REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 68 OF 2013

MAKUTO MUSOTSI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

-consolidated with-

CRIMINAL APPEAL NO. 69 OF 2013

MUSUNGU MUSOTSI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

-consolidated with-

CRIMINAL APPEAL NO. 70 OF 2013

SAID MUSOTSI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(*Being appeals from the original conviction and sentence of Hon. M.L. Nabibya – Ag. SRM in Criminal Case No. 231 of 2011 delivered on 19th April, 2013 at Butali*.)

JUDGMENT

INTRODUCTION:

1. The three Appellants in the consolidated appeals herein, MAKUTO MUSOTSI, MUSUNGU MUSOTSI and SAIDI MUTSOTSI appeared before Hon. M.L. Nabibya, District Magistrate, as she then was, on 04/05/2011 and faced a joint charge of assaulting one HENRY KATUNYA. They were subsequently tried, convicted and sentenced to one (1) year probation each.

2. They preferred separate appeals to this Court, but first the evidence before the trial Court.

THE TRIAL:

3. The prosecution called 4 witnesses in support of its case. PW1 was the complainant HENRY KATUNYA, PW2 was CALEB MUNAVULI KIDIAVAI, PW3 was JOSEPH LIANDI and PW4 was a Clinical Officer one SIFUNA KIZITO. In view of the nature of this appeal, I will not revist the witness evidence at this point in time since I will adequately do so in the analysis of this appeal.

4. The Appellants upon being placed on their defences opted and gave sworn testimonies without calling any witnesses.

5. Judgment was delivered on 12/04/2013 followed by sentencing on 19/04/2013.

THE APPEAL:

6. Being aggrieved by the conviction and sentence, the Appellants herein filed their appeals before this Court. Criminal Appeal No. 68 of 2013 by MAKUTO MUSOTSI, Criminal Appeal No. 69 of 2013 by MUSUNGU MUSOTSI while SAIDI MUSOTSI filed Criminal Appeal No. 70 of 2013. These appeals, though not formally consolidated by an order of the Court, were heard together and Criminal Appeal No. 68 of 2013 became the lead file. This was so given that all the Appellants were represented by the same firm of Advocates, **C.O. SAMBA & CO. ADVOCATES** and filed identical Petitions of Appeal.

7. Each of the Appellants raised nine similar grounds of appeal in their respective Petitions of appeal which were tailored as follows:-

1. ***The learned trial magistrate erred in law in convicting the appellant against the weight of evidence.***
2. ***The learned trial magistrate erred in lawin convicting the appellant in the absence of positive identification of the accused and their purported involvement in the alleged assault.***
3. ***The learned trial magistrate erred in law in narrowing the issues for determination into a single one contrary to the law.***
4. ***The learned trial magistrate erred in law in failure to identify the correct issues for determination in regard to a case of assault and that culminated in a prejudicial judgment and erroenous conviction.***
5. ***The learned trial magistrate erred in law in casually rejecting the appellant's evidence alibi.***
6. ***The learned trial magistrate erred in law in failure to analyse the totality of evidence before her and that culminated in an unlawful conviction.***
7. ***The learned trial magistrate misdirected herself in law in purporting to shift the burden of proof to the appellant.***
8. ***The learned trial magistrate erred in law in failure to find that absence of evidence of the Investigating Officer and arresting officer was fatal to the prosecution case.***
9. ***The learned trial magistrate erred in law in failure to give the appellant the benefit of doubt in the face of several material contradiction in the prosecution case.***

The petitioners prayed that the appeals be allowed, the convictions quashed and sentences set-aside accordingly.

8. At the hearing of the appeals, Mr. Shivega Counsel appeared for the Appellants whereas the State was represented by Mr. Ng'etich, Learned State Counsel.

