REPUBLIC OF KENYA
IN THE HIGH COURT
AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL CASE NO. 312 OF 2003

(From Original Conviction and Sentence in Criminal Case No. 532 of 2003 of the Principal Magistrate's Court at Kitui: M.N. Gicheru P.M on 25/11/03)

MUSYOKI JOHN Alias AWILO :: APPELLANT

VERSUS

REPUBLIC :: RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 314 OF 2003

JOHN MUTUKU MUASYA :: APPELLANT

VERSUS

REPUBLIC :: RESPONDENT

J U D G E M E N T

The two appellants Musyoki John Alias Awilo and John Mutuku Muasya were charged before Kitui Principal Magistrate's Court in Criminal Case 532 of 2003 with the offence of Robbery with Violence Contrary to Section 296 (2) of the Penal Code. The 2nd Charge was one of Grievous Harm Contrary to Section 234 of the Penal Code. In the alternative to the 1st charge, John Mutuku was charged with handling stolen property Contrary to Section 322 (2) of the Penal Code. After the trial, both appellants were convicted of the two counts and on the first count the mandatory death sentence was passed whereas they were sentenced to serve ten (10) years imprisonment each on the count two. Being aggrieved by the said convictions and sentences, they filed these appeals No. 312/03 and 314/03. The appeals were consolidated and proceeded as Criminal Appeal No. 312/03.

Briefly stated, the facts of the case before the lower court as we understand them are that the 2nd appellant was an employee in the home of the complainants. He was employed by PW 2 Jeniffer Mwende who is a mother of the complainants PW 1 and 3. PW 2 left her home on 1/2/03 to visit her husband who was admitted in Kenyatta National Hospital at Nairobi. She left her children at home in company of the 2nd appellant. The complainants PW 1, 3 and the other sister PW 4 were at home doing their various chores. PW 1, 3 and 4 said 2nd appellant was in company of the 1st appellant when they retired to bed on that evening of 1/2/03

. The complainants left the two appellants in their kitchen. In the night, the complainants were

suddenly attacked. PW 1 was the first to be attacked. One of the assailants held a torch as the other did the assault. PW 1 was not able to see either of the assailants. PW 3 said she was able to see the two appellants and called out their names and the 1st appellant then said they would then kill them. The complainants were seriously injured. They were found injured in the house next morning and were taken to hospital. PW 5 who learnt of the attack on the girls early next morning informed villagers. Police were called. PW 7 visited the scene. The 2nd appellant who used to sleep in PW 1's shop could not be traced anywhere. According to PW 6, 2nd appellant left him with a bicycle on 2/2/03 at 5.00 a.m claiming that it belonged to Ngile. PW 6 surrendered it to police. 2nd appellant was arrested in Ukunda Mombasa on 3/4/03 where a belt and purse stolen during the robbery were recovered. He mentioned the 1st appellant who was also arrested. In his defence the 1st appellant denied any involvement in the offence. His wife (DW 3) said the 1st appellant was in their house on the night of the alleged robbery. The 2nd appellant told the court that he left PW 2's employment on 23/12/02 and had got a job in Ukunda.He denied committing the offence and that the belt he was found with was given to him as a gift.

The appellants filed Memorandums of appeal and the grounds can be summed up as follows:-

> That they were not properly identified as the robbers as the circumstances were not favourable to proper identification; That the appellants were not mentioned in the first report to police; That the sentences imposed were excessive and harsh; That their defenses were not taken into account.

In respect of 2nd appellant, that failure to call the owner of the belt whom 2nd appellant claimed gave him the belt found with 2nd appellant at time of arrest, left a gap in the prosecution evidence. The learned State Counsel Mr O'mirera vehemently opposed the appeal.

On the issue of identification 1st appellant argued that he was never identified because when PW 5 went to the scene, she was never told who the robbers were and that his name does not appear in the Occurrence Book report made to police on the same day. 2nd appellant re-echoed the above submission. Mr O'mirera submitted that the appellants were properly identified because PW 1 had not seen the robbers but PW 3 saw them, called them by name and it is then they vowed to finish them and went ahead to cut PW 3. Appellants had been with the witnesses in the same home on the same night. We have on our part re-evaluated the evidence on record. PW 1 denied having been able to see the robbers save for PW 3 who called out the names of the appellants and it is then the robbers vowed to finish them.

