REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.585 & 587 OF 2009

(An Appeal arising out of the conviction and sentence of U.P. Kidula – CM delivered on 18th December 2009 in Thika CMC. CR. Case No.3092 of 2000)

PETER MUTHUI MWENGA……1st APPELLANT

ALEX MUSYOKA MAKAU……2NDAPPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellants, Peter Muthui Mwenga and Alex Musyoka Makau were charged with six (6) counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the night of 1st June 2000 at Mwingi Township in Mwingi District, the Appellants, jointly robbed Francis Muthengi Maithya, Alice Mumbua Kimanzi, Kimanzi Musyimi, Paul Oketch Nyangweso, Agnes Kalundi Kimanzi and Naomi Ndete Martin (the complainants) of cash, electronic goods and clothes listed in the charge sheet, and in the course of the robbery, either threatened or used actual violence to the said complainants. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, the Appellants were convicted as charged on the six (6) counts of **robbery with violence**. They were sentenced to death. The Appellants were aggrieved by their conviction and sentence. They have filed an appeal to this court.

The Appellants raised more or less similar grounds of appeal challenging their conviction and their sentence. They were aggrieved that they were convicted on the sole evidence of identification yet the circumstances in which the said identification was made was not conducive for positive identification. They took issue with the fact that the trial court failed to take into consideration the totality of the evidence adduced and the fact that they could have been victims of mistaken identity. They faulted the trial magistrate for failing to take into consideration that the evidence adduced by the prosecution witnesses was contradictory and inconsistent and was therefore not sufficient and did not meet the threshold upon which the trial court could have convicted them. They were aggrieved that the alibi defence was not considered before the trial magistrate reached the verdict that they were guilty of the offence as charged. They were also of the view that their defence was not considered and therefore the trial court reached the erroneous verdict that they were guilty as charged. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the death sentence that was imposed upon them.

Prior to the hearing of the appeal, Prof Hassan Nandwa the advocate for the Appellants filed written submission in support of their respective appeals. He also made oral submission in support of the appeals. Learned counsel submitted that the Appellants were convicted on the sole evidence of identification. He faulted the trial court for failing to properly analyze and evaluate the evidence of identification and thus reached the erroneous determination that the Appellants had been identified in the course of the robbery. Learned counsel emphasized that conditions favouring positive identification were not present when the complainants alleged that they had identified the Appellants as being members of the gang that robbed them on the night in question. He explained that the circumstance in which the Appellants were apprehended by members of the public raised reasonable doubt that they were the ones who participated in the robbery. The prosecution witnesses adduced evidence to the effect that after the robbery they went in pursuit of the robbers and were able to catch up with them after more than 15 kilometres from the scene of robbery. It was incomprehensible that the complainants could have tracked down the Appellants for such a long distance on the basis of their footprints before apprehending them.

Learned counsel submitted that, in the circumstances, it could not be said that the complainants were in hot pursuit of the Appellants. He lamented that crucial witnesses were not called, including an administration police officer who is alleged to have arrested one of the Appellants. In the absence of his evidence, it cannot be concluded that the Appellants were arrested in the circumstances in which the prosecution claimed that they were arrested. Learned counsel faulted the police for mishandling the evidence of identification. In particular, he complained that the Appellants were exposed to some of the witnesses after their arrest thus failing to afford the Appellants' the opportunity to be properly identified in a police identification parade. Prof Nandwa submitted that the trial court did not take into account the alibi defence of the Appellants before reaching the verdict that the Appellants were guilty as charged. He took issue with the fact that whereas the trial court acquitted a co-accused of the Appellants after believing his alibi defence, on the same facts and circumstances, she failed to uphold the Appellants' alibi defence. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash the conviction and set aside the sentence that was imposed upon them.

Ms. Nyauncho for the State opposed the appeal. She submitted that the Appellants were convicted on the basis of watertight evidence of identification which was adduced by the prosecution witnesses. She added that some of the prosecution witnesses actually recognized the Appellants in the course of the robbery. She submitted that the Appellants, with others, went to an estate in Mwingi Township, pretended to be police officers, gained access to some residential houses and broke into others where they robbed the complainants of cash and other valuable as appears in the charged sheet. She submitted that in the course of the robbery, the Appellants were recognized by some of the complainants, while in other instances, due to the length of time that the robbery had taken place, the complainants were able to identify them. He explained that after the robbery, the complainants tracked down the robbers and managed to arrest and apprehend the Appellants. This was a few hours after the robbery. When they approached the Appellants, they threw down the items that they were carrying. Some of the items were positively established to belong to the complainants. There were also overcoats found similar to the ones worn by the police. She submitted that the totality of the evidence adduced by the prosecution witnesses, clearly points to the fact that the prosecution did establish to the required standard of proof that it was the Appellants who robbed the complainants. She urged the court to dismiss the appeals and confirm the conviction and sentences meted out on the Appellants.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

In the present appeal, the issue for determination by this court is whether the prosecution adduced evidence to establish the guilt of the Appellants to the required standard of proof beyond any reasonable doubt on the charges of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**.