9. Mr. Shivega argued grounds 2, 5 and 7 together as well as grounds 1, 3, 4 and 6 together.It was his very strong submission that the Appellants were not properly identified as the assailants on the complainant. He put forth his argument on two grounds. First, he argued that despite PW1 testifying that he knew the Appellants as his neighbours he never disclosed their names to the Police when making the initial report and even in the statement made thereafter. It was his argument that if at all PW1 knew the Appellants as his neighbours one wonders why he did not disclose their names accordingly.Second, he argued that in the absence of giving the names of the Appellants, PW1 was to give their descriptions accordingly which he also failed to do. Having failed to give their names and their descriptions, he submitted that the prosecution had failed to prove that the Appellants were the assailants as alleged. In support of this argument he relied on the **Court of Appeal Criminal Case No. 90 of 2003 Said Bakari Ali & 2 Others vs. Republic (unreported).**

10. Counsel for the Appellants further attacked the manner in which the trial Court handled the Appellants' alibi defences. He argued that by the Court asking the Appelants to call witnesses to prove that they were not at the scene of crime, it shifted the burden of proof thereby erring in law. He relied on Court of Appeal at Kisumu Criminal Appeal No. 130 of 2005 reported as **Vitalis Obongo Onya vs. Republic (2008) eKLR.**

11. Mr. Ng'etich opposed the appeals and argued grounds 1, 3, 4, 6 and 7 together and grounds 5 and 9 separately.He submitted that the Appellants were properly identified as the assailants being neighbours to PW1 and that the evidence on identification was properly and carefully considered by the trial Court and they were properly convicted and sentenced. He argued that since it was evidence of recognition there was no need of an identification parade and distinguished the Criminal Appeal No. 90 of 2003 in that the complainant therein did not know the assailants and no parade was conducted.

He further argued that having been placed on the scene of the crime, it was the duty of the Appellants to prove otherwise and the Court handled that aspect well. He further argued thast there were no contradictions in the evidence and prayed that the appeals be dismissed.

That being the background of the appeals, this Court now proceeds to examine whether the appeals are merited or otherwise.

ANALYSIS AND DETERMINATION:

12. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

13. The offence that faced the Appellants was assault and was drafted in the following manner.

> ***"ASSAULT CAUSING ACTUAL BODILY HARM CONTRARY TOS ECTION 251 OF THE PENAL CODE.***

1. ***SAIDI MUSOTSI. (2) MUSUNGU MUSOTSI. (3) MAKUTO MUSOTSI:- On the 27th April, 2011 at Chegulo area Masakha sub location in Kakamega North District within Western province jointly, unlawfully assaulted HENNRY KATUNYA thereby occassioning him actual bodly harm "***

14. In a charge of such a nature, the prosecution remains under a legal duty to prove the following ingredients:-

i. ***That the complainant was unlawfully assaulted;***
ii. ***The complainant sustained actual bodily harm;***
iii. ***It was the appellants who unlawfully assaulted the complainant and occassioned him harm.***

On whether the complainant (PW1) was assaulted and sustained actual bodily harm:

15. The evidence on record on this aspect is overwhelming. There is no doubt that PW1 was unlawfully assaulted and sustained bodily injury. The evidence of PW4 (Sifuna Kizito) the Clinical Officer confirms the foregone that indeed PW1 was so assaulted and he treated him on 27/04/2011. The very PW4 also filled in the P3 form on the very day. Since there is no evidence justifying the assault upon the PW1, the said assault remains unlawful. I therefore find that indeed PW1 was unlawfully assaulted and sustained body harm.

On whether the Appellants unlawfully assaulted PW1:

16. PW1 testified on 07/10/2011. During cross-examination, the Court declared him a hostile witness and ordered his incarceration for 7 days. He was released on 14/10/2011 and the matter set for further cross-examination. During examination-in-chief, PW1 stated that on 27/04/2011 at around 9.00 a.m. while on his farm planting maize in the company of other people who were helping him, saw his neighbours' children enter his farm each carrying a panga, stick and stones in the pockets. The said people prevented him and the others from accessing the other side of the farm. One MAKUTO MUSOTSI attempted to hit him using a stick as the others had stones. He then had a stone hitting him on the left side of his stomach. This was followed by more stones and he ran away. The other people screamed as he told them to stop planting. He reported the incident at Malava Police Station and was issued with a P3 form. It was his testimony that he complained about three people assaulting him and that the first one threw a stone at him as well as the second as the third tried to hit him.

17. On cross-examiantion, he confirmed to have recorded his statement with the police the same day and confirmed that he did not mention the then accused person's names. He said that he was hit with 3 stones, one on the left hand side of the ribs and the other two on his back. He ran away for his safety and returned latter to collect the stones which he took them to the police station but he was surprised not to see the same in Court. As PW1 was being taken through the OB Report and his statement on why he did not give the names of those who allegedly assaulted him to the police when he made the initial report, he became hostile thereby leading to being incarcerated. This was after the Court warned him in vain. Further cross-examination on PW1 was not undertaken as when the matter came up for further hearing on 03/01/2012 the Appellants' Counsel was absent and the Court declined to adjourn the hearing. Although the Court allowed the Defence Counsel's application to recall PW1 and the other 2 witnesses who had testified in the Counsel's abscence, the prosecution closed its case without the advantage of the defence cross-examining PW1, PW2 and PW3.

18. PW2 stated that he had been hired by PW1 on 27/04/2011 to work on PW1's farm and at around 9.00 a.m. while they were planting maize, he saw three men armed with stones, pangas and rungus and they started attacking the complainant amid alot of noise. They stoned him and also used their pangas and rungus. PW1 ran away and told him to leave the farm. To him PW1 was injured on the back. He identified the three people as the Appellants. PW2 only confirmed knowing the Appellants by appearance but not by their names as he lived at Chegulo but had been hired by PW1 to work at Matsaha.

19. PW3 who stayed at Mabusi was also working on PW1's land on the same day. At around 9.00 a.m., he saw three people who stopped him from working. These people then went away and came back armed with stones, pangas and rungus. They then began stoning PW1 and he ran away.

He confirmed not to be aware if there was an access road through the farm as he had just been hired that day and also did not know the boundaries of PW1's land. He identified Makuto Mutsoti, the then third acused person, as the one who stoned PW1 but did not state how he identified him.

20. The alleged incident took place at 9.00 a.m. From the testimonies of PW1, PW2 and PW3 it is clear that the morning was bright and they were working on the farm. The prevailing conditions were therefore favourable for ease of recognition or identification of the attackers. Whereas PW1 stated to know the assailants as his neighbour's children, PW2 and PW3 did not know them as they had been hired from other places to work on PW1's farm. It also remains open that PW1 did not give out the names of those who assaulted him to the police either during the initial report making or even during the statement-writing.

21. The identification of the attackers by PW1 was based on recognition for he alleged that indeed they were people very know to him being his neighbours' children. Being people known very well to PW1, he ought to have given their names to the police at the earliest opportuity. This was the surest way of recognising someone he knew well. It therefore remains unknown why PW1 opted not to so give the names of his assailants to the police and even so before Court thereby leading to being incarnated for a whole week.It is imperative that when a witness does not give the name of the attacker then such a witness ought to give a clear description of the attacker to the police at the earliest opportunity. This would definitely coroborate any further identification in Court. This, PW1 again failed to so do. The evidence of PW2 and and PW3 does not in anyway support that of PW1 on identification. They both state that they had been hired from other places to work on PW1's land and whereas PW2 alleged to know one of the attackers by appearance, he too did not give his descriptions to the police. Their evidence was therefore of no probative value.

22. The issues of recognition and identification have been subjects which Courts have dealt with for quite sometime. The law on these aspects is now well settled. In **R. vs. Turnbull & Others (1973) 3 ALL ER 549** the Court considered the factors to be taken into account on visual identification and in instances of recognition. The Court said:-

> ***"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

The Court of Appeal in this case of **Warunga vs. Republic (1989) KLR 424** stated that where the only evidence against a defendant is evidence of recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circusmtances of the recognition were favourable and free from possibility of error before it can safely make it the basis of a conviction. In **Simiyu vs. Republic (2005) 1 KLR 192**, the Court of Appeal stated that there is no better mode of identification than by name and when a name is not given, then there is a challenge on the quality of identification and a great danger on mistaken identity arises. In the case of **R. Vs. Alexander Muturi Rutere alias Sanda & Others (2006) e KLR,** the court again stated that if a witness is known to an accused but no name is give to the police, then giving the name subsequently is either an afterthought or the evidence given is not reliable. And in the case of **George Bundi M'Riberia Vs. Republic (Court of Appeal Criminal Appeal No. 352 of 2006** (unreported) the Court again reiterated that failure of a witness to give the name of an assailant at

the earliest opportuity weakens the evidence of that witness.