Though PW 3 said that it is the 1st appellant who spoke, she never told the court that she recognized the voice as that of 1st appellant. PW 2 told court that she was able to see both appellants using the torch light as the torch was not directed at her eyes and that it is 2nd appellant who had a torch and flashed the torch at Flora and 1st appellant and she was, therefore, able to see the 1st appellant. PW 5 who then visited the scene said that PW 3 only mentioned the 2nd appellant as the person PW 3 saw. PW 7, the officer who visited the scene upon receiving the robbery report said PW 1 mentioned only 2nd appellant as the robber but PW 3 mentioned 1st and 2nd appellants as the robbers. The same PW 7 is the one who went back to police station and entered a report in the Occurrence Book which was produced by DW 3 on request by 1st appellant. It was the Occurrence Book 5 of 2/10/03. PW 7 recorded that only 2nd appellant an employee in the complainants' home was mentioned as having been involved in the robbery. Since PW 1 was not able to identify any of the robbers, there is only evidence of a single identifying witness who is PW 3. The robbery took place in the night. PW 3 had been woken up suddenly by the screams of her sister PW 1 upon being attacked. There was no light apart from the torch. The court was not told how powerful this torch was, and how long it was shone on the 1st appellant by his fellow robber.

In the cases of **REPUBLIC** Versus E**RIA SEBWATO 1960** E.A and P**ETER KIMAR**U versus **REPUBLIC Criminal** Appeal 111/03 the courts held that such identification at night and under unfavourable circumstances should be watertight.

Further in the case of J**OSEPH LEBOI OLE TOROKE** Criminal Appeal 204/1987 the Court of Appeal had this to say:

"We accept that the recognition and identificati on are quite different concepts but

his alone cannot absolve a trial court from the need to warn itself of the danger of identification by a single witness. It is possible for a witness to believe quite genuinely that he had been attacked by someone he kn ew well and yet still be mistaken. So the possibility of error is still there whether it be a case of recognition or identification.

In this case, the magistrate never warned himself of the danger of relying on evidence of a single identifying witness in convicting the 1st appellant. From our evaluation of the evidence before the lower court, it seems that PW 3 never mentioned the 1st appellant as one of the robbers as PW 7 would have recorded it in the 1st Occurrence Book report.

In the case of **CHARLES OUMA** versus **REPUBLIC Criminal Appeal 222/02** the Court of Appeal observed that description of the appellant should have been given on making of 1st report. Similarly in this case 1st appellant's name should have been given to the witnesses who first went to the scene and should have been included in first report to police. We are of the view that PW 3 did not identify 1st appellant as one of the robbers and he should have been given the benefit of doubt and acquitted of both charges. We hereby quash the convictions, set aside the sentence against the 1st appellant. Coming to the identification of 2nd appellant, we only have the evidence of PW 3 as PW 1 did not see any of the attackers. PW 3 said that 2nd appellant held the torch and flashed it at the other. PW 3 did not demonstrate how she came to see 2nd appellant if he was flashing the torch light away from himself. It is our view that though PW 3 named the 2nd appellant as one of the robbers, it seems she merely suspected him but did not positively identify 2nd appellant.

Though the 2nd appellant told court in his defence that he had left PW2's employment by December 2002, we are convinced by the evidence on record that he was an employee of PW 2 as of 1/2/03 and had been left with the complaints on that fateful day and was with them that night. He mysteriously disappeared on the night of the robbery only to be found in Ukunda in April 2003 three months later. He notified nobody of his departure.. We do believe the evidence of PW 6 who told court that the 2nd appellant left a bicycle with him on the morning of 2/2/03 promising to come back for it but never did and PW 6 handed it over to police. The bicycle went missing from PW2's house on the night of the robbery. PW 2 and 7 said that in Ukunda they searched 2nd appellant's bag and found a belt and purse stolen during the robbery. PW 1 and 3 identified them. 2nd appellant insists that the belt was a gift to him by PW2's husband. The said husband was not called as a witness.Even if he was not, we are satisfied that PW 2's purse stolen during the robbery was found on the 2nd appellant and one can never have receipts for everything they have. We are satisfied that the 2nd appellant's conduct on the morning of 2/2/03 when he walk off, left a bicycle with PW 6 never to return till arrested three months later does show that he was one of the robbers and he escaped after the incident. He was arrested while still in possession of some of the stolen goods. The circumstantial evidence points irresistibly to his guilt.

We find that the conviction was safe, we confirm it as well as the sentences meted. It is unimaginable that 2nd appellant who lived with the young girls would so viciously and brutally attack the young girls who were asleep and totally defenseless. The 2nd appellants appeal is dismissed. We hereby allow 1st appellant's appeal. He is set at liberty forthwith unless otherwise lawfully held.

Dated at Machakos this 2nd day of November 2004.

J.W. LESIIT **R.V. WENDOH**

JUDGE **JUDGE**