REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 5 OF 2015

BETWEEN

BENSON ACHACH ACHACH ……...…… 1ST APPELLANT

JARED OKOTH ONGONGA ……..… 2ND APPELLANT

AND

REPUBLIC …..…….……...……. RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B. Ochieng, Ag PM dated 1st December 2014 at Principal Magistrate's Court at Maseno in Criminal Case No. 777 of 2011)

JUDGMENT

1. In the subordinate court, the appellants, **BENSON ACHACH ACHACH** and **JARED OKOTH ONGONGA** were part of a four-man gang charged with robbery with violence contrary to **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of Count 1 was that on 21st June 2011 at about 10.00pm in Kisumu West District within Nyanza Province they with other not before the court joint robbed E A O of a 50kg bag of beans valued at Kshs. 650/-, one bucket valued at Kshs. 250/-, onions valued at Kshs. 100/-, tomatoes valued at Kshs. 500/-, tea leaves valued at Kshs. 250/-, rice valued at Kshs. 600/- and a panga valued at Kshs. 400/- and at or immediately before or immediately after the time of such robbery used actual violence on the said E A O.

2. Count 2 was a charge of defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act*** against the other accused. The appellants also faced Count 3 of assault causing actual bodily harm contrary to **section 251** of the ***Penal Code***. The particulars were that on 21st June 2011, the appellants, in Kisumu West District unlawfully assaulted E A O thereby occasioning her actual bodily harm.

3. The appellants were convicted on the first and principal count of robbery with violence. The 1st appellant was sentenced to death while the 2nd appellant was detained at the President's pleasure due to the fact that he was child at the time he committed the offence.

4. The appellants now appeal against the conviction and sentence based on their respective petitions of appeal. They have also filed amended ground of appeal together with written submissions. The principal issue raised by the appellants is that of identification. They contended that they were not identified on the material night and that the learned magistrate failed to find that the conditions and surrounding circumstances could not allow positive identification. They also contended that the prosecution did not prove all the elements of the charge of robbery with violence hence they are entitled to an acquittal. The respondent took the view that the prosecution had proved all the elements of the offence and that the

circumstances surrounding the incident were favourable to positive identification.

5. In considering the issues raised by the appellants, 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**). The prosecution case was as follows.

6. The prosecution case was narrated by the principal witness, E O O (PW 1) who recalled she was sleeping in the sitting room of her mother's house with her younger siblings W A (PW 2) and J A (PW 4) on the night of 21st June 2011. Their mother, R A O (PW 2) was attending a funeral. At about 10.30pm, she heard a bang on the door and four assailants came in and started demanding Kshs. 10,000/- which she did not have. They rejected her suggestion that they take Kshs. 500/-. PW 1 narrated the ordeal as follows;

The wanted Kshs. 10,000/-. We were beaten up with pangas. The intruders were flashing torches. They had 3 big torches. The intruders were flashing torches in turns. I saw 4 people in the house. They were all armed with pangas. I recognised all 4. Their names are Atoti, Fred, Achach and Okoth. They are also residents of Magwar. I am not related to them. …… During the assault, I held Fred by the neck. Atoli intervened by hitting me on the back. Achach also hit me on my neck. Okoth didn't beat me …...

7. PW 2 recalled that on the night she saw five people enter the house. One of them flashed a torch and she only recognised two assailants as the other three had covered their faces. She testified that her sisters were assaulted and that she was dragged into one of the bedrooms and defiled. She passed out and found herself at Kombewa Hospital. PW 4 was also present in the house when the assailant struck. She told the court that the assailants came into the house flashing torches, demanding money and threatening to beat them. She testified that the assailants started beating PW 1. Although she knew the appellants, she could not recall seeing them.

8. After the orgy of violence, the assailants left whereupon the PW 1 raised alarm. A neighbour, Joan Odhiambo Onyango (PW 7), and took them to hospital. PW 3 arrived from the funeral that morning and was informed of the incident. She proceeded to Kombewa Hospital where she found PW 1 and PW 2 undergoing treatment. She testified that she knew appellants as they were from the neighbourhood. PW 1 was later examined by Paul Outa Ouko (PW 9), a clinical officer at Kombewa District Hospital, who confirmed that she had sustained injuries on the chest inflicted by a panga.

9. A local youth leader, M O O (PW 5) recalled that on 22nd June 2011, he was informed that some people had invaded his in-laws. He proceeded to Kombewa Hospital where he found PW 1 and PW 2 admitted. PW 1 gave him the names of the assailants and he proceeded to report to Kombewa Police Station. He later met the Assistant Chief who assisted in locating and arresting the appellants and the other accused. The Assistant Chief, Jennifer Okelo (PW 6), testified that the incident was reported to her on 23rd June 2011. She arrested one of the accused and confirmed that members of the public had arrested the others. PC Nzuki (PW 8), the investigating officer, told the court that he visited the scene at Kombewa and re-arrested the accused who had been arrested. He collected the exhibits and recorded statements.

10. When put on his defence, the 1st appellant denied that he had committed robbery. He however gave an account of how he was arrested. The 2nd appellant stated that he knew nothing about the offence.