23. The Court of Appeal in **Morris Gikundi Kamande Vs. Republic (2015) eKLR** at Nyeri had this to say.

> ***".....It is our considered view that failure by PW1 and PW3 togive a description of the appellant or mention his name or to state they were attacked by a person they knew weakens their testimony. Being a person known to them, PW1 and PW3 should have given the name or description of the appellants as was stated in the cases of Moses Munyua Mucheru – v- R, Criminal Appeal No. 63 of 1987 and Juma Ngondia – v- R, Criminal Appeal No. 13 of 1983 and Peter Njogu Kihika & Another – v- R, Criminal Appeal No. 141 of 1986. In Lesarau – v- R, 1988 KLR 783, this Court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. In R – v- Turnbull, (1976) 3 All ER 551, Lord Widgery C.J. observed that the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger. In R – v- Alexander Mutwiri Rutere alias Sanda & 8 Others, (2006) eKLR, the High Court observed that "PW1 and PW2 and several other witnesses claimed they gave the manes of the attackers whom they claimed to know before the incident to the police; the Police Occurrence Book did not have any entry on the names of the attackers, … a reasonable conclusion is that the names of the accused persons were not given because they were not known by the witnesses who therefore lied before the trial court."***

In the case of **Simiyu & Another vs. Republic (2005) 1 KLR** 192 at page 195, the Court of Appeal faced with facts similar to those in this instant case expressed itself as follows:-

> ***"If PW1 and PW3 recognized the appellants as their immediate neighbours then why did they not give their names to the police soon after the attack upon them? 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 person to whom the description was given (See R – v- Kabogo s/o Wagunyu, 23 (1) KLR 50). The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identity. The failure by the superior court to consider this aspect of the evidence shows that the superior court dealt with the evidence in a perfunctory manner. There was no exhaustive appraisal of the evidence tending to connect each appellant with the commission of the offences to see whether their respective convictions were safe…. Though the prosecution case against the appellants was presented as one of recognition or visual identification, it is manifest that the quality of identification by the witnesses was not good and gives rise to a danger of mistaken identification…. In the circumstances, we have no doubt that the appellants' convictions are both unsafe and unsatisfactory".***

24. On my part I am persuaded by the foregone decisions that the failure by the trial Court to consider the quality of the evidence of the alleged recognition of the Appellants and the failure to weigh that the complainant knew the Appellants prior to the alleged incident and noting that no name or description of the Appellants was given to the police by PW1, PW2 or PW3 is fatal. But what is more disturbing in this case is that PW1 even refused to disclose the names of the alleged attackers to the trial Court and ended up in custody. Could there be a possibility of mistaken identity or he simply did not know the attackers or the Appellants? I am therefore of the humble view that the trial Court, with utmost respect, erred in its evaluation of the evidence on recognition. There was therefore no exhaustive appraisal of the evidence tending to connect the Appellants with the commission of the offence to see whether the conviction was safe. From the evidence it is clear PW1 was shielding something from the police and the Court on the aspect of identification and

that makes it unsafe to hold that the Appellants identification was proper and free from error. The conviction and sentence can not therefore stand.

25. A further analysis of the evidence reveals that the trial Court erred in shifting the burden of proof to the Appellants when it formed the opinion that:-

> ***"They didnt call any other evidence to corroborate theirs in favour of fellow workmates whom they were together at their said work place. Lack of corroboration casts doubt in their entire case."***

The holding by the Court of Appeal in **Vitalis Obonyo Onyango vs. Republic (2008) e KLR** remains the position in law when it held that:-

> ***"... We however, think that the Superior court improperly suggested that the appellant ought to have called a witness to witness his defence. An accused has no obligation to prove his defence except in limited cases where the law places an evidential burden on him."***

11. Coupled with the poor state of investigations and the fact that crucial witnesses did not testify before the trial Court including the Investigation officer and the Arresting officer and in the abscence of any reasonble excuse for not testifying, this Court presumes that their evidence would have been adverse to the prosecution's case. **(See: BUKENYA & OTHERS -versus- UGANDA (1972)EA 549** and **NGUKU -versus- REPUBLIC (1985)KLR 412).** It is this Court's finding that the conviction further remains unsafe.

CONCLUSION:

26. In the totality of the re-evaluation of the evidence before the trial Court and being guided by the several decisions hereinabove, I find that the conviction of the Appellants remain unsafe and unsatisfactory. I hereby allow the appeal, quash the conviction and set-aside the sentence meted upon the Appellants. It may only be unfortunate if the Appellants had fully served the sentence.

DELIVERED, DATED and SIGNED this 4th day of June, 2015

A.C. MRIMA

JUDGE