



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 25 AND 21 OF 2014 (CONSOLIDATED)**

**JONES MWALIA NGANDA.....1ST APPLICANT**

**MICHAEL NZIA NGUA ..... 2ND APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence in Mwingi SRM Criminal Case No. 61 of 2013 – V.A. Otieno Ag. SRM dated 28/03/2014)**

**JUDGMENT**

The two appeals were consolidated and heard together.

The two appellants were charged in the subordinate court with robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of offence were that on the night of 5th and 6th February 2013 at Nzawa Location in Migwani District of Kitui County jointly with others not before court robbed Catherine Mbuwa two cell phones make Nokia and Motorola GII5 valued at Kshs. 10,000/= and immediately before the time of such robbery struck the said Catherine Mbuwa. They denied the charge. After a full trial they were convicted of simple robbery and sentenced to serve 10 years imprisonment each.

Dissatisfied with the decision of the trial court the appellants have appealed to this court. Their appeals were consolidated and heard together. They challenge both the conviction and the sentence.

At the hearing of the appeal the second appellant Michael Ngula submitted that the learned magistrate did not consider his case properly. It was his contention that he was implicated because of an existing dispute between his parents and the complainant relating to land. He stated that though he was not directly involved in that dispute, he became a victim of the same.

Jones Nganda submitted that the magistrate did not consider that the initial report to the doctor from the complainant was that she did not know the thief. He submitted that the court did not consider his defence and the fact that the shoes were not produced in evidence. He also emphasized that the prosecution witnesses came from the same family. He further felt that the magistrate did not take into account that his father had died and his mother was suffering from high blood pressure, when sentencing him.

Learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that the two petitions of appeal were similar. With regard to identification the complainant tendered evidence on the fact that both

appellants were in possession of torches which produced sufficient light in the room for proper identification. Both appellants were known to her before as neighbours. In addition counsel submitted, PW1 tendered evidence to the effect that a slipper recovered at the scene belonged to Michael and that Michael wore a brown shirt that night and during the trial. Counsel emphasized that the evidence of light in the room was not challenged by any of the appellants in cross examination.

Counsel emphasized that this being a case of recognition, there was no need for an identification parade.

On corroboration counsel, submitted that the evidence of prosecution witnesses was consistent and supportive. The doctors' evidence corroborated the evidence of injuries suffered. Counsel submitted also that the evidence of arrest was clear. There was nothing sinister or unlawful regarding the mode of arrest. Counsel submitted further that though the complainant lost the receipts for the mobile phones which were stolen from her, that should not be taken against the prosecution case as it was common for people to lose purchase documents for items such as mobile phones. In any case counsel argued, none of the appellants claimed ownership of the mobile phones. In addition, though the mobile phones were not recovered other relevant items were produced in court and as such, the prosecution had proved its case beyond reasonable doubt. Counsel submitted that some of the witnesses who were called by the prosecution were not relatives of the complainant. He also stated that there was no evidence of an existing grudge.

On the conviction and sentence, counsel submitted that the court was wrong to convict for simple robbery. According to counsel, the ingredients of robbery with violence had been proved, and as such the counsel urged this court to convict for robbery with violence contrary to section 296 (2) of the Penal Code and impose the death sentence on the appellants accordingly.

In response to the Learned Prosecuting Counsel's submissions Jones the 1<sup>st</sup> appellant stated that PW2 was recalled and he raised his hand to object but he was overruled by the trial court. Michael the 2<sup>nd</sup> appellant stated that he was in a trial court for the first time in his life and did not know how cases were conducted.

The prosecution called 8 witnesses at the trial. The summary of the prosecution evidence is that on the night of 5th/6th February 2012 the complainant Catherine Mbuwa went to bed at around 11pm. Shortly thereafter she felt something unusual on the head and when she opened her eyes, she saw the two appellants. Michael Nzia Ngula was holding a torch and struck her with a stick, and Jones Nganda was standing in the room. She panicked and they both attacked her and she lost consciousness. When she later gained consciousness she woke up her sister. By that time she had realized that she had suffered an injury on the right side of the head and her right hand and finger were broken. She was in critical condition. She realized later that the assailants got into the house by breaking the window. She found that her two mobile phones a Motorola and a Nokia phone were missing. She was taken to hospital and treated. A report was made to the police, and the two appellants were arrested separately and charged with the offence. The P3 form indicated that the injuries suffered by the complainant amounted to grievous harm.

