REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 63 OF 2016

MARK EKIRU.....1ST APPELLANT

KOKURO LEKITELA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 214 of 2014 by the Ag. Principal Magistrate – Hon. W. Wachira delivered on 9th January 2015 at Lodwar)

JUDGEMENT

1. The Appellants **MARK EKIRU** and **KOKURO LEKITELA** were charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** the particulars of which were that on the 10th day of May 2014 at Kabokorit Village in Turkana West District within Turkana County jointly robbed **NYANYIPAD LEMUYA** of her national identity card and cash Kshs.10,000/= and immediately after the time of such robbery used actual violence to the said **NYANYIPAD LEMUYA.**

2. They were charged on count II with the offence of grievous harm contrary to **Section 234** of the **Penal Code** the particulars of which were that on the 10th day of May 2014 at Kabokorit Village in Turkana West District within Turkana County jointly did grievous harm to **EMURIA LEMUYA.**

3. They pleaded not guilty to the charges, were tried, convicted and sentenced to life imprisonment on the main charge. Being dissatisfied with the conviction and sentence they initially filed individual appeals in Kitale which appeals were transferred to this court for trial and determination.

4. Both Appellants raised identical grounds of appeal summarized as follows for the purpose of the trial and determination:-

a) The prosecution case was full of contradictions.

b) The conditions prevailing was not ideal for his identification.

c) The prosecution case was not proved to the required standard.

5. For record purposes these appeals were consolidated for purposes of trial and determination and substantially heard by Justice Riechi on 28/02/2017 who reserved Judgement for 30/3/2017 when on 29/3/2017 it was noted that the original record of proceedings was not on record and an order was made to recall the same for High Court at Kitale. The State on 10/1/2017 filed a notice of enhancement of the

sentence from life imprisonment to death and served the Appellant.

6. When the matter came up for hearing before me the Appellants who were not represented filed handwritten submissions which they relied upon while Mr. Mongare appeared for the State and opposed the appeal.

SUBMISSIONS

7. It was submitted by the 1st Appellant that the charge sheet was defective and that the complainant failed to make a first report to the police and were only told of the arrest of the Appellants. It was contended that their identification was not safe as no identification parade was conducted and neither did the prosecution witnesses testify on the intensity of the lighting and the source thereof at the scene thereby raising the possibility of mistaken identity. It was further contended that vital prosecution witnesses were not called to testify against him.

8. The 2nd Appellant submitted further that their fundamental rights were violated through the amended charge sheet and that there was no proof of theft. It was contended that the prosecution case was full of material contradictions.

9. This being a first appeal the court is legally required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that I did not have the advantage of seeing and hearing witnesses as was stated in **OKENO v REPUBLIC [1972] EA 32:-**

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M RUWALA v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424."***

PROCEEDINGS

10. The prosecution case was that **PW1 NYANYIPAD LEMUYA** was asleep at 3.00 a.m. when **PW2 EMURIA LEMUYA** came to her crying having been stabbed. Through the use of moon light she saw the two Appellants who were known to her as they lived nearby. The 2nd Appellant then hit her on her left side while the 1st Appellant stabbed her with a knife on the left hand. They robbed her of cash Kshs.10,000/=. She became unconscious only to later on find herself in the hospital. **PW2** corroborated this evidence and stated that while asleep he was attacked by two people one who had a knife. He had a torch and was also able to see them using moonlight. He stated that he identified the Appellant after their arrest at the police station. This evidence was further fortified by **PW3 SYLIVA LEMUYA** who came out with a torch and saw **PW1** bleeding, though in shock she was able to see the 2nd Appellant who beat her on the leg.

11. PW4 FREDRICK CHEPKWONY produced medical report (P3 form) in which he confirmed the injuries sustained by **PW1** and **PW2** while **PW5 PC GREGORY MUTUKU** received the report at 5.00 a.m. the same day and proceeded to the scene. They searched for the Appellant and at 8.00 a.m. the 1st Appellant was arrested by the members of the public but they rescued him before being subjected to mob injustice and was found in possession of a knife.

12. When put on their defence the Appellants gave unsworn statement of defence with the 1st Appellant statement being that he was with a friend selling charcoal when a big crowd emerged and took them to the police station before being charged. The 2nd Appellant stated that he was a student and while alighting from a bus he met two people who told him to go to the police station.

ANALYSIS AND DETERMINATION

13. From the proceedings and submissions herein I have identified the following issues for determination upon rehearsing the evidence tendered before the trial court:-

1) Whether the Appellants were properly identified.

2) Whether the prosecution case against the Appellants was proved to the required degree.

3) Whether the conviction was safe.

14. It is not in doubt that the alleged attack took place in the morning at 3.00 a.m. The complainant was asleep at the time of the attack. **PW1's** evidence was that the Appellants lived nearby and were therefore known to her and with the aid of the moon light she was able to identify them. **PW2** who was first attacked lit a torch and was able to see the 1st Appellant before he stabbed him on the chest. The Appellants were his neighbours and they had been eating and walking together. He saw the Appellants attack his mother **PW1**. It is therefore clear that the Appellants were identified by recognition which as was stated by the Court of Appeal in the case of **WAMUNGA v REPUBLIC [1989] KLR 426**:-

> ***"It is trite law that where the only evidence against a Defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

15. In this appeal, the Appellants were known to **PW2**, they were his friends with who he had eaten and walked together so he knew both of them. This evidence was corroborated by **PW1** who too knew the Appellants. The Appellants according to **PW5** were arrested by members of the public at 8.00 a.m. in the morning. The 1st Appellant in his defence confirmed that the two were together when they were arrested. I therefore agree with the trial court's finding that the Appellants were properly identified and therefore find their conviction was safe.

16. On whether the prosecution case was proved to the required degree:- The Appellants were two at the time of the alleged commission of the offence. They were armed with dangerous weapons and at the time of the robbery as per the evidence of **PW4** used violence against **PW1** and **PW2**. Where there was no recovery made and where no evidence of theft, according to **PW2** there was no commotion before the attack and he failed to understand the reason for the attack. **PW1** stated that they took from her pocket Kshs.10,000/= which was meant for school fees and since there cannot be any receipt to prove cash, I am satisfied that all the elements of the charge of robbery with violence were proved beyond reasonable doubt.

17. On sentence:- Whereas the Respondent had filed a notice of enhancement of the sentence meted out to the Appellants, in view of the determination of the Supreme court on the none-mandatory nature of death sentence and having taken into account the fact that sentencing is a discretionary right of the trial court, I am unable to find fault with the trial court's finding on the same and hereby affirm the sentence given.

18. It therefore follows that the appeal herein as consolidated lacks merit and is herby dismissed both on conviction and sentence. The trial court's finding is affirmed and it is so ordered.

19. The Appellants have right of appeal.

Dated, delivered and signed at Lodwar this 5th day of March, 2019.

…….

J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the Respondent*

_____ *for the 1st Appellant*

_____ *for the 2nd Appellant*

Accused 1 - _____

Accused 2 - _____

_____ *- Court assistant*