11. The offence of robbery is defined under **section 295** of the ***Penal Code*** as follows:-

Any person who steals anything, and at, or immediately before, or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

For this robbery to qualify as a violent one under **section 296(2)** attracting a death sentence, the

offender must be:-

a. armed with a dangerous or offensive weapon or

b. be in company with one or more other persons or

c. immediately before or after the time of robbery, wound, beat, strike or use any other personal violence to the victim.

12. It is apparent from these provisions that the prosecution must prove stealing as an essential element of the offence of robbery with violence. From the particulars of the charge the appellants were accused of stealing;

50kgs of beans valued at Kshs. 650/-, at one bucket valued at kshs. 250, Onions valued at Kshs. 1,000/-, Tomatoes valued at Kshs. 500/- tea leaves valued at Kshs. 400/-, Rice valued at Kshs. 1,000/-, Sonitec radio valued at Kshs. 600/- and a panga valued at Kshs. 400/-.

However, none of the witnesses called by the prosecution testified that the items outlined in the charge were stolen. PW 1 testified that, "*the attackers took J's money in a basket. I didn't know the amount of money. A bag containing my Kshs. 500/- was also taken by the thugs."* PW 2 simply stated that household goods were removed outside but did not elaborate what these household goods were. PW3 did state what was taken from her house while PW 4 did not give any evidence on the items stolen.

13. In order to succeed, the prosecution had to prove that the items set out in the charge sheet were stolen in the course of the robbery as the stealing is an essential ingredient of the offence of robbery. I find that the prosecution failed to prove that the items set out in the charge sheet were stolen from the complainant consequently the offence was not proved.

14. But acquittal on the charge of robbery with violence is not the end of the matter. The appellants also faced an additional charge of assaulting PW 1 and causing her actual bodily harm. What the court is tasked to decide is whether the evidence of identification was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellants**.** Our courts have emphasized that unless handled with care, evidence of visual identification can occasion a miscarriage of justice (see ***Karanja & Another v Republic,* [2004] 2 KLR 140 and *Wamunga v Republic,* [1989] KLR 424**). In ***Republic v Eira Sebwata* [1960] EA 174**, and ***Kiarie v Republic* [1984] KLR 739**, the Court of Appeal was even more categorical on reliance on such evidence holding that the evidence must be *"absolutely watertight"* to justify conviction.

15. The robbery in the present case was committed at night and the only form of lighting were torches in the hands of the robbers. PW 1, PW 2 and PW 4 confirmed that the assailants were flashing torches. Only PW 1 who was able to identify the appellants. She recognised the appellants as they came from the same village and she had known them from childhood. PW 2, PW 3 and PW 4 also confirmed that they came from the same neighbourhood. She gave their names to the Police following which they were arrested so soon thereafter. On cross-examination by the 2nd appellant, PW 1 stated that she had known him for a long time and could even recognise his voice. This was thus a case of recognition as opposed to identification of a stranger. From the fact that the assailants had torches in the closed space of the room, the time it took for the assailants to threaten PW 1 and demand money and the fact that the appellants were not strangers is sufficient assurance that the identification evidence upon which the appellants were convicted was free from error. I also find that nothing was suggested to them in cross-examination that implied a grudge of some sort against the appellants.

16. I would add that even though PW 1 stated that the 2nd appellant did not assault her, he was part of a gang that had stormed into the house where the girls were sleeping and engaged in an orgy of violence. There was no other reason he was in that house other than to prosecute an unlawful purpose with the other assailants. He cannot escape liability as his actions are covered by the doctrine of common intention set out in **section 21** of the ***Penal Code*** which states as follows;

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

17. That PW 1 sustained injuries was established by PW 9 who classified her injuries as harm. The appellants' defence was did not deal with circumstances of the offence and did nothing to shake the prosecution case. I therefore find the appellants guilty of assault causing actual harm contrary to **section 251** of the ***Penal Code*** and I convict them accordingly.

18. As regards the sentence, I consider that the 1st appellant was part of a gang that viciously attacked an innocent girl. I sentence him to three (3) years imprisonment. Such period shall take into account he time already served in after conviction. The trial court certified that 2nd appellant was a child as he was below the age of 18 years at the time he committed the offence. I am therefore guided by **section 191** of the ***Children Act*** which excludes imprisonment as a sentence for a child. In my view, he had fallen under dangerous influence and to prevent him from falling prey to such influences I sentence him to two (2) years' probation.

19. The appeal succeeds and is therefore allowed on the following terms;

a. The appeal is allowed and the convictions and sentence for Count 1 is being robbery with violence contrary to section 296(2) of the *Penal Code* are quashed and the sentences set aside.

b. The appellants are convicted on Count 3 being assault occasioning actual bodily harm contrary to section 251 of the *Penal Code*.

c. The 1st appellant is sentenced to three (3) years imprisonment and the sentence shall run from 1st December 2014.

d. The 2nd appellant is sentenced to two (2) years probation. He is therefore set free unless otherwise lawfully held.

DATED and DELIVERED at KISUMU this 28th day of July 2016.

D.S. MAJANJA

JUDGE

Appellants in person.

Ms Chelangat, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondents.