REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 143 OF 2000

CONSOLIDATED WITH

CRIMINAL APPEALS NO. 153 AND 154 OF 2000

CORAM: D.S. MAJANJA J.

BETWEEN

JAMES GIKUNDI.....1ST APPELLANT

GEORGE MWITI.....2ND APPELLANT

CHARLES MUGWIKA.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. D.K. Gichuki, SRM dated 22nd June 2000 at the Chief Magistrate's Court at Meru in Criminal Case No. 132 of 1999)

JUDGMENT

1. Following conviction and sentence by the Magistrates Court, the appellants lodged their first appeal to this court. The appeal was heard and judgment delivered on 21st November 2000 (Okwengu and Onyancha JJ). The appellant then preferred a second appeal but since the judgment was missing, the Court of Appeal rejected the appeal. The appellants then successfully applied for the appeal before this court to be heard afresh in ***Meru Constitutional Petition No. 3 of 2017***.

2. The appellants, **JAMES GIKUNDI**, **GEORGE MWITI** and **CHARLES MUGWIKA** were charged with the offence of robbery with violence contrary **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. It was alleged that on 6th January 199 at Akithi Location, Meru North District within Eastern Province with other not before the court robbed **LAWRENCE NTOTHUBUKU** of Kshs. 10,540/- cash, 12 packets of Sportsman cigarettes, 20 packets of Champion cigarettes, 15 packets of Supermatch cigarettes and a radio cassette make National valued at Kshs. 3,500/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said **LAWRENCE NTOTHUBUKU**.

3. The appellants raised the same issues in their respective petitions of appeal. They complained that the prosecution failed to prove the case against them beyond reasonable doubt. That the trial magistrate shifted the burden of proof from the prosecution to the appellant contrary to the principles of law. They contended that the trial magistrate erred in holding that the prosecution witnesses positively identified them at the time the offence was committed. They further contended that the prosecution case was full of contradictions and doubts which the trial magistrate failed to address. The appellant also attacked the judgment on the ground that the trial magistrate failed to consider their respective defences without any reason.

4. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions as to whether or not to uphold the conviction all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**).

5. In order to prove the case against the appellants, the prosecution called 5 witnesses. Lawrence Ntothubuku (PW 1) owned a shop with his wife, Grace Mwonjuki (PW 2). On the night of 6th January 1999 at about 10.30pm, a gang of men broke into their house with axes and pangas. The gang then forced them into their kiosk where they stole money, a radio cassette player and assorted cigarettes. In the course of

the robbery they assaulted PW 1 who was injured on the forehead.

6. PW 3, the daughter of PW 1 and PW 2, also testified that at about 10.00pm, before the incident, the 1st appellant, who she knew, came in the company of other people and asked her take him to her mother's house to buy cigarettes. She told him that she does not sell cigarettes so they left. She testified that after a while she could hear the commotion and screaming in her parents' house but since her door was locked from outside she could not assist. After the robbers left, PW 1 and PW 2 opened for her door and they all left together to report the incident at Tigania Police Station.

7. The Investigating officer, PC Patrick Kazioka (PW 4) recalled that on that night PW 1 made a report of the robbery. Together with other officers, they proceeded to the scene of the incident where they found the door had been broken. PW 1 led them to the homes of the appellants where they were arrested. PW 4 also issued a P3 form to PW 1. He was examined and the P3 form filled at Miathene Sub-district hospital. PW 5 who produced it confirmed that PW 1 had a cut wound on the face measuring 2 X 2 cms and a bruise on the left side of the chest probably caused by a sharp and blunt object.

8. In their respective defences, the appellant gave alibis and denied that they committed the offences. The 1st and 2nd appellants denied that they committed the offence. They testified that they had been working the whole day for the 1st appellant's father, Domisiano Mberia (DW 4), fixing his fence. Thereafter they went to sleep and were only arrested early in the morning. The 2nd appellant claimed that he was only arrested as he was at the home of the 1st appellant where he had come to assist in making the fence during the day. The 3rd appellant denied that the offence and testified that he was only arrested in the morning. DW 4 testified and confirmed that both the 1st and 3rd appellants were with him on the material day. The 3rd appellant's mother, Margaret Nyinoombabu (DW 5) gave an account of his arrest. She testified that the complainant had sworn to punish the 3rd appellant after he had cut his trees. She also stated that the 3rd appellant had come home on the previous evening and had spent the night at home before he was arrested.

9. The facts as I have narrated fall within the definition of the offence of robbery with violence under **section 296(2)** of the ***Penal Code***. The offence is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at/or immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic*** **NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR,** ***Oluoch v Republic*** **[1985] KLR 549** and ***Ganzi & 2 Others v Republic*** **[2005] 1 KLR 52)**.

10. In this case, the evidence is clear that the there was a robbery on the material night. The question or issue for determination is whether the appellants were identified as the assailants who committed the act. In dealing with this issue, I am alive to the fact that the incident took place at night in circumstances that were less than ideal for identification. In ***Wamunga v Republic*** **[1989] KLR 424** the Court of Appeal warned that;

> ***[W]here 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 be the basis of a conviction.***

11. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see ***Maitanyi v Republic*** **[1986] KLR 198** and ***R v Turnbull*** **[1967] 3 ALL ER 549)**. The Court of Appeal was categorical in ***Kiarie v Republic*** **[1984] KLR 739**, that reliance on such evidence of identification must be *"absolutely watertight"* to justify conviction.

12. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see ***Anjononi & Others v Republic*** **[1980] KLR 59**). But in ***Wanjohi & 2 Others v Republic*** **[1989] KLR 415**, the Court of Appeal held that, *"recognition is stronger than identification but an honest recognition may yet be mistaken."*

13. I now turn to consider whether the appellants were identified as the assailants. PW 1 testified that he could see the assailants come into his room through the spaces in the timber walls. They had torches and when they came into the bedroom where he was, he was able to see them as the torches were bright. One of the assailants, who was holding and axe, hit him on the chest with the axe handle and pushed him into the shop which was the next room. He was ordered to lie down. He identified the person holding the axe as the 1st appellant. He told the court that the 3rd appellant put a panga on his neck as he ordered him to secure money while the 1st appellant was ransacking the shop. The 1st appellant took the cigarettes while PW 2 counted the money. After taking the money and cigarettes, the assailants left. PW 1 told the court that he was able to identify the 1st and 3rd appellants as they lived in the same neighbourhood.

14. On her part, PW 2 testified that when the assailants broke into the house, they had bright torches and she was able to see them through the spaces of the timber walls as they came into the room. She recalled that the 1st appellant had a panga and a torch. She also knew him as a villager. She stated that the 3rd appellant is the one who cut PW 1 with an axe. She further testified that this was happening the other assailants were directing their torches at PW 1. As her husband was being pushed to the shop, the 1st appellant pushed her under the bed. While under the bed, she could still see PW 1 being beaten through the spaces in the timber. After a while, the 1st appellant came back and dragged her to the shop and demanded to be shown the money. She showed the box to the 2nd appellant and as he took the money, the 3rd appellant held a panga by PW 1's neck. After taking the money and other items, the assailants left.

15. From the evidence, this was a case of recognition rather than identification of a strangers. The evidence of PW 1, PW 2 and PW 3 was that 1st and 3rd appellants were from the locality and were well known to them. They confirmed as much in their defence. PW 1 and PW 2 gave consistent evidence of how they were attacked and how the assailant came to the house with bright torches which they shone in the confined space of the bedroom and the shop. Given the time PW 1 and PW 2 interacted with the appellants in the small confined space of

PW 1's room and shop, the fact the 1st and 3rd appellants were well known to them, I am satisfied that the prevailing conditions were favourable for positive recognition of the appellants. In addition, there is the testimony of PW 3 which puts the 1st appellant at the scene of the incident. The fact that the assailants were known to the witnesses enabled them to report the incident and direct them to the homes of the 1st and 3rd appellants where they were arrested.

16. The appellant defence is in the nature of an alibi. The law is settled that an accused person who raises the defence of alibi does not assume the burden of proving it. It is sufficient if the alibi raises reasonable doubt as to whether or not the accused was at the scene of the crime (see ***Kiarie v Republic*** **[1984] KLR 739).** This means that the burden always remains with the prosecution to prove that the accused committed the crime under trial. The appellants did not give notice of their alibi in order for the prosecution to call evidence in rebuttal. In such a case, the duty of the court is to consider the alibi alongside the prosecution case and in doing so I find the appellants' defence mere moonshine and I reject it in light of the clear evidence by PW 1, PW 2 and PW 3 putting them at the scene of the incident. I therefore affirm the conviction.

17. As regards the death sentence imposed on the appellants, the Supreme Court in ***Francis Karioko Muruateru & Another v Republic*** **SCK Pet. No. 15 OF 2015 [2017] eKLR** declared the mandatory death sentence for the offence of murder unconstitutional. In the case of ***William Okungu Kittiny v Republic*** **KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR**, the Court of Appeal held that the ***Muruatetu*** also applied to the provisions of **section 296(2)** of the ***Penal Code*** which impose the death penalty as a mandatory sentence for robbery with violence. I therefore set aside the death sentence imposed on the appellants.

18. The accused were first offenders and the offence was serious in that they terrorised a couple and inflicted violence on PW 1. As the appellants have served 18 years in prison, I sentence them to time served. I order that they be released unless otherwise lawfully held under a separate warrant

SIGNED AT KISII

D.S. MAJANJA

JUDGE

DATED and DELIVERED at MERU this 16th day of July 2018.

A. MABEYA

JUDGE

Appellants in person.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.