither saw nor heard the witnesses as they testified during trial and cannot therefore give an opinion as to the demeanour of the said witnesses (**see Okeno –vs-Republic [1972] EA 320**). In the present appeal, the issue for determination by the court is whether the prosecution established a case for this court to convict the Appellants on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to required standard of proof beyond any reasonable doubt.

The facts of this case are straight forward. PW3 Nicholas Kioko Mutua was at the material time the owner of motor vehicle Registration No.KBL 807 C Mitsubishi Canter. The motor vehicle was hired out to transport furniture. PW3 employed PW1 Maurice Musembi Kimeu and PW2 Henry Mutungi Malelu as his driver and loader respectively. PW1 testified that on 20th January 2014, he was approached by someone who wanted him to ferry household goods from Kahawa West to Kayole. The person gave him his contacts. At 3.00 p.m., he called PW1 and requested him to proceed to Kahawa West to collect the goods. PW1 drove the vehicle to Kahawa West accompanied by PW2. He picked the customer at Tushauriane in Kayole. They arrived at Kamiti Prison about 5.00 p.m. The customer directed him to a road which he referred to as a shortcut. They went into a coffee plantation. There were no houses. They found three (3) men by the roadside. The customer told them to stop and carry the three men because they were the ones who would assist them ferry the household goods. PW1 stopped the vehicle. The three men boarded the vehicle. He was instructed to drive further on. He was ordered to stop the vehicle. One of the men pointed a pistol at him. Another one threatened to stab him with a knife. He attempted to reverse the vehicle. In the process, the vehicle hit a perimeter wall. He was ordered to surrender the motor vehicle. He handed over the keys to one of the men.

It was obvious to PW1 and PW2 that the **"customer"** was an accomplice to the three men. They were removed from the vehicle. Their hands were tied with a rope. They were escorted into the coffee plantation where their feet were also tied. PW1 and PW2 testified that two of the men drove off with the motor vehicle while two of the remaining men guarded them. They were at the coffee plantation until 11.00 p.m. when the two men guarding them left. They were able to untie themselves. They walked to the road. They found the police at a roadblock. They made a report of the robbery to the police. A vehicle was sent from Kiambu Police Station to pick them. They were taken to Kiambu Police Station. They made a report which was recorded at the OB. The OB report was produced in evidence. It was clear from the said OB report that the complainants did not give the physical and facial description of the persons who robbed them. PW1 called PW3 to inform him of the robbery. The complainants spent the night at the police station. They were released to go home and requested to return to the police station later to record their statements.

Three days later, they went to the police station. While at the police station, PW1 and PW2 testified that

they saw the Appellants at the Report Office. The Appellants were being fingerprinted. They had been arrested on unrelated offence of theft and burglary. After their identification by the complainants, the Appellants were interrogated by PW4 PC Luke Rotich. According to PW4, the 2nd Appellant told them that indeed they had robbed the complainant of the motor vehicle. The 2nd Appellant offered to take them to the person who had custody of the motor vehicle. This person was referred to as Tony. The 2nd Appellant was escorted to Outering area but the said Tony did not appear. The motor vehicle was not recovered. After evaluating the evidence adduced by the prosecution witnesses, the trial court convicted the Appellants on the basis of the evidence of visual identification by PW1 and PW2.

Upon re-evaluating the evidence adduced before the trial court, it was clear to this court that the evidence relied on by the trial court to convict the Appellants was not watertight. The trial court appreciated that to convict the Appellants on the evidence of visual identification, the court had to satisfy itself that the conditions favouring positive identification existed before the court believed such evidence. Indeed, the trial court cited the case of **Cleopas Otieno Wamunga vs Republic, Criminal Appeal No.20 of 1982** (unreported) where it was held that:

> ***"Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification."***

In the present appeal, it was clear to this court that the circumstances which the complainants are said to have identified the Appellants raises doubt as to whether they were positive that they had identified the Appellants. According to the complainants (PW1 and PW2), they were robbed and held hostage for a period of more than five (5) hours. They had earlier been lured by a person who pretended to be a customer. According to the complainants, they were in close proximity with the said *"customer"* whom they identified as the 1st Appellant. They picked three men near Kamiti Prison before they were diverted into a coffee plantation where they were held upto 11.00 p.m. before they managed to free themselves and report the incident to the police at a nearby road block. Other than telling the police, in the first report, that they would be able to identify their assailants if they saw them again, the complainants did not give the physical and facial description of their said assailants. They did not even give the description of the clothes that the robbers wore. They did not give any unique features of the robbers that would make them be positive that the Appellants were the ones who had robbed them.

In such circumstances, it would be difficult for this court to reach a finding that the subsequent identification of the Appellants by the complainants at the police station was watertight and free of any error. The complainants fortuitously identified the Appellants at the police station when they went to collect a police abstract report. This was three (3) days after the incident. The Appellants had been arrested for unrelated offence. They were being fingerprinted at the Report Office when they were allegedly identified by the complainants. This court doubted the basis upon which the said identification could have been made in the absence of a description made in the first report to the police. It is not enough for the complainants to have said that they would have identified the robbers if they saw them again. It is trite law that where the prosecution relies solely on the evidence of visual identification, the court must warn itself of the danger of convicting an accused person on the basis of such evidence because the possibility of mistaken identity cannot be ruled out. In the present appeal, in the hectic circumstances of the robbery, and the fact that the complainants may have been under extreme stress, it cannot be entirely ruled out that they may have been mistaken in the identification of the Appellants as the persons who robbed them.

In **Maitanyi –Vs- Republic [1986] KLR 198 at Page 200**, the Court of Appeal held that where the prosecution relies on the evidence of identification, it is important that the court interrogates the circumstances upon which the said identification was made. If there is doubt, then it was imperative that the said evidence of identification be corroborated by other evidence. In the present appeal, it was clear that, other than the evidence of identification, no other evidence was adduced by the prosecution

witnesses to connect the Appellants to the robbery. The motor vehicle that was robbed from the complainants was not recovered. None of the items that were robbed from the complainants were recovered in the Appellants' possession. Taking into consideration the totality of the evidence adduced in this case, this court cannot rule out the possibility that the Appellants could have been victims of mistaken identity. Their *alibi* defence in that regard may well be true.

The upshot of the above reasons is that the respective appeals lodged by the Appellants (they were consolidated and heard together as one) are hereby allowed. Their respective conviction is quashed. The sentence imposed upon them is set aside. They are ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF MAY 2016

L. KIMARU

JUDGE