REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CR. APPEAL NO. 132 OF 2011

(Consolidated with Cr. Appeal No. 134 of 2011)

1. TIMOTHY KYALO KIOKO ……...1ST APPELLANT

2. KIVUVA NDETI…….……2ND APPELLANT

VERSUS

REPUBLIC……..……...RESPONDENT

(An Appeal from the conviction and sentence in Criminal Case No. 3023/2009 in the Chief Magistrate's Court at Machakos (Hon. J.M. Munguti, SRM))

Judgment

1. The two appellants, Timothy Kyalo Kioko ("1st Appellant") and Kivuva Ndeti ("2nd Appellant") were presented before the Chief Magistrate's Court at Machakos on 16th November, 2011 and charged with one count of robbery with violence contrary to section 296(2) of the Penal Code.
2. The particulars of the offences as presented in the charge sheet were as follows. It was alleged that on "4th day of November, 2009, at Kwa Kakita village, Kilome Sub-location, Mukaa location in Mukaa District within Eastern Province, jointly with others not before Court, while armed with offensive weapons namely knives and rungus, robbed Shadrack Mulei Kakui of cash Kshs. 4,500, one mobile phone make Vodafone valued at Kshs 2,200 and one cap, and, at or immediately before or immediately after the time of the robbery threatened to use actual violence to the said Shadrack Mulei Kakui."
3. The Appellants pleaded not guilty to the single charge and a trial was scheduled. After a fully-fledged trial, the Learned J.M. Munguti ("Learned Trial Magistrate") convicted the 1st and 2nd Appellants of the single count of robbery with violence and sentenced them to death as the law mandatorily stipulates.
4. The Appellants are aggrieved by both conviction and sentence and have appealed to this Court. Before us, the two Appellants each urged eight grounds of appeal contained in their respective "Amended Memorandum [of] Grounds of Appeal and Written Submissions." For all intents and purposes, the grounds are the same and we shall analyze them shortly.
5. First we analyze the evidence as it emerged from the trial.
6. The Complainant, Shadrack Mulei Kakui ("Shadrack") was walking home at Utitu village on 4th November, 2009. He had left Kilome Market at around 8:00 pm. He was alone. On reaching the

Kwa Kikata Junction, he observed a man emerge from a culvert. That person started walking towards him; he then inquired why he (Shadrack) was going home late. When Shadrack ignored him and kept walking on, the man suddenly and viciously attacked him. He first boxed Shadrack on the right ear and as Shadrack tried to defend himself, the assailant swept him off his feet in a brutal move and an all-out altercation ensued. The assailant then brandished a knife even as a second assailant emerged from the bushes holding a piece of wood. All in all, four assailants emerged. They brutally assaulted Shadrack and stole his belongings – including the items listed in the charge sheet; leaving him for the dead by the side of the road. Indeed, they only left him alone when he played dead.

7. During the scuffle, Shadrack testified that he was able to recognize two of his assailants. He testified that he recognized the very first attacker who spoke to him through both voice and visual recognition. The attacker he so identified is the 1st Appellant herein. Shadrack testified that they played football together at the Kilome Super Star league. He believed he clearly recognized him when he spoke during the encounter as well as through the illumination from the moonlight which, Shadrack says, was "enough."
8. Shadrack also recognized the second assailant who is now the 2nd Appellant in the case. He testified that they went to Kilome A.C.A. Primary School together in 1999 and used to occasionally see each other at Kilome Market.
9. Left for the dead, Shadrack was eventually able to collect himself and make a slow and painful walk back home. He got home at about 9:00pm and immediately shared with his brother, Jonathan Nzomo Kakui ("Jonathan") what had happened. In particular, he mentioned the two Appellants to Jonathan. Jonathan persuaded him that in view of the advanced evening, it would be better for them to report the matter to the Police the following day.
10. Shadrack testified that when he reported to the Police he gave the names of his assailants – although in cross examination he admits that the names and descriptions were not contained in the witness statement he gave. Corporal Alex Ogutu ("Corporal Ogutu") to whom the report was officially made at Kilome Police Station confirmed that Shadrack identified his two attackers as Gatimu and Babu. Gatimu and Babu are the common or nicknames used for the 1st and 2nd Appellants respectively. Corporal Ogutu testified that the two names were entered in the investigation diary. The Appellants were known to Corporal Ogutu as "robbers" in the village.
11. Jonathan's testimony corroborated that of Shadrack about the fact that he came home with serious injuries and said that he identified two of his attackers as the Appellants; people he knew well. The only other Prosecution Witness was Benson Mwanza Michael, a Clinical Officer at Kilungu Sub-District Hospital who confirmed that he treated Shadrack for injuries on 5th June, 2009. The injuries he treated are consistent with the assault and the injuries Shadrack had described to the Jonathan and to the Police.
12. In the face of this evidence, the Learned Trial Magistrate concluded that the Appellants had a case to answer and placed them on their defence. They both chose to give unsworn testimonies. Both denied that they were involved in the assault in any way. Both claimed that they were framed up with the charges because they had a grudge with Shadrack: the 1st Appellant allegedly over Shadrack's misguided allegation that he (1st Appellant) was having an affair with Shadrack's wife; the 2nd Appellant over an alleged girlfriend of Shadrack's who was a waiter at a local bar. In any event, both Appellants denied being anywhere near Kwa Kakita on the fateful day when the robbery took place.
13. The Learned Trial Magistrate briefly considered the evidence adduced and came to the conclusion that the Prosecution case had been proved beyond reasonable doubt. He identified three issues that required determination:
    a. Whether there was positive identification of the Appellants;
    b. Whether the necessary ingredients of the offence of robbery with violence were proved; and
    c. Whether the defence evidence "rebutted the Prosecution's evidence."
14. On the first issue, the Learned Trial Magistrate was alive to the fact that the evidence of identification was one of a single witness. But he was buoyed by the fact that this was evidence of recognition not mere identification; that there was adequate moonlight; and that, for the 1st Appellant, there was additional corroboration through voice recognition. The Learned Trial

Magistrate concluded, even after duly administering a caution to himself about the dangers of relying on the evidence of a single identifying witness, that the identification evidence was free from any error.

15. On whether all the ingredients of robbery with violence were proved, the Learned Trial Magistrate had no hesitation in finding that it was proved that there was more than one assailant; and that actual violence was used during the robbery from which the victim (Shadrack) suffered actual bodily injuries. There was, therefore, no doubt that there was a robbery with violence.
16. Finally, the Learned Trial Magistrate was of the considered view that the defences offered by the Appellants in the face of the Prosecution case did not shake that case; the overall evidence was "too overwhelming" against the Appellants.
17. We begin by observing that as a first appellate court, we have an obligation to re-evaluate all the evidence given at trial and come to our own independent conclusions. We are not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, we must be acutely aware that we never saw nor heard the witnesses as they testified and, therefore, we must make an allowance for that. **See *Okeno v R* [1972] EA 32** and ***Kariuki Karanja v R* [1986] KLR 190.**
18. As we said before, the Appellants raised eight identical grounds of appeal. Most of these grounds are repetitive and overlap with each other. Perhaps, recognizing this, both Appellants grouped them together and argued all eight grounds at the same time. On our part, for purposes of analysis, we have paraphrased the Appellants' complaints and grouped them into three:
    a. That the Learned Trial Magistrate erred in law and in fact for convicting the Appellants in the absence of watertight identification evidence linking the Appellants to the crime;
    b. That the Learned Trial Magistrate erred in law and in fact for convicting on the basis of evidence by the Clinical Officer which was improperly admitted as evidence;
    c. That the Learned Trial Magistrate erred in law and in fact when he shifted the burden of proof to the Appellants in violation of the Appellants' constitutional rights.
19. Our case law calls for caution in receiving identification evidence because of the grave possibility of a miscarriage of justice occasioned by misidentification. The predecessor to the Court of Appeal plainly stated in ***Roria v R* [1967] EA 583**, that ***"a conviction resting entirely on identity invariably causes a degree of uneasiness."*** And, the Court of Appeal reminded us in ***Kiarie v Republic*** that ***"it is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken."*** Finally, the famous ***Charles Maitanyi v R* [1986] 1 KLR 198** admonished courts to exercise the greatest caution and circumspection before convicting on testimony of identification especially where the evidence is that of a single identifying witness.
20. To aid in the exercise of this "c*ircumspection*" our courts have adopted the comprehensive guidelines for receiving and considering identification evidence set out in the famous English case of ***Regina v Turnbull* [1976] 3WLR 445**. They are nine in number and they instruct a judicial officer who is considering evidence on identification to ask the following questions:
    a. How long did the witnesses have the accused under their observation?
    b. What was the distance between the witnesses and the accused person?
    c. What was the lighting situation?
    d. Was the observation impeded in any way, as for example, by passing traffic or press of the people?
    e. Had the witnesses ever seen the accused person?
    f. If the witnesses knew the accused prior to the current transaction, how often?
    g. If the witnesses had seen the accused only occasionally prior to the current transaction, did the witness have any specific reason for remembering the accused?
    h. How long elapsed between the original observation and the subsequent identification to the police?
    i. Was there any material discrepancy between the description of the accused given to the Police by the witnesses when first seen by them and his actual appearance?
21. In the instant case, after re-evaluating the entire record, we are unable to say that the Learned Trial Magistrate misapplied these principles or failed to render the correct analysis. We note that the Appellants have complained that there was insufficient light; and that it was described in terms of its intensity and quality. They have also claimed that Shadrack did not immediately describe him to the Police. In this connection, the Appellants have raised issue with the fact that the names used

