REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.82 OF 2014

[consolidating Criminal appeal 81 & 82 of 2014]

1. LAWRENCE MURIITHI MWENDA

2. WILSON MURIUKI MWORIA...APPELLANTS

VERSUS

REPUBLIC ……………………………………………......RESPONDENT

(From the original conviction and sentence in criminal case No. 452 of 2012 of the Chief Magistrate's Court at Meru by Hon. D.O Onyango – Ag. Senior Principal Magistrate)

JUDGMENT

LAWRENCE MURIITHI MWENDA and **WILSON MURIUKI MWORIA,** the appellants were charged with an offence of robbery with violence contrary to section 296 (2) of the Penal Code.

The particulars of the offence were that on 17th March 2012 at Mbirikine One village, Imenti North District of Meru County jointly robbed **JACKSON MUGAMBI SILAS** of cash Kshs.8600 and a mobile phone valued at Kshs. 4200/= all valued at Kshs. 12800/= and immediately before the time of the said robbery threatened to use actual violence to the said of cash Kshs 3300/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **JACKSON MUGAMBI SILAS.**

The appellant were found guilty of the offence and sentenced to suffer death. They now appeal against both conviction and sentence.

The appellants were represented by Carlpeters Mbaabu, learned counsel. He raised six grounds of appeal. The grounds can be summarized as follows:

1. That the learned trial magistrate erred in law and in fact by failing to appreciate that the appellants were not positively identified.

2.That the learned trial magistrate erred in law and in fact by failing to note that the prosecution evidence was full of contradictions.

3. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's defence.

The state opposed the appeal through Mr. Namiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

At about 7 PM, the complainant met with the appellants. The two stopped and robbed him. These were people known to him prior to the incident.

In their defence the appellants denied involvement in the offence and contended that they were implicated due to an existing grudge over their mode of circumcision.

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.**

This is a case where the prosecution called witnesses who claimed that they were able to recognize the appellants. The appellants challenged the said identifications. The learned trial magistrate was alive to this fact. He cited the case of **CLEOPHAS OTIENO WAMUNGA v REPUBLIC[1989]eKLR** where the court of appeal said:

> ***Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well known case of R v Turnbull [1976] 3 All E.R. 549 at page 552 where he said:***
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> ***"Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

The evidence of Jackson Mugambi (PW1) testified that at the time of the robbery, it was not yet dark. He said he was able to recognize the appellants . He said these are people he went to school with and they come from the same village. Pius Muregwa (PW2) testified that he found the appellants in the act of robbing the complainant and when he asked them what they were doing, they ran away. He said these were people known to him for they come from the same area. Godfrey Kiraithe (PW3) testified that when he was attracted to the scene by some commotion, he identified the two appellants running away.

These prosecution witnesses, the complainant and the appellants are villagers who have grown up in the same area. I find that the circumstances were favourable for a positive identification. In the instant case it was a case of recognition.

Although it was contended that the prosecution case was riddled with contradictions, my perusal of the record does not reveal any material contradictions. This ground of appeal has no basis.

The learned trial magistrate in his judgment considered the defence by each appellant before arriving at his decision. He appreciated the legal position that the appellants had no burden of proof once they raised alibi defence. He noted that the first appellant had recorded a statement with the police indicating where he was contrary to what he testified in court.

The defence by both appellants that they were framed up due to their differences emanating from the mode of their circumcision was considered by the trial magistrate before dismissing it. The prosecution evidence against the appellants was overwhelming.

The upshot of the foregoing analysis of the evidence is that the appeal by both appellants lacks merit. The same is dismissed.

DATED at Meru this 19th day of December, 2016

KIARIE WAWERU KIARIE

JUDGE