REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.264 & 265 OF 2010

(An Appeal arising out of the conviction and sentence of Hon. U.P. Kidulla, C.M. delivered on 27th April 2009 in Kibera CM. CR. Case No.228 of 2009)

JOHN CHEGE MUTHONI……………………….…………..1ST APPELLANT

KELVIN ONCHURU SEREMANI……………………........…2NDAPPELLANT

VERSUS

REPUBLIC………………………………………………........RESPONDENT

JUDGMENT

John Chege Muthoni (1st Appellant) and Kelvin Onchuru Seremani (2nd Appellant) were charged with five (5) counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 31st December 2008 at Hi-tech Wines and Spirits Bar, Riruta in Nairobi County, the Appellants jointly with others not before court, while armed with a dangerous weapon, namely a pistol robbed Bernard Benson Ligami, Melvin Moronje Mulunda, Margaret Vihenda Amazimbi, Petronilla Musili Khamasi and Rogers Salim Mwafan (hereinafter referred to as the complainants) of mobile phones, cash and various alcoholic drinks listed in the charge sheet, and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said complainants. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, they were convicted as charged on the five (5) counts of **robbery with violence**. They were sentenced to death as is mandatorily provided by the law. The Appellants were aggrieved by their conviction and sentence. Each Appellant filed an appeal to this court challenging his conviction and sentence by the trial court.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the basis of evidence of identification that was made in circumstances that did not favour positive identification. They faulted the trial court for relying on the evidence of identification obtained in an identification parade that was not conducted in accordance with the law. They took issue with the fact that they had been convicted yet no property stolen from the complainants was recovered in their possession. They were finally aggrieved that they had been convicted on the basis of evidence of prosecution witnesses that did not establish their guilt to the required standard of proof. They faulted the trial magistrate for not taking into account their defence before arriving at the decision to convict them. In the premises therefore, each Appellant urged the court to allow his respective appeal, quash the conviction and set aside the death sentence that was imposed on them.

During the hearing of the appeal, the court consolidated the two separate appeals lodged by the Appellants. The appeals were heard together as one. This court heard oral rival submission made by Mrs. Rashid for the 1st Appellant and by Mr. Swaka for the 2nd Appellant. Both counsel submitted that the Appellants were convicted solely on the evidence of identification. They argued that the circumstances favouring positive identification was not present at the time it was alleged that the complainants identified the Appellants. They explained that in cases where the prosecution relies on the evidence of identification, it was important that the identifying witnesses give the description of the assailants in the first report made to the police. The circumstances in which the identification was made must also be recorded in detail. This includes, in case such as the present one, where the robbery took place at night, the intensity of the light, the position of the identifying witnesses vis-à-vis the assailants, the time it took for the witness to identify the assailant and the general conditions prevailing at the time of the robbery. Learned counsel submitted that such safeguards were put in place by the law to prevent incidents of mistaken identity. In the present appeals, they submitted that the circumstances favouring positive identification were absent, the identifying witnesses did not give the physical description of the assailants in the first report that they made to the police, and finally, none of the property robbed from the complainants was recovered in the Appellants' possession. They took issue with the fact that the trial court had failed to take into consideration the Appellants' respective alibi defences before arriving at the determination to convict them. In the premises therefore, they urged the court to allow their respective appeals.

Ms. Aluda for the State opposed the appeal lodged by the 1st Appellant. She however conceded to the appeal lodged by the 2nd Appellant. In respect of the 1st Appellant, she explained that she was properly identified by the complainants during the robbery. The 1st Appellant had prior to the robbery, bought a cigarette from a complainant who was a waiter in the bar. The witness had the opportunity to clearly see the 1st Appellant. The circumstances favouring positive identification were present. There was sufficient electric light. The robbery took some time. During this period, the identifying witnesses were able to observe the physical features of the 1st Appellant. The 1st Appellant was seen on the following day by one of the complainants who was able to positively identify him. Her memory was still fresh. The 1st Appellant was escorted to the police station where he was detained. Ms. Aluda submitted that the prosecution had adduced sufficient evidence of identification to enable the court convict the 1st Appellant. The defence of the 1st Appellant was duly considered. She urged the court to disallow 1st Appellant's appeal. However, she was of the view that the evidence of identification of the 2nd Appellant was not sufficient to sustain a conviction. She conceded to the appeal lodged by the 2nd Appellant.

This court, as the first appellate court, is required to look afresh at the evidence adduced before the trial court before arriving at its independent determination whether or not to uphold the conviction of the Appellants. In doing so, this court must be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore must give due allowance in that regard (See **Okeno –vs- Republic [1972] EA 32**). In the present appeal, the main issue for determination is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellants on the charges of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**.

Before giving reasons for our decision, it is imperative that we set out the facts of this case, albeit briefly.
PW1 Bernard Benson Ligami owned a pub at Riruta Satellite. At the material time, he had employed PW2 Margaret Vihenda Amazimbi and PW4 Melvin Muronji Mulunda to work in the said pub. PW3 Petronilla Musili Khamasi and PW6 Rogers Salim Mwafan were customers at the bar at the time of the robbery incident. PW1 was at the pub at the time of the robbery incident. According to the five witnesses, at about 9.00 p.m. as they were in the bar, a group of about five (5) robbers entered the pub, ordered them to lie down before robbing them of their respective mobile phones and cash. A music system in the pub was also stolen. The gang of robbers was able to subdue the complainants after threatening them with a pistol. The complainants testified that the robbery took place for about ten (10) minutes. Prior to the robbery, one of the robbers, who PW2 identified as the 1st Appellant, had gone to the pub and bought a cigarette. He also requested for a match box to light the cigarette. The match box was given to the robber by PW5. After a short while, the robber returned with the gang and ordered the people

who were in the pub to lie down. After robbing them, they were herded into the counter where they were all locked in.

Whereas the other witnesses testified that they were not able to identify the Appellants as being among the persons who robbed them, PW2 and PW4 testified that they were positive that it was the 1st Appellant who was among the gang that robbed them on the material night. There was sufficient light. The period they were exposed to the 1st Appellant during the robbery was sufficient to enable them be positive that they had identified the 1st Appellant. PW2 and PW4 testified that although they had not met with the 1st Appellant prior to the robbery incident, they were certain that it was the 1st Appellant who had robbed them.

PW2 described how the 1st Appellant, prior to the robbery, had purchased a cigarette from her. During this period, she was able to note the physical features of the 1st Appellant. On the following day, *i.e.* 1st January 2009, at about 10.00 a.m. while PW2 was walking to work, she saw the 1st Appellant. She raised alarm. The 1st Appellant was apprehended and escorted to the bar. He was later escorted to Riruta Police Station where he was detained. PW2 testified that when she saw the 1st Appellant on the following day, she was positive that he was among the gang that robbed them. Her memory was still fresh. The 2nd Appellant was later arrested and identified in an identification parade by one of the witnesses. None of the robbed items were recovered.

When the Appellants were put on their defence, they denied committing the offence. They gave alibi defence. They testified that they were elsewhere at the time the robbery took place. They called evidence from their relatives to confirm that indeed they were at their respective homes at the time the robbery is said to have taken place.

We have carefully re-evaluated the evidence adduced before the trial court. We have also considered the submission made during the hearing of this appeal. We have evaluated the grounds of appeal put forward by the Appellants. From the evidence adduced by the prosecution witnesses, it was clear that the prosecution relied on the sole evidence of identification to secure the conviction of the Appellants. As was held in **Maitanyi –Vs- Republic [1986] KLR 198 at P.200**:

"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".

When relying on the sole evidence of identification, the prosecution must ensure that such evidence is watertight to prevent the possibility of mistaken identity. Over time, the courts have come up with rules which must to be followed when the prosecution is presenting to the trial court the evidence of identification. The circumstances under which the identification was made must be properly explained. In cases where the criminal offence took place at night, the source of light must be explained. The intensity of the light must also be stated. The position of the identifying witness *vis-à-vis* the person identified must be noted. It is also important that in the first report made to the police, the identifying witness must give the physical description of the assailant. This will enable a comparison to be made between the physical description made in the first report and the actual physical description of the accused upon his arrest. As was held in **Simiyu & Anor –vs- Republic [2005] 1 KLR 192**:

"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given."

In the present appeal, we are not persuaded that the circumstances in which the robbery took place were conducive for positive identification. It was at night. None of the complainants had met or known with the Appellants prior to the robbery incident. Although there was electric light, it was not clear from the testimonies of the complainants the position of the source of light *vis-à-vis* their position they were when allegedly identified the Appellants. Three of the five witnesses testified that they did not identify any of the robbers. One of the witnesses testified that she was terrified during the robbery incident that she could not be able to identify any of the robbers.

PW2 and PW4 claimed that they identified the Appellants in the course of the robbery. They did not however give the physical description of their assailants in the first report made to the police. They did not even give the description of the clothes that their assailants wore on the night of the robbery to enable them be positive that it was the Appellants who had robbed them. This court is not persuaded that evidence of identification by the prosecution was watertight. It is possible that the Appellants were victims of mistaken identity. The Court of Appeal in **Peter Gatiku Kariuki –vs- Republic [2014]** eKLR cited with approval the case of **Michael Kimani Kungu –vs- Republic CA CR. Appeal No.686 of 2010** where it was held:

"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well-known case of R VS TURNBULL (1976) 3 ALL ER 549 at page 552 where he said-

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

In the present appeal, the evidence of identification relied on by prosecution raises doubt that indeed the Appellants were properly identified by the complainants. There are too many gaps in the evidence of identification that raises reasonable doubt that the Appellants were identified as members of the gang that robbed the complainants during the robbery incident. There is no other evidence that was adduced by the prosecution to corroborate the evidence of identification. None of the items robbed from the complainants was recovered in the possession of the Appellants. The possibility that the complainants were mistaken in their identification of the Appellants cannot be ruled out. The alibi defence adduced by the Appellants may well be the correct position as relate to the events of that material night.

The upshot of the above reasons is that the respective appeals lodged by the Appellants are hereby allowed. Their convictions are hereby quashed. They are acquitted of the charges of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code**. They are ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF JUNE 2015

L. KIMARU

JUDGE

G.W. NGENYE – MACHARIA

JUDGE