REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 23 OF 2014

1. SILAS M'TULATIA IMUBUO

2. GEOFFREY KAIRE THAMBURA

3. JOSEPH NKUNJA..... APPELLANTS

VERSUS

REPUBLIC ……. RESPONDENT

(From the original conviction and sentence in criminal case No.544 of 2012 of the Senior Principal Magistrate's Court at Isiolo by Hon. J.M. Irura – Ag. Principal Magistrate)

JUDGMENT

SILAS M'TULATIA IMUBUO, GEOFFREY KAIRE THAMBURA and **JOSEPH NKUNJA** the appellants herein were Charged with an offence of robbery contrary to section 296 (2) of the Penal Code.

The particulars of the offence were that on the night of 29th October 2012 at Nturiri area in Meru County, jointly with others not before court, while armed with rifles robbed **NJORO MAIRUTHA** of his two cows and a donkey all valued at Kshs. 80,000/= and immediately before or immediately after the time of such robbery wounded **DOMICIANO GITONGA**.

The appellants was convicted and sentenced to suffer death. They now appeal against both conviction and sentence.

The appellants were unrepresented. Each had filed own grounds of appeal which can be combined as follows:

1. That the learned trial magistrate erred in law and fact by failing to make a finding that no gun was taken for examination.

2. That the learned trial magistrate erred in law and fact by failing to appreciate that they had grudges with their accusers.

3. That the learned trial magistrate erred in law and fact by failing to ascertain that the appellants was properly identified.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the case are briefly as follows:

The complainant's livestock were stolen by people who were armed. This was at night and some of the robbers were recognized.

Each of the appellant pleaded an alibi and contended that they were implicated due to grudges.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32.**

Domiciano Gitonga (PW 4) was supposedly injured by a gun. There was no attempt by the prosecution to prove this fact. A P3 form would have done so with a medical expert's evidence assisting to establish whether it was at a close range or not.

A ballistic expert evidence was not availed to court in spite of the fact that some spent cartridges were picked at the scene. This would have helped to shed light as to how many guns were involved, and whether the gun that shot Domiciano (if indeed it was a gunshot wound) belonged to the robbers and which was not recovered or whether it belonged to the police reservist Silas Kinga (PW3) who testified that he fired bullets. finally the spent cartridges would have helped the investigators to establish how many firearms were involved. No explanation was offered. This was a serious omission in the prosecution case.

Each appellant raised an issue of being framed up due to a grudge. Though the first appellant did not bring out clearly the facts of the grudge with the complainant (PW1) the responses the complainant gave to the questions raised by the appellant ought to have put the learned trial magistrate on alert. At one instance this is what the complainant responded:

> **"You are my neighbour I said that the first accused was living in your house when they commit felonies"**

It was important to establish whether he suspected the first appellant due to his association with a person he considered a criminal or whether he indeed recognized him. We shall revert to the issue of recognition later.

Geoffrey Kaire Thambura, the second appellant, said that his deceased father had a case with the complainant. The dispute was settled before the Njuri Ncheke elders. After his demise, the complainant started to bring issues with him over the same parcel of land. The allegation was not put across to the complainant during cross examination and the learned trial magistrate was justified to dismiss it. It was an afterthought.

There was evidence on record of altercation between the complainant and the third appellant where the complainant claimed that he (3rd appellant) had threatened to steal his livestock. The learned trial magistrate ought to have addressed this issue and make a finding whether the case against this appellant was motivated by their earlier differences or not. This did not happen.

According to the complainant, the robbers struck at about 11PM.In his own evidence there was moonlight. This is therefore a case of recognition which the appellants contend was wrong. I will be guided by the directions given by Lord Widgery CJ, in the celebrated case of **R v TURNBULL & OTHERS - [1976] 3 ALL ER 549** where he observed as follows:

> **First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he**

should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be make. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened: but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur. A few examples, taken over the whole spectrum of criminal activity, will illustrate what the effects on the maintenance of law and order would be if any law were enacted that no person could be convicted on evidence of visual identification alone.

I have quoted extensively for this case offers one of the best guidelines to both investigators and the trial courts on matters of identification and recognition.

In the instant appeal I will endeavour to establish how each witness came to identify each appellant. Let us start with the complainant. He testified that at about 11PM he was attracted by his dogs that were barking. When he went outside, he saw a flashlight then heard gunfire. This is when he saw the third appellant at his (complainant's) gate. the third appellant shot at him. There are facts that do not add up here. If there was bright moonlight as he testified, one is left wondering why the robbers would use a spotlight to attract attention to themselves. Ordinarily, we know that thieves do not like to draw any attention in their operations. The same argument would be extended to the initial shooting. He never testified as how long he had the person he claimed to have identified under observation and from what distance. I make a finding that there was no ample light in which the complainant could have identified the third appellant or any of the attackers as he claimed.

The evidence of Isaiah Mbaabu (PW2) sounds more of fiction than reality. First, he said he was outside his house at about 7.30 PM. He testified of the incident unfolding as he observed. However from his narration the robbery may have taken place at 8.10 PM at the latest. This gives a very big variance in time with the time the complainant said the robbery took place. There is a span of about 3 hours that is unaccounted for in his testimony. Secondly, If we assume that indeed he was seated outside his house all this time as the drama unfolded, he needed to explain further why this was so. Ordinarily, people do not

sit outside their houses at night doing nothing and for that matter, alone.

My doubts are bolstered by his statement. He testified that when he heard gunshots from the lower side and somebody screaming, he opened the door and his brother Domiciano Gitonga entered bleeding. Domiciano confirmed that his brother opened the house for him and they had to wait for the people outside to leave before he could be taken for treatment. This tells it all; though he claimed to have been outside his house, this was not true.

The evidence of PC Nahashon Makau (PW5) is that at the scene on the night of the robbery Domiciano Gitonga gave him only one name; that of Cyrus. He never testified to have been given the name of the third appellant who was accused 1 in the magistrates court. No explanation was given and the only logical inference to make was that the failure to do so was because he was not identified as being part of the robbers.

Domiciano Gitonga (PW4) testified that he identified the first appellant from a distance of about 5 meters. This contention is doubtful for he said he had not seen the gun until he was short at. The gun was described as a rifle. If he had not seen it before the shooting then at what time was he able to see it and describe it? I have already addressed the issue of lighting and need not repeat. Though he testified that he identified Nkunja, one is left wondering when he did this, but it would appear it must have been after the shooting. This was not possible in the circumstances.

Although the appellants did not raise the issue of admission of illegal confessions in evidence, it is important that I address it for it was prejudicial to the appellants. PC Nahashon Makau(PW5) and PC Micah Korir (PW6) testified of a confession. Section 25A (1) of the Evidence act provides as follows:

> **A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice.**

The two police constables were not competent to receive a confession. Even if momentarily we assume they were, there is a procedure to follow. The learned trial magistrate erred in admitting illegal confessions. This must have influenced her mind in convicting the appellants.

The upshot of the foregoing analysis of the evidence on record is that the convictions of the appellants were very unsafe. I accordingly quash the convictions and set aside the sentence imposed on each of them. Each is set at liberty unless if otherwise lawfully held.

DATED at Meru 20th day of December 2016

KIARIE WAWERU KIARIE

JUDGE