



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

**HIGH COURT CRIMINAL APPEAL NO. 171 OF 2013 CONSOLIDATED WITH HIGH COURT
CRIMINAL APPEAL**

NO. 250 OF 2013

WILLIAM KAMAU MWANGI1st APPELLANT

JAMES ARINDA TOBOSO2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

*(From original conviction and sentencing in Criminal Case No. 152 of 2011 at the Principal
Magistrate's Court at Kigumo by S. Mbungi - Principal Magistrate on 5th July, 2011)*

JUDGMENT

These appeals are consolidated. The two appellants Willaim Kamau Mwangi and James Arinda Toboso were charged with the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code. They denied the offences but after a full trial both were convicted and sentenced to death. These appeals arise from the said conviction and sentence.

Both appellants have raised several grounds of appeal contained in their petitions and written submissions filed herein. The summary of the said submissions is that they were convicted on evidence that was full of inconsistencies and contradictions, and that conditions obtaining at the time of the alleged offence were not conducive for proper identification or recognition. It is also their position that the first report did not support the evidence of the witnesses and that essential witnesses were not called to give evidence. They have also complained that their respective defences were not considered.

Mr. Njeru the learned counsel for the Republic opposed the appeals submitting that there was sufficient evidence which was strong enough to sustain the conviction. Therefore there was no reason to depart from the decision of the lower court.

The evidence adduced before the lower court was that the premises of the complainant which was a bar were raided on the night of 5th September, 2010 and goods set out in the charge sheet stolen. The assailants were said to have been armed with dangerous weapons.

The evidence adduced by the prosecution through P.W. 2 is that he, P.W. 2, identified the appellant and another with the aid of a lantern. This witness was a watchman at the premises who in addition to the light from the lantern used his torch to identify the appellants. The evidence of P.W. 2 was supported by that of P.W. 3 who also said he identified the appellant known as William Kamau Mwangi. This

appellant was allegedly his neighbour. In fact it was her who led the police to the home of the appellant where he was arrested.

As the first appellate court we are required to evaluate the evidence adduced before the lower court and arrive at independent conclusions. This offence took place at night and there is evidence that the premises had a generator, which however had been switched off at the time of the alleged offence on the instructions of P.W. 2. When the assailants stormed into the premises all people were ordered to lie down and the assailants proceeded to steal the goods mentioned in the charge sheet.

P.W. 3 testified that he knew the appellants as they were neighbours. On the day of the robbery she noticed light from one torch and three people entered and ordered everyone to lie down. There were two lantern lamps according to this witness. She identified one of the assailants called Mwangi who was the uncle to William Kamau Mwangi the 2nd appellant herein. Although she said she recognized the appellant her statement made to the police did not give this information. Further, although she said she knew the names of the appellants, these were not given to the Police. P.W. 8 one P.C. Charles Onyango was the investigating officer in this matter. In his evidence he said as follows,

“The first accused was brought to the police station for another offence. I arrested him. The 2nd accused came to check the 1st accused and I arrested him.”

Under cross-examination he said the 1st accused was brought to the Police Station for being in possession of bhang. He also said the reportees did not mention the names of the suspects when they first made a report at the Police Station. In their respective defences the two appellants denied the offence. The 1st appellant told the court that he met the mother of the 2nd appellant who told him that the 2nd appellant was in the Police cells. He went to the Police Station to check on him where he was arrested and charged with this offence. The 2nd appellant on the other hand was arrested after his house was searched by police officers and some bhang allegedly found therein. He was taken to the police station and placed in the cells. The 1st appellant went to see him and he was also arrested. The two defences find support from the evidence of P.W. 8 the police officer who investigated this case.

Going back to the night of the robbery, if it is true that there was sufficient light from the lanterns, it was not necessary for P.W. 2 the watchman to use his torch. Even if the two lanterns were on, the intensity of light coming from them has not been established. We note from the Judgment of learned trial magistrate that he talked of three lanterns while the evidence of the witnesses mentioned only two lanterns. Further we also note that the learned trial magistrate said the robbery took time and we find no support for that statement from the evidence.

If it is true that P.W. 2 and P.W. 3 knew the two appellants by name and also as neighbours, they should have given their names in the first report made to the police. That they did not, casts doubt as to the evidence of identification of the assailants. The defences advanced by the two appellants in our judgment were plausible and created a reasonable doubt in the prosecution case.

In view of the foregoing we find that the conviction of the two appellants was unsafe. Accordingly, these appeals are allowed, convictions quashed and sentences set aside. We order that the appellants shall be released forthwith unless otherwise lawfully held.

Orders accordingly.

SIGNED, DATED and DELIVERED in open Court this 25th day of November, 2013.

A. MBOGHOLI MSAGHA

RADIDO STEPHEN

JUDGE

JUDGE