IN THE HIGH COURT OF KENYA

AT BUNGOMA

(CORAM: CHERERE -J)

CRIMINAL APPEAL NUMBER 157 AND 158 OF 2016

(CONSOLIDATED)

CLEOPHAS WANJALA MASINDE.....1ST APPELLANT

GEOFREY NANDAYI WEKESA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 1612 of 2013 in the

Chief* Magistrate's Court at *Bungoma delivered by C.L.Yalwala (SRM) on 30.6.16)

JUDGMENT

Background

1. **FERDINAND JUMA** and **TITUS MAFURA**, the appellants have appealed against the conviction and death sentence imposed on them for the offence of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. The particulars of the charge are that:-

> ***On the night of 22nd and 23rd July, 2013 at Kimakumi village within Bungoma County jointly with others not before the court while armed with dangerous weapons namely pangas, iron bar and wood plank robbed Nathan Wanjala Makokha of motor cycle KMDB 100 V make TVS Star, red in colour valued at Kshs. 90,000/- and at the time of such robbery used actual violence on the said Nathan Wanjala Makokha.***

The prosecution's case

2. The prosecution called 7 witnesses in support of the charges. PW1, Nathan Wanjala Makokha, the complainant recalled how a group of 2 persons gained entry into his house at midnight on the night 22nd and 23rd July, 2013. He stated that he had a torch whose light enabled him to see the 1st appellant who was armed with an iron bar, the 2nd appellant who was armed with a wooden plank and one Khisa who was armed with a panga. He stated that Khisa cut him on the head and the 1st appellant fractured his right hand after which the robbers took his motor cycle ignition key and dove away with his motor cycle KMDB 100 V make TVS Star, red in colour valued at Kshs. 90,000/- which has never been recovered. It was his evidence that the appellants were his neighbours and he had known them for a period of 7 years. He also told court that the 1st appellant had on the day of the robbery been his witness when he sold ½ acre from land the proceeds of which he used to purchase the motor cycle that was robbed. He further stated that he informed Godfrey Shikuku that he had recognized his attackers. PW2 Dr. Muli Denis produced the complainant's P3 form **PEXH. 3**, filled by his colleague Dr. Damba which shows that complainant suffered a cut wound on left parietal skull and fracture of right ulna. PW3 Godfrey Shikuku Wamalwa told court that the complainant informed him that he was robbed by Cleophas and Geoffrey. He stated that he later identified the 2nd appellant to the police that arrested him and did not know how or from where the 1st appellant was arrested. PW4 Silas Wamalwa Masika and PW5 Patrick Sifuna Makokha arrived at the scene of crime long after the robbery. PW6 CPL Geoffrey Ngeno stated that the complainant named the appellants 3 days after the robbery and that upon their arrest, an identification parade was conducted by PW7 IP Dominic Munyithya as a result of which the appellants were identified.

3. Both appellants denied the offences and i*n a judgment* dated *30th June, 2016;* appellants were convicted and sentenced to suffer death.

The Appeal

4. The conviction and sentence provoked this appeal. In their separate petitions of appeal filed on 12.7.16 and written submissions filed on 14.9.18, they raised 2 issues as follows:

1) ***Whether they were properly identified by complainant***

2) ***Whether the prosecution case was proved beyond reasonable doubt***

5. When the appeal came up for hearing on 7.11.18, the appellants counsel Mr. Otsiula stated that they were wholly relying on their grounds of appeal and written submissions.

6. Mr. Oimbo, learned State Counsel opposed the appeal and submitted that appellants were the complainant's neighbours and had had recognized them with the light from his torch. He further submitted that complainant had given the names of his assailants to PW3 and that the identification parade was not fatal to the prosecution case.

Analysis and Determination

7. This being a first Appeal, this Court has a duty to evaluate the evidence, analyse it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that (see **Isaac Ng'ang'a Kahiga v Republic [2006] eKLR)**.

8. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the appellants and on behalf of the state. In dealing with this appeal, I will separately address the 2 grounds summarized above.

1) Were the appellants positively identified?

12. The grave men of this appeal really turns on the issue of identification, nay, recognition of the appellants by the complainant. The offence was committed at night and hence the means by which the appellants were identified by recognition becomes critical. According to the complainant, he had a torch whose light enabled him to see the appellants clearly.

10. The difference in approach between identification and recognition was expressed thus by Madan J.A for the Court in ***Anjononi and Others vs The Republic [1980] KLR****;*

> ***"……This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)"***

11. That is not to suggest of course, that cases of misrecognition cannot occur (See ***Karanja & Anor vs. Republic [2004] KLR 140)*** and courts are still duty-bound to examine such evidence with great care.

12. That being the case it was necessary for the trial court to test the reliability of such identification. In the case of ***Maitanyi –vs- Republic (1986) KLR 198****, the Court of Appeal* Court held,

> ***"……That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.***

13. In the recent case of ***John Muriithi Nyagah v Republic [2014] eKLR***, the Court of Appeal held:-

"In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc."

14. The court record shows that the learned trial Magistrate did not at all evaluate the evidence of identification to test the reliability of the evidence of identification at night.

15. Concerning the identification parade, the prosecution did not offer an explanation why it was deemed necessary to conduct identification for persons that were allegedly known and named by the complainant.

2. ***Was the prosecution case proved beyond reasonable doubt?***

16. In his evidence in chief, the complainant told court that he identified the appellants from the light of his torch. In cross-examination however, he conceded that he did not have a torch during the robbery. In the case of ***Ndungu Kimanyi vs. Republic, (1979) KLR 282 at page 283,*** the Court of Appeal stated:-

> ***"We lay down the minimum standard as follows: The witness upon whose evidence it is proposed to rely should not create an***

impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

17. In the Court of Appeal decision in the case of ***Elizabeth Gitiri Gachanja & 7 others vs Republic (2011) eKLR*** **,** it was held that the evidence relied upon to convict in capital offences must be of high quality, credible and beyond reasonable doubt. The complainant's evidence in this case raises doubt leaves the court in no doubt that the scene was not lit and that ought to have sowed the seed of doubt on the mind of the learned trial magistrate concerning the recognition of the appellants by the complainant at night. Such doubt should have benefited the appellants.

18. Having considered the evidence in its totality, I find that the complainant's evidence fell short of proving the prosecution case beyond any reasonable doubt.

20. Consequently, the appeal succeeds. The conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that appellants shall be released and set free forthwith.

DELIVERED AND SIGNED AT BUNGOMA THIS..9th ...DAY OF…November…….2018

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - Ribba & Diannah

1st Appellant -

2nd Appellant -

For the State - Mr Oimbo