It was common ground that the Appellants, to a large extent, were convicted on the basis of the evidence of identification. The complainants were residents of a housing estate in Mwingi Town. According to the evidence adduced, the particular estate had about 18 residential houses. At about 2.00 a.m. on 1st June 2000, a gang of robbers gained entry into the estate. They started knocking into the respective doors of residents claiming that they were police officers. Some of the complainants including PW1 Francis Muthengi Maithya and PW4 Paul Oketch Nyangweso allowed the robbers entry into their houses. They were then robbed of cash and other valuables. They testified that during the course of the robbery, they were able to identify the Appellants. They were in close contact with the robbers. The electric light was illuminating their houses. PW4 and PW6 Naomi Ndete testified that they were able to recognize the 2nd Appellant. PW6 testified that the 2nd Appellant was previously a neighbour and was known by the nickname **"Kalulu".** PW7 Alice Mumbua also testified that in the course of the robbery she recognized the 2nd Appellant having previously been acquainted with him. PW11 Agnes Kalundi Kimanzi also testified that she identified the Appellants during the course of the robbery. In particular, she testified that the robbery took place for more than 30 minutes. The other victims of the robbery were not able to identify the robbers.

According to the complainants, after the robbery, they went in hot pursuit of the robbers. They followed their footprints and after about 3 hours, they saw three men walking ahead of them. When the three men saw them, they dropped what they were carrying and ran into the bush. They pursued them and were able to apprehend the Appellants. Some of the items that were dropped were positively identified to have been robbed from some of the complainants. According to PW5 Peter Kavilu Yoko, the Assistant Chief of the area, the Appellants were beaten by members of public upon their apprehension. He arrived at the scene and rescued the Appellants. He called the police who arrived at the scene and took away the Appellants. Investigations were conducted by PW13 Corporal Frank Kalu, then based at CID Mwingi District. He concluded that a case had been established for the Appellants to be charged with the offences that they were convicted.

When the Appellants were put on their defence, they denied committing the offences that they were charged with. They adduced alibi defence. Both testified that they were victim of circumstances in the sense that they were accosted by members of the public while they were in the course of their daily business and wrongly accused that they had robbed the complainants. Indeed, they insisted that they were victims of mistaken identity. They reiterated that they were not at the scene of the robbery when the robbery is alleged to have taken place. They were not persuaded that the evidence adduced by the prosecution witnesses tied them to the scene of crime.

As stated earlier in this judgment, the prosecution's case hinged to a large extent on the evidence of identification. As was held in the case of **Maitanyi –vs- Republic [1986] eKLR,** in cases where reliance is placed on the evidence of identification, the court ought to rigorously test that evidence so as to exclude the possibility of error or mistaken identity. In **Stephen Matu Kariuki & 2 Others –vs- Republic [1996] eKLR**, the Court of Appeal held that where the court relies on evidence of identification, especially that which was made in difficult circumstances, it must investigate various parameters including the following: ***"how long did the witness have the accused under observation" "at what distance" "in what light" "was the observation impeded in any way, as for example by passing traffic or press of people" "had the witness ever seen accused before" "how often"…"***

In **Michael Norman Mbachu & Another –vs- Republic [2016] e**KLR, the Court of Appeal held that the chain of events from the time of the robbery to the time of arrest must not be broken in order for the prosecution to establish a direct link between the robbery and the arrest of accused.

In the present appeal, it was clear to the court that indeed the Appellants were positively identified during the robbery. On re-evaluation of the evidence of identification that was adduced by the prosecution witnesses, it was clear that the said identifying witnesses had the time to closely observe the facial and

physical features of the Appellants to be able to be positive that they were the robbers upon their arrest. In respect of the 2nd Appellant, he was recognized by three of the complainants during the course of the robbery. He was known to them prior to the robbery incident. Infact, he was a previous neighbour of PW6 who knew him by his nickname **"Kalulu".** Evidence was also adduced by the prosecution witnesses in regard to how the complainants pursued the robbers and managed to apprehend them a few kilometres from the scene of the robbery. On seeing the complainants, the Appellants dropped what they were carrying and ran towards a bush. They were however apprehended and later taken to the police station. This court holds that the prosecution adduced evidence which established to the required standard of proof beyond any reasonable doubt that indeed the Appellants were the persons who robbed the complainants. The circumstances favouring positive identification were present when the complainants identified the Appellants in the course of the robbery. If there was any doubt that they were the robbers, that doubt was removed with the evidence that some of the items that were found in the Appellants' possession were positively established to belong to some of the complainants. The alibi defence adduced by the Appellants did not dent the otherwise strong, cogent, consistent and credible evidence that was adduced by the prosecution witnesses.

In the premises therefore, this court holds that the grounds of appeal put forward by the Appellants have no merit and are hereby dismissed. The respective appeals lodged by the Appellants are hereby dismissed. The conviction and sentence of the Appellants are hereby confirmed. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF FEBRUARY 2018

L. KIMARU

JUDGE