REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.198 & 200 OF 2010

(An Appeal arising out of the conviction and sentence of HON. T. NGUGI – PM delivered on 26th March 2010 in Makadara CM. CR. Case No.2882 of 2007)

BERNARD MUTINDA NDUNDA……1ST APPELLANT

MICHAEL KILONZO NTHAMBU…….…….....……..2ND APPELLANT

VERSUS

REPUBLIC…….....….....RESPONDENT

JUDGMENT

The Appellants, Bernard Mutinda and Michael Kilonzo were charged with three (3) counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 24th June 2007 at Huruma Ngei II Estate in Nairobi, the Appellants, jointly with another person not before court, robbed Catherine Wairimu Wachira, Grace Njuguini Kariuki and Anthony Mwangi Toro (hereinafter referred to as the complainants) of their mobile phones and cash as particularized in the charge sheet, and in the course of the 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 charge. After full trial, they were convicted as charged of the lesser but cognate offence of **robbery with violence** contrary to **Section 296(1)** of the **Penal Code**. They were each sentenced to serve ten (10) years imprisonment. They were aggrieved by their conviction and sentence. They each filed a separate appeal to this court challenging their respective conviction and sentence.

For the purposes of this appeal, the two separate appeals were consolidated and heard together as one. The Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the evidence of identification that did not stand up to legal scrutiny. They took issue with the fact that the trial magistrate had failed to properly evaluate the evidence of identification, including that of the clothes that the assailants allegedly wore on the material night of attack before finding them guilty of the offence. The Appellants faulted the trial magistrate for failing to properly evaluate the evidence and thereby reached the erroneous determination that the prosecution had proved its case to the required standard of proof beyond any reasonable doubt. They were particularly irked that they were convicted in the absence of the evidence of the arresting officer. They were of the view that this was a critical witness who ought to have been called to illuminate the circumstance of their arrest. They were finally aggrieved that their respective defences was ignored by the trial court when it reached the verdict that they had

committed the offence. In the premises therefore, the Appellants urged the court to allow the appeal, quash their respective convictions and set aside the custodial sentences that were imposed on them.

During the hearing of the appeal, the Appellants handed to the court written submission in support of their respective appeals. In summary, the Appellants argued that the trial court erred in relying on the evidence of identification that was made in circumstances that did not favour positive identification. They urged the court to allow their respective appeals. Ms. Maina for the State conceded to the appeal. She submitted that from the evidence of the prosecution witnesses, it was clear that the Appellants were indeed not positively identified. There was no sufficient light to enable the identifying witnesses to be certain that they had identified the Appellants.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court and reached its own independent determination whether or not to uphold the conviction of the Appellants. Being a court of first review, this court is required to always give allowance to the fact that it neither saw nor heard the witnesses as they testified (See **Okeno –Vs- Republic [1972] EA 32).** In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the Appellants on the charge of **robbery with violenc**e contrary to **Section 296(1)** of the **Penal Code.**

It is clear from the submission made by the parties to this appeal that the prosecution relied on the sole evidence of identification to secure the conviction of the Appellants. The complainants in this case were returning home after attending a party. The date was 24th June 2007. The time was 2.00 a.m. According to PW3 Anthony Mwangi Toro, as he was dropping PW2 Grace Njuguini at her home in Huruma, they were accosted by a gang of robbers. PW3 had just stepped out of his car to bid farewell to PW2 when he was ordered not to return to the motor vehicle. PW3 told the attackers not to harm them as he was willing to surrender anything that they wanted, including the motor vehicle. The gang consisted of three robbers. The gang robbed them of their mobile phones and cash that was in their possession. After robbing them, the gang disappeared into the nearby buildings. According to PW3, during the robbery he was able to positively identify the Appellants because he interacted with them for some time. There was light from the street lights. The complainants were not sure whether the Appellants were armed or not. They however testified that they were subdued with something that appeared to be similar to a police baton.

After the robbers had fled, PW3 called his uncle one Boniface Mwangi who happened to be a police officer. They were advised to report the matter to Huruma Police Post. They had earlier made a first report to Muthaiga Police Station. They returned to the scene of crime with the police. PW3 testified that when they returned to the scene, they saw the Appellants in a kiosk about 50 metres from where they had been robbed. They stopped the motor vehicles and arrested them. The Appellants were searched but nothing that was robbed from the complainants was found in their possession. PW4 PC Geoffrey Kaunda, then based at Huruma Police Post was the investigating officer in the case. He testified that the area where the Appellants were robbed, was at the time notorious for many mugging incidences. He testified that the mugging incidences were common because there wasn't much lighting in the area. There were many drinking dens in the area. There were a lot of movements of people in the area even during the night. PW4 testified that it was not safe for anyone to be moving about in the area at that time of the night.

When the Appellants were put on their defence, they denied that they robbed the complainants. They told the court that they were arrested by the police when they were going home at that particular time in the night. The Appellants told the court that they petty traders who worked late into the night. In essence, it was the Appellants' case that they were victims of mistaken identity.

As stated earlier in this judgment, the prosecution relied on the sole evidence of identification to secure the conviction of the Appellants. For a court to convict an accused person on the sole evidence of identification, especially an identification made in circumstances that did not favour positive identification, the court must warn itself of the danger of relying in such evidence before convicting the accused. The court must satisfy itself that such evidence of identification is watertight as to exclude the possibility of error that may be occasioned by the events surrounding the identification (see **Maitanyi –**

Vs- Republic [1986] KLR 198). The court must also take into account that in hectic circumstances of the robbery, there is a possibility that the victims of the robbery maybe in shock and therefore may not be in a position to be certain that they had positively identified their assailants. The court is also required to ascertain the source of light and whether the light was sufficient to enable the victims of the robbery to be positive as to their identification of their assailants. It will be critical also for the court to assess the position of the identifying witness *vis-à-vis* the assailants taking into account the source of light.

In the present appeal, upon evaluation of the evidence of identification, it is clear to this court that the complainants' alleged identification of the Appellants as their assailants cannot be free of error. Although the complainants testified that they were able to identify the Appellants by the street lights, PW4, the investigating officer contradicted them as to the source of light. PW4 testified that the area where the complainants were robbed was not particularly well lit. Since it is not clear from the evidence of prosecution witnesses whether there was sufficient light to enable positive identification to be made, this court cannot reach the finding that the complainants had indeed positively identified the Appellants. Furthermore, a disturbing aspect of this case is that it was apparent that the complainants sought the help of their relative who happened to be a police officer to assist them to trace their assailants. This relative by the name Boniface Mwangi was not called to testify in the case. It was apparent to this court that in his zeal to appear to do something, the said Boniface Mwangi may have arrested innocent people on suspicion that they had robbed his relatives. It was inconceivable that the complainants returned to the scene more than an hour after the robbery incident and still find the robbers in the same vicinity. We are of the view that this was a case of an overzealous officer wanting to help his relatives and in the process harmed innocent people. It was instructive that upon their arrest, none of the items allegedly robbed from the complainants were recovered in the Appellants' possession.

Taking into consideration the totality of the evidence adduced before the trial court, it is clear to this court that the evidence of identification relied on by the prosecution to secure the conviction of the Appellants was not watertight. The circumstances in which the said identification was made was not conducive for positive identification. The circumstances of the arrest of the Appellants raised reasonable doubt that they were indeed the persons who robbed the complainants.

In the premises therefore, the appeals lodged by the Appellants have merit. They are allowed. The Appellants conviction is quashed. The custodial sentences imposed on them are set aside. The Appellants are hereby ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE