REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CRIMINAL APPEAL NO. 47 OF 2014

(Consolidated with Criminal Appeal No. 48 of 2014)

R.V.P. WENDOH AND J.A.MAKAU JJ

CHARLES KABWI LAIBONI ……..…… 1st APPELLANT

FREDERICK NTOITI MUTURIA ……..…… 2ND APPELLANT

-V E R S U S –

REPUBLIC …… ……..RESPONDENT

(From the original conviction and sentence in criminal case no. 3793 of 2010 of the Chief Magistrate's court at Isiolo – C. Maundu –. S.P.M.)

JUDGEMENT

1. The Appellants CHARLES KABWI LAIBONI, the 1st Appellant and FREDRICK NTOITI MUTURIA the 2nd Appellant were the first and second accused persons at the lower court respectively, they were charged with one count of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge were that the two appellants on the 20th day of September 2010 at Mutuati market Mutuati Division in Igembe District within the Eastern province,jointly with another not before court, armed with dangerous weapons namely slashers, robbed Francis Mutethia Muthee of mobile phone make Nokia 1200 valued at Kshs. 2000/- and cash 1600/- all valued at 3600/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Francis Mutethia Muthee.

2. The two Appellants were convicted and sentenced to death. Being aggrieved by the conviction and sentence they filed these appeals which we have consolidated having arisen from the same trial.

3. That each of the Appellant challenged the conviction and the sentence on the basis of evidence of identification and recognition urging that it was not free from possibility of an error and on the prosecution witness evidence being uncorroborated; contradictory; failure by the prosecution to summon vital witnesses, failure to consider the appellant's defence and failure to consider that the complainant did not give the names of the assailants in the first report; and on the ground that there existed a grudge between the said appellants family and that of the complainant.

4. This is the first appeal from the conviction. We are therefore the first appellate court and are guided

by the principles enunciated in the case of **Okenov Republic (1972) EA 32** where the Court of Appeal set out the duty of the first appellate court in the following terms:-

> ***"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peter v. Sunday Post, [1958] EA 424.)"***

5. The 1st Appellant and the 2nd Appellant appeared in person. Each of the Appellant filed written submissions. Their bone of contention was that the evidence of recognition could not sustain the conviction because all prosecution witnesses evidence was full of discrepancies and it was contradictory; that the conditions at the time of commission of the offence were not conducive for proper recognition; that conviction was not safe for failure to summon vital witness; that the charge was defective and the court erred in failing to consider an existing grudge between the 2nd appellant's family and complainant's family.

6. These appeals were strongly opposed. Mr.Kariuki Mugo, learned state counsel, urged us to dismiss this appeal for lack of merits. Mr.Kariuki Mugo urged both appeals raised similar grounds of appeal. On the issue of the recognition of the Appellants, he submitted that PW1,PW2 and PW5 recognized the appellants as they are their neighbours; He urged that there was electricity light urging that there was no mistake of mistaken identity as the complainant knew the appellants very well. He urged that the evidence of prosecution witness was well corroborated and that there was