



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NO. 41 & 43 OF 2016 (CONSOLIDATED)**

**MOSES NDANYI EDWARD.....1<sup>ST</sup> APPELLANT**

**DAVID SHIBURA LULAVU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of Honourable W. Kagendo Chief Magistrate, delivered on 10<sup>th</sup> March 2016 in Molo Chief Magistrate's Court Criminal Case No. 210 of 2015)*

**JUDGMENT**

1. Moses Ndanyi Edward, the 1<sup>st</sup> Appellant and David Shibura Lulavu, the 2<sup>nd</sup> Appellant respectively were charged with the Offence of Attempted Robbery with Violence contrary to Section 297(2) of the Penal Code. Particulars of the Offence being that

***“On the 20<sup>th</sup> day of January, 2015 at Londiani Township in Londiani Sub-County of Kericho County, jointly being armed with dangerous weapons namely Pangas and Rungus attempted to rob PETER MWAURA KIARIE of his Nokia Lumia Phone. One ipad all valued at Ksh 83,000/= and cash Ksh 14,200/= and at or immediately after the time of such attempted Robbery used actual violence”.***

2. Facts of the case were that on the 20<sup>th</sup> day of January, 2015, PW1 Peter Mwaura Kiarie was walking to his house at 9.00pm when he was ambushed by two (2) people who assaulted him. He struggled with them as he screamed. Light at a nearby construction site was switched on. The two (2) individuals ran away. He sustained injuries but managed to reach his house that was some 160 metres away. People followed him and took him to Londiani Nursing Home where he was treated. The matter was reported to the police who investigated, arrested the appellants and charged them.

3. When put on his their defence the Appellants denied having committed the offence. The 1<sup>st</sup> Appellant stated that on Wednesday, the 21<sup>st</sup> day of January, 2015 at 8.00am he was on his way to Londiani District Hospital when he encountered police officers on patrol who sought to know where he was going and where his house was situated. He was arrested without being informed of the reason. He was subsequently charged and the person who caused his arrest was not called as a witness.

4. The 2<sup>nd</sup> Appellant on the other hand stated that he heard screams on the night of 20<sup>th</sup> January, 2015 while inside his house. He opened the door and saw what appeared as a group of drunk youths making noise. Assuming that they were from watching video he closed the door and went to attend to his children. After they slept he left their house and as he walked on, Enos a person he had disagreed with because of an issue at a construction site where Robert Esinin Elim (PW4) his colleague worked attacked him. PW2 Solomon Kahura Mugo urged PW4 to take him to the police. He was taken to the police station without knowing the reason. The following day those who visited him told him that the complainant had been assaulted and injured. Subsequently he was arraigned in court.

5. It was his testimony that he had seen Enos and PW4 carrying a heavy harmer. When it turned out that it was missing from the construction site investigation carried out culminated into the recovery of the same from the house of Kenneth. As a result Kenneth and Enos were relieved of their duties. PW4 was demoted from a storekeeper to a night watchman. When he (2<sup>nd</sup> Appellant) met them they accused him of having given the information to their boss. They vowed to ensure he would regret. That he requested for Enos to be availed in court but his request went unheeded.

6. The learned trial magistrate analyzed evidence adduced and reached a finding that the two (2) appellants were the ones who attacked and injured the complainant on the fateful night. She convicted and sentenced them to suffer death as provided in law.

7. Aggrieved by the conviction and sentence the Appellant appealed on grounds that can be condensed thus: the identification of recognition

was not watertight so as to justify a conviction; one crucial witness declined to testify; evidence adduced by PW1 and PW4 was contradictory; Section 216 as read with Section 329 of the CPC was not complied with hence the case was not proved beyond any reasonable doubt.

8. The appeal was canvassed by way of oral evidence. Learned counsel, Ms Chemgetich for the Appellants submitted that the incident happened at 9.00pm and security lights were low per the testimony of the complainant, therefore, he was not able to see his attackers and he did inform PW2 of that fact. That PW4 claimed he identified the appellants with the aid of a torch which he did not tell how far long the torch was shone on them such that he was able to see them, that the fact of the torch having been introduced was proof of electricity power being in doubt. She called upon the court to draw an inference that lighting in the area was wanting that is why they had to use the torch. Further that PW1 told the court that Khalwale was one of the attackers but none of the Appellants goes by that name.

9. Secondly, she argued that PW5 told the court that the Appellants were identified by PW4 and one Enos, a crucial witness who was not availed to testify and that the trial magistrate failed to caution herself of the danger of relying on evidence of a single identifying witness.

10. In response, the learned counsel for the State, Senior Assistant Director of Public Prosecution, Mr. Kemo conceded to the appeal. He stated that evidence adduced by the PW1, the complainant, showed that visibility was wanting, yet the complainant said that he saw the 1<sup>st</sup> Appellant holding a panga. That it wasn't established how a PW4 was when he allegedly flashed the torch that he allegedly used to see the Appellant, a fact that casts doubts on circumstances that obtained that could be favourable for him to identify the appellants. That the issue of the name Khalwale did case doubt as to who was seen as neither of the appellants was referred to as Khalwale. In the circumstances Enos could have been a critical witness in the case but was not called to testify.

11. This being a first appellate court, I am duty bound bound to re-evaluate and re-consider all evidence adduced at trial bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. **(see Okeno Vs Republic (1973) EA 32).**

12. The Complainant herein was attacked at night, at 9.00pm or thereabout. In his testimony he stated that he was not able to see his attackers. However he learnt that the individuals had been arrested. He did not identify the person's in open court. Similarly he did not go to the police station to identify his alleged attackers. PW4 on the other hand stated that he saw the attackers with aid of a torch that he flashed. This was therefore a case of visual identification. In the case of **Wamuga Vs Republic (1989) KLR 426** the Court of Appeal stated that

***“It is trite 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”***

13. Factors that the court ought to take into consideration in interrogating whether visual identification was positive were stated in the case of **Republic Vs Turnbull and others (1976) 3 ALL ER 549** thus

***“Where the quality of an identification is good, the jury can safely be left to assess the value of the identifying evidence even if there is no other evidence in support, provided always that an adequate warning has been given about the special need for caution. However, where in the opinion of the Judge the quality of the identifying evidence is poor, he should withdraw the case from the jury and direct an acquittal unless there is other evidence which supports the correctness of the identification. That other evidence may be either corroboration in the legal sense or something which convinces the jury that the identification is not mistaken; any odd coincidence, if unexplained, may be supporting evidence. The Judge should identify to the jury any evidence which he adjudges capable of supporting the evidence of identification and he should tell the jury if there is any evidence or circumstances which cannot support an identification.”***

14. The Complainant was clear in his evidence, he was not able to identify the persons who attacked him. The visibility was poor. He could only see figures. He saw some light from a spotlight that is when the people who had already injured him escaped.

15. PW2 his neighbour Solomon Kahura Mugo who had gone to the toilet heard their neighbour Enos making a telephone call. He heard him state that he had seen two (2) people but could not tell what intention they had. All over a sudden he heard screams from the roadside. He heard the name of his neighbour the complainant being mentioned as having been hit. When he reached the scene the complainant was bleeding. As he assisted in taking to Londiani Nursing Home the complainant told him that he did not know who attacked him. After he returned from the Nursing Home he saw people having arrested the 2<sup>nd</sup> Appellant. The mob was beating him. He was a person known to him. It was however until the following day that he heard that he was one of the persons who was identified by the watchman that Enos rang on the fateful night.