When put on their defence Jones Nganda stated that he operated a butchery at Kilonzweni Village. As he was proceeding to his farm a crowd of villagers beat him up and tied him with ropes. They took him to the police and charged him for an offence which he did not commit. He gave his testimony on oath.

Michael also gave sworn testimony. He stated that he was a second hand clothes dealer. That on 6th February 2013 while at his farm at around 12 noon, a group of people including two administration officers came and arrested him. In his view he was arrested because of existing family disagreements and as such the charges were fabricated against him. He called a witness called Mary Kangangi. It was her evidence that on the 3rd of February 2013 she went to his home and on 6th of February 2013 the mother of Michael told her that some people were looking for him because he was suspected of assaulting a woman and also stolen mobile phones.

Faced with the above evidence, the learned trial magistrate convicted and sentenced the appellants. There from arose the two appeals.

This being a first appellate court, I am duty bound to reevaluate all the evidence on record and come to

my own conclusions and inferences. **See Okeno Vs. Republic [1972] EA 32.** I have reevaluated the evidence on record. The conviction of the two appellants is grounded on identification or recognition of the appellants by the complainant visually at night. This is identification by a single identifying witness.

In situations where the case against an accused person relies on the evidence of visual identification by a single witness in unfavorable circumstances the court has a duty to critically consider the evidence and circumstances of identification in order to eliminate any possibility of mistaken identity, before relying on the such evidence to convict an accused person. **See the case of Abdalla bin Wendo & Another Vs. R [1953] 20 EA Cr. 166.**

The present case relates to an incident that occurred at night after 11pm. The only identifying witness is the complainant. She was attacked suddenly and according to her she panicked. There was no light in the room. She became unconscious shortly after the attack.

There is no evidence that she reported to anybody about the identity or her recognition of the appellants immediately she became conscious. Though she woke up her sister, there was no evidence that she named or described the appellant to her. It is the complainant's evidence that she recognized both appellants through the light of the torches which they flashed at her. That in my view is a general statement. The complainant was required to explain how far she was with either of the appellants when she recognized him. She should have given the direction she was facing for clarity. She should have described her position in bed or whether she was sitting or lying down. She should have described whether the torches were at any time flashed on the faces of the appellants to enable her recognize them. Short of that the allegation that she recognized any of the appellants through the light of the torches, in my view did not suffice to establish positive identity of the appellants in a criminal case. There could be a real danger of mistaken identity. In my view the identification of the appellants by the complainant herein was not free from the possibility of error. On that consideration, the appeals will succeed.

In addition to the above, the items said to have been stolen that is the two mobile phones were not recovered or produced in court. No receipts or documentation was produced in court to substantiate the allegation that the complainant possessed or owned those mobile phones at the time of robbery. There was no independent evidence to support the allegation that the complainant was in physical possession or used the two mobile phones. Here again there could be a possibility of mistake on the ownership or possession of the items allegedly robbed. The evidence on record did not establish such possession. In my view, the possession of the two mobile phones, was in doubt. On that account also the appeals will succeed as the violent theft of the two mobile phones is in doubt.

There is also the issue of a sandal said to belong to one of the appellants. No evidence was tendered connecting the ownership of the said sandal to any of the appellants.

The doubtful identity of the appellants is fortified by the fact that the people who arrested the appellants had to follow foot prints in order to trace them. It is clear to me from the evidence on record that none of the appellants was arrested either because of the identity given by the complainant or because of the sandal. Infact the person who was said to own the sandal was arrested not because of his connection with the sandal, but because he was mentioned by his co-accused. In a criminal case, such contradictory evidence cannot be of help to the prosecution in establishing the guilt of an accused person. It merely creates a doubt whose benefit has to be given to the accused. I give the benefit to the appellants.

In the result I find that the appeals herein are merited. I allow both the appeals, quash the conviction and set aside the sentence. I order that each of the two appellants be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Garissa this 20<sup>th</sup> day of April, 2015**

**GEORGE DULU**

**JUDGE**