



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 4A AND 4B OF 2015 (CONSOLIDATED)

FORMERLY

MACHAKOS CRIMINAL APPEAL NO. 180 OF 2013

AND

CRIMINAL APPEAL NO. 301 OF 2013

MICHAEL NZASI.....1ST APPELLANT

FRANCIS KIMULI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Criminal Case No. 102 of 2013 by Hon. S. K. Mutai Ag. PM on 15/08/13)

J U D G M E N T

1. **Michael Nzasi** and **Francis Kimuli**, the 1st and 2nd Appellants, respectively were charged with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. Particulars of the offence being that on the 7th day of **June, 2013** at about **7.30 p.m.** at **Mutomo Township, Mutomo Location** in **Mutomo District** within the **Kitui County** being armed with dangerous weapons namely **Stones** jointly robbed **Ngozo Lukas Kshs. 1,800/=** and at or immediately before or immediately after the time of such robbery wounded the said **Ngozo Lukas**.

2. Facts of the case were that on the 7th **June, 2013** at about **7.30 p.m.** **Ngozo Lukas Mutie** (Complainant) was in company of PW4, **Pius Nzangi**. Prior to going home he entered a shop as his friend (PW4) walked on. He purchased rice, sugar and other household items. As he walked on he saw a person he referred to as **Mike**, and identified as the 1st Appellant and another. The two persons accosted him, searched him and took **Kshs. 1,800/=**. PW4 went to where they were and the persons ran away. He reported the matter to the police station. He sought treatment at the dispensary where he was treated. He was issued with a P3 form that was filled by PW2 **Daniel Mulwa**, a Clinical Officer who classified the degree of injury sustained as harm. The Appellants and PW4 were arrested by members of public. They were re-arrested by **No. 75433 PC Japheth Kidiavai**. PW4 was released as the two (2) Appellants were charged.

3. When put on their defence the 1st Appellant denied having robbed any person.

4. The 2nd Appellant stated that on the 7th **June, 2013** he was at home. On the 8th **June, 2013** he went to **Mutomo** to look for casual work only to be arrested.

5. The trial Magistrate considered evidence adduced and found that the Appellants were positively identified as persons who robbed the Complainant. He convicted and sentenced them to serve **life imprisonment**.

6. Being dissatisfied with the conviction they appealed on grounds that:

- Conditions that prevailed did not favour correct identification.
- Evidence adduced was not corroborated by independent evidence.

- Alibi evidence adduced by the Appellant was not considered.
- Provisions of **Section 169(1)** of the **Criminal Procedure Code** were not adhered to.
- The State/Respondent opposed the Appeal, through the State Counsel **Ms. Rono**. It was submitted that the Complainant saw the Appellants with aid of the torch that he flashed and identified in particular the 1st Appellant whom he knew. He identified him by name which was an indication that he was familiar to him. She argued that it was a case of recognition as opposed to mere identification as held in the case of **Anjononi & Others vs. Republic (1080) KLR 59**. Further she stated that PW1's evidence was corroborated by that of PW4. With regard to **Section 169(1)** of the **Criminal Procedure Code** she stated that it was strictly complied with. She called upon the Court to dismiss the Appeal and enhance the sentence to a death sentence.

7. This being the first appellate court, it is duty bound to subject evidence adduced at trial to a fresh and exhaustive examination and come to its own conclusion bearing in mind that it did not see nor hear witnesses who testified at the hearing. (**See Okeno vs. Republic (1972) EA 32**).

8. The offence is alleged to have been committed at **7.30 p.m.** It was dark such that the Complainant was using a torch. It was therefore a case of visual identification at night. In the case of **Wamunga vs. Republic (1989) KLR 426**, the Court of Appeal stated thus:

“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.”

9. In the case of **Obwana & Others vs. Uganda (2009) 2 EA 333 at 337**, the Court of Appeal of Uganda stated thus:

“It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. The rationale for this is that a witness may be honest and prepared to tell the truth, but he might as well be mistaken. This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself of the dangers of acting on such evidence.”

10. The Complainant (PW1) was with PW4 prior to entering a shop where he purchased household items. He stated that:

“Pius and Francis came, I flashed Mike and another person. They came towards me. I was hit on my left cheek and I fell down. They came and searched me. The torch had dropped. I screamed and called Pius (PW4). They took my Kshs. 1,800/=. PW5 came and they ran away. Mike disappeared. Mike is the 1st accused. PW5 took me to the gate of Mutomo Mission Hospital. I sent him to go to the shop where I bought goods. PW5 stayed for long and my cousin took me to the police station..... The 1st accused was arrested that night and the second accused was arrested the following day after the 1st accused led the police officers to him.....”

11. PW4 stated that when PW1 entered the shop he walked on. When he heard screams. He went back and found him injured. He went on to state thus:

“I saw one person whom I identified as Mike (1st accused). I called him but he ran away.”

12. None of these witnesses stated what made them to identify the Appellants. It was dark such that the Complainant had to use the torch to see. Other than identifying the 1st Appellant in the dock and referring to him as **Mike**. Neither PW1 nor PW4 stated how they knew the Appellant and what made them believe he was one of the persons who assaulted the Complainant on the material night.

13. PW5 the Investigating Officer stated that the Complainant went to the station and reported that he was confronted by two (2) men known to him who robbed him of **Kshs. 1,800/=**. The 1st Appellant was arrested by members of public and taken to the police station while the 2nd Appellant was arrested the following day. One **Pius** was also arrested but he (Investigating Officer) realized that he was not one of the attackers.

14. There is a disconnect of the chain of evidence as adduced by the Prosecution as to how the 1st Appellant was arrested by members of public. No evidence was led as to how the 2nd Appellant was arrested. Who identified the Appellants prior to their arrest? If indeed the Appellants were the Complainant's assailants, why was PW4 arrested? And who was the stated **Pius**? Was it PW4 or another person?

15. PW3 on the other hand stated that he was near the guest bar when he saw the Complainant bleeding on the cheek. The Complainant told him he had been hit with a stone by the Appellants. Then he told the Complainant that he had seen the Appellants running away. Looking at the prevailing circumstances, it was dark. The witness did not tell the court what aided him to see the Appellants, whether he knew them previously and what made him believe that they were the ones. In his examination in chief he did not give their names or describe how they were such that he was able to identify them. On cross examination he stated that there was electrical light and he knew the 2nd Appellant before. The fact that the Complainant had to use a torch to flash the persons who assaulted him is evidence that the area was dark. The Prosecution did not estimate the distance between the scene of the incident and where PW3 was when he saw two (2) people running. The

witness did not tell the court if indeed he knew the 2nd Appellant, how he knew him and how often he used to see him or what made him believe he was the person. With regard to the 1st Appellant the witness did not say if he knew him before. It is not stated how he was able to tell that the person he allegedly saw running away was the same person the Complainant had in mind.

16. An in-depth look at the evidence of the Complainant reveals that there were four (4) people prior to his assault. There was **Pius** and **Francis**. Then **Mike** and another person that PW1 could not identify. He alluded to having been hit but did not state who amongst the four (4) people hit him. On being hit and he screamed calling PW4, he went and the people ran away. According to him PW5 took him to the gate of **Mutomo Hospital**. However, PW3 alleged he is the one who went to him after he was injured and took him to the Police Station prior to being referred to hospital. **Pius** (PW4) on the other hand was silent on having seen **Francis** or the other person that was in company of **Mike**. He denied having been arrested following the incident and alleged that the 2nd Appellant was arrested after he was mentioned by the Complainant as his accomplice. Neither PW1 nor PW5 the Investigating Officer mentioned the 2nd Appellant as having been arrested as a result of being mentioned by the 1st Appellant.

17. Evidence adduced by the Prosecution witness in the circumstances was contradictory and inconsistent. The identification in the circumstances was not free from error. Evidence adduced did not satisfy the court whether it was a case of recognition. Evidence adduced was entirely on identification which was not watertight to justify a conviction.

18. In the result I allow the appeal, quash the conviction and set aside the sentence imposed. The Appellants shall be released forthwith unless otherwise lawfully held.

19. It is so ordered.

Dated, Signed and Delivered at Kitui this 11th day of January, 2017.

L. N. MUTENDE

JUDGE