to identify them at the Police Station were "Gatimu" and "Babu." If those were their names, they should have appeared as aliases on the charge sheet, they argue.

22. After a re-evaluation of the evidence, we are persuaded that there was sufficient evidence to positively conclude that Shadrack identified the Appellants during the attack. We begin by noting that contrary to what the Appellants argue on appeal, the record clearly shows that Shadrack identified the two Appellants by name to Jonathan, his brother, who was the first person he saw after the attack. He also named them to Corporal Ogutu, the Investigating Officer. These were the earliest instances Shadrack had to report the robbery and describe his attackers without the dangers of memory fading or ideas being suggested or planted into his memory. For avoidance of doubt, we observe that at the stage of reporting soon after an attack the name is merely for purposes of identification; there is no requirement of a showing that the reporting victim used the official names of the assailant. Further, there is no requirement that the name that was used to identify the assailant be included in the charge sheet as an alias as the Appellants demand.
23. We also note that although Shadrack does not state the intensity of the moonlight, he says that there was "sufficient" light for him to see his attackers.
24. We are further comforted by the fact that the encounter was on close quarters where Shadrack had an opportunity to see his assailants. It surely is much easier to identify an assailant with whom one is engaging in one-on-one combat if one knew them before. In the case of the 1st Assailant, we are persuaded that Shadrack was also able to recognize his voice as the evidence demonstrates. Finally, and most importantly, like the Learned Trial Magistrate, we note that this was evidence of recognition not mere identification. Even after warning ourselves, as the Learned Trial Magistrate did, of the dangers of relying on the testimony of a single identifying witness, we think there is enough evidence here to find that the identification of the Appellants as the assailants was proven beyond reasonable doubt.
25. Turning to the second complaint by the Appellants that the conviction cannot stand because it is based on the evidence of a Clinical Officer who is an unregistered medical practitioner, we are also firmly of the view that nothing much arises out of this complaint. The Complaint here seems to be that PW3, the Clinical Officer, was not competent to fill in P3 form since he was not a registered Clinical Officer. We note, first, that the Appellant did not timeously object to the production of the P3 form. Indeed, the form was produced with his concurrence. It is, therefore, a little late to object to it on appeal. Further, the Appellant does not point out why, on appeal, he suddenly makes the allegation that PW3 is not a registered Clinical Officer. That objection should have been raised and dealt with during trial. In any event, injury to the victim is not a necessary ingredient to prove robbery with violence; it would have sufficed to demonstrate that there was more than one assailant.
26. In any event, on the question whether a Registered Clinical Officer is competent to fill a P3 form, we think that the Court of Appeal has supplied sufficient answer. In **MARK WANJALA WANYAMA v REPUBLIC [2008] eKLR (Crim. No. 69 of 2006)** the Court of Appeal pronounced itself on the issue thus:

> ***As to whether the clinical officer's evidence should have been admitted, we observe that that evidence was on the medical condition of the complainant when she was handled by the clinical officer. It was based on facts and on the expert knowledge of the witness. The weight of evidence attached to such evidence could be different from the weight attached to the evidence of a qualified doctor but that is beside the point. That evidence, whatever weight was given to it, could not, in our view, be ignored merely because it proceeded from a witness covered by a different Act from that under which the doctors are specified. If the evidence of the clinical officers were to be declared inadmissible in law, then we are at a loss as to how many such cases of rape, and assault, would see justice done to them in Kenya? We say so because we take judicial notice of the fact that in Kenya, very few medical facilities are manned by qualified doctors. We do not see any merit in that ground.***

27. If this decision enunciated in 2006 left any doubts on the question whether, in Kenya, Clinical Officers are competent to fill P3 forms and testify in court, the decision in **RAPHAEL KAVOI KIILU v REPUBLIC [2010] eKLR (Crim. App. No. 198 of 2008)** should put to flight any such

doubts. The Court of Appeal held thus:

> ***The challenge touching on the clinical officer's qualification is in our view taken care of by a scrutiny of the Act governing the affairs of clinical officers bearing in mind that the appellant did not lay any factual basis for his allegation in the first place. Under section 2 of the Clinical Offences Act (Training, Registration and Licensing Act Cap 260 (LoK) a clinical officer means:-***
>
> > ***"a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act. ……"***
>
> ***Section 7(4) of the Act states:-***
>
> > ***"A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette."***
>
> ***The Act goes further to provide that such officers may engage in private practice "in the practice of medicine, dentistry or health work for a fee." It follows that the clinical officer did testify in this case on his area of competence.***

28. We need not add to these authoritative statements by the Court of Appeal on the competence of Clinical Officers to testify before Kenyan courts.
29. That takes us to the last group of complaints by the Appellants. They both feel quite strongly that the Prosecution case was not proved to the requisite standards so as to dispel reasonable doubts. Additionally, they are of the opinion that the Learned Trial Magistrate shifted the burden of proof to them contrary to established constitutional principles of fair trial. They cited the case of **Sekitoleko v Uganda (1967) EA 531** to emphasize that the burden of proving guilt beyond reasonable doubt never shifts whether the defence is alibi or something else.
30. Did the Learned Trial Magistrate shift the burden of proof to the Appellants? In pertinent part, this was the Learned Trial Magistrate's analysis of the Defence evidence:

> ***On the defence by the [Appellants] none of [them] have given their account of where they were on 04/11/2009 at around 8:00p.m. The court is alive to the fact that the burden of proof cannot shift to the defence in criminal proceedings save in certain cases where the law expressly puts the burden on the accused. In this case none (sic) I find the defences offered by the [Appellants] have not shaken the Prosecution case.***

31. Again, after a perusal of the trial record, we are unable to disagree with the Learned Trial Magistrate's analysis and conclusions. We do agree with the Appellants that the first sentence of the paragraph just quoted from the judgment would seem to improperly suggest that the Appellants had a duty to prove where they were on the material day. In fact, a criminal defendant bears no such burden. In criminal trials, the position on burden of proof is the same one in common law long enunciated by Lord Sankey in the celebrated ***Woolmington v DPP*** **[1935] AC 462**: the legal burden lies on the prosecution to establish guilt beyond reasonable doubt throughout the trial – from the beginning to the end. The only exceptions are the plea of insanity and other statutory exceptions. With regard to alibi defence, only an evidential burden is placed on the criminal defendant. The criminal defendant is only required to adduce some evidence to raise the issue of alibi; it then falls on the Prosecution to disprove the alibi evidence beyond reasonable doubt. See, for example, *R v Johnson* [1961] 46 Cr. App. R. 55.
32. However, even with this clarification, we note that the Trial Court was entitled to weigh the credibility of a defendant's alibi evidence to determine if it raises reasonable doubt that the defendant was not at the scene of the crime. The Learned Trial Magistrate who heard the witnesses concluded that the evidence by the Prosecution witnesses was too overwhelming and established

the guilt of the Appellants beyond reasonable doubt even after duly considering the issue of alibi. We are unable to say that the Learned Trial Magistrate erred in any way in reaching that conclusion.

33. Having reached these conclusions, it follows that the appeals by the two Appellants are not meritorious. Consequently, we dismiss the appeals and affirm both the convictions and sentence of the Appellants.

DATED, SIGNED AND DELIVERED this 19th day of December 2013.

JOEL M. NGUGI, Judge

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B. T. JADEN, Judge

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