REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.46 OF 2011

(CONSOLIDATED WITH CRIMINAL APPEAL NO.47 OF 2011)

GEORGE MBARIA MAATHAI.....1ST APPELLANT

ROBERT MUNIU GICHOGU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.5144 of 2010 by Hon. W. Kagendo, Principal Magistrate, dated 7th February,2011

JUDGMENT

1. The appellants were charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code.**
2. The particulars of the offence are that on 30th June, 2010 at St. John in Nakuru, jointly with others not before the court and whilst armed with dangerous weapons, namely pistol, robbed John Kariuki Waithaka (P.W.2) of a motor cycle valued at Kshs.70,000/= and immediately at or immediately before or immediately after the time of such robbery threatened to use actual violence on P.W. 2
3. The appellants were convicted and the mandatory sentence of death was meted out.
4. The appellants being aggrieved by the decision of Hon. W. Kagendo, Principal Magistrate, preferred the appeals, H.C.CR.A. NOs. 40 and 47 of 2011 on both conviction and sentence.
5. At the hearing of the appeals, both appeals were consolidated.
6. The appellants listed the following grounds of appeal in their Petitions of Appeal.

i) That they pleaded not guilty

ii) That the honourable magistrate erred in law and fact when convicting them while the evidence adduced was insufficient.

iii) That the honourable trial magistrate erred in law and in fact when she convicted them relying with the witness's evidence which was contradicting and uncorroborated contrary to the requirement of the law

iv) That the prosecution failed to produce essential witnesses who were mentioned during the trial thus contravening section 141(1) and 150 Criminal Procedure Code

v) That no description was given to the police during the reporting to the police which could have led to their arrest.

vi) That no identification parade was conducted as required by the law.

vii) That no exhibit was produced before court and nothing was found in their possession.

viii) That the honourable trial magistrate erred in law and fact when she rejected their sworn defence which was not impaired by the prosecution without any cogent reason contrary to Section 19(1) of the Criminal Procedure Code.

ix) That since they could not remember all that was said during the trial they pray that they be furnished with certified copy of the proceedings and they wish to be present during the hearing of this appeal.

7. At the hearing of the appeals the appellants made partial oral submissions but relied mostly on their written submissions.
8. Upon hearing the oral submissions made by the appellants and Learned Prosecuting Counsel for the State, Mr. Marete, we find the only issue for determination relates to identification.
9. This being the first appellate court, it is incumbent on this court to re- assess and re-evaluate the evidence and arrive at an independent conclusion. Refer to the case of **Okeno** V. **Republic**, E.A. (1972) 32.
10. The appellants submit that the only basis of their conviction was the evidence of the complainant, (P.W.2), on identification.
11. That the witness, (P.W.2) was unable to give a physical description of his attackers at the trial and no evidence was given as to how long he (P.W.2) had the attackers under observation.
12. The appellants further submit that P.W.2 had stated in his evidence that he had not known the customer before and therefore there was need for an identification parade to have been conducted as required by law.
13. The appellants submitted that the identification was unsatisfactory and therefore could not sustain a conviction.
14. They urged the court to quash their convictions and set aside their sentence.
15. The appeal was opposed by Learned Prosecuting Counsel who submitted that P.W.2 was able to identify the appellants as there was adequate electric lighting at the school gate where the incident took place.
16. That the appellants were arrested by members of the public at the Bahati stage and that it was the evidence of Corporal Joseph Mugenya, P.W.7 that P.W.2 was able to identify the appellants at the scene before arrest.
17. Counsel submitted that the identification was before the arrest and therefore the circumstances did not require an identification parade to be conducted.
18. He submitted that the conviction was safe and urged the court to uphold the sentence.
19. We have examined the circumstances in which the complainant (P.W.2) identified the appellants and find that it was visual identification.
20. The test for visual identification was set down in the well known case or **Republic** V. **Turnbull** [1976] 3 All E.R. 549.
21. The incident occurred at 7.50p.m. at night and P.W.2 states that there was electric lighting at the school gate which was the scene of the crime.
22. The evidence of the complainant (P.W.2) was that the light was sufficient to enable him to see the appellants.
23. The witness states that one of the attackers was his customer (1st appellant) and that he had ferried him on his (P.W.2's) motor bike upto the place the attack took place.
24. We find that there was proximity but as the 1st appellant was a passenger and was seated behind P.W.2, we find that it would not have been possible for the witness (P.W.2) to have observed the 1st. Appellant.
25. At the school gate, where the incident occurred, there is no mention on the nature of lighting, whether it was a single bulb or florescent tube lighting and of its intensity and there is also no

mention of the time frame that he had to observe the appellants. In particular the 2nd appellant.

26. The description P.W.2 gave in evidence of the 1st appellant, who was his customer was that he was tall and light and that is the purported identification.
27. For the reasons stated above, we find that the incident occurred at night and that the conditions and circumstances were in our view not favourable for positive identification of the appellants.
28. We concur with the submissions of counsel for the State that the conditions under which the appellants were arrested did not require an identification parade.
29. We find that the appellants were not positively identified by P.W.2 and that the conviction which is solely based on the evidence of P.W.2 is found to be unsafe.
30. We find that the appeals have merit and the convictions are hereby quashed and the sentences set aside.
31. We order that the appellants be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated,Signed and Delivered at Nakuru this 28th day of June, 2013.

R. P. V. WENDOH

JUDGE

A. MSHILA

JUDGE