16. PW4 a security guard did receive a telephone call from Enos who allegedly informed him about two (2) persons who were standing outside the construction site, his place of work. According to the information received the persons were armed with a panga. He peeped and saw two (2) people who crossed the road. He recognized the 2<sup>nd</sup> Appellant a person he had known for one (1) year. When he asked him what he was doing he responded by enquiring whether there was anything that he owned on the road. He then went back to his house. It was soon afterwards that he heard noise. He went on to state that he went outside flashed the torch and he did see the 1<sup>st</sup> Appellant holding a panga and was in the process of cutting the complainant. The 1<sup>st</sup> Appellant stood on the side watching. He saw the complainant pick his stuff, a cell phone, Ipad and a bag. Then, PW2 arrived and people went in search of the 2<sup>nd</sup> Appellant. After a short while he learnt of the arrest of the 2<sup>nd</sup> Appellant.

17. It was the evidence of PW1 that he had the bag well strapped on the back which contained a laptop, Ipad, cellphone and other items. He did not state that the items fell off his back. This is therefore contradictory to the allegations of PW4 that he picked items that had fallen down.

18. At the outset following a call received PW4 said he only recognized the 2<sup>nd</sup> Appellant. He used a torch which aided him in seeing the individuals. This was proof that the lighting at the place was poor. It was PW4's evidence that later he saw the 1<sup>st</sup> Appellant cutting the complainant but he did not state for how long he observed him and at what distance he stood. This was important because PW1 stated that on the spotlight being flashed the assailants ran away.

19. The 2<sup>nd</sup> Appellant, a person well known to the complainant and PW4 stated circumstances in which he found himself at the scene of the incident. The evidence adduced by PW4 was therefore barely enough such that it required collaboration.

20. It is contended that a critical witness was not called to testify. Section 143 of the Evidence Act provides that;

***“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact”***

21. In the case of **Julius Kalewa Mutuga Vs Republic, Criminal Appeal No. 31 of 2005**, the Court of Appeal held that

***“... As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive”***

22. In the case of **Bukenya & Others Vs Uganda (1972) EA 549** the Court of Appeal of East Africa held thus:

***(i) “The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.***

***(ii) The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.***

***(iii) Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.”***

23. The individual who put ideas in the mind of PW4 of an impending criminal activity was Enos. He was not a police informer who required protection. Circumstances in which he made a call to PW4 if he did, and I say so because no evidence of a call having been made from a service provider was tendered, are questionable. In his testimony PW5 No. 70651 Corporal Kenneth Muriithi stated that at the point of being mandated to investigate the case the Appellants were already in custody. He went on to state thus:

***“.... Kiarie told me one suspect had been arrested that night of 20/1/15 and the other one the next morning. Accused had injuries when I saw him. I established that the members of public who arrested him had injured him. I took Accused 2 to hospital and he was treated. Accused was identified by Esinyemi and the watchman and one Enos. Enos was a crucial witness. He has however declined to record a statement. Esinyemi identified Accused 1.”***

24. Both individuals who identified the Appellants prior to their arrest were not called to testify. Enos in particular was indeed a crucial witness in the case as stated by the investigating officer because he is the one who made PW4 act. His evidence was very important. Conditions that prevailed at the time the offence was committed were not favourable to positive identification. The court needed his evidence to confirm the allegations of evidence adduced by PW4. Failure to call him was detrimental to the prosecution's case. It can only be inferred that his evidence could have been adverse.

25. Finally, the complainant testified thus:

***“... The people said the people that my attackers (sic) were Karwane and someone else. 1 other person I do not recall. When I heard Khalwale, I recalled that this Khalwale had been to my shop at around 8.00pm while the ambush was at 9.00 pm I could also recall that the person who cut me was about my height. I was not able to see the exact weapon that hit me.... I was not able to see my attackers...”***

26. As correctly submitted, none of the Appellants is called Khalwale and in his testimony the complainant did not identify either of them as the Khalwale who went to his shop on the material night prior to the incident.

27. In the circumstances it was unsafe to convict the appellants. In the result I find the appeal having merit and allow it. The Appellants shall be released forthwith unless otherwise lawfully held.

**Dated and delivered in Nakuru this 6<sup>th</sup> day of November, 2018.**

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**L. Mutende**

**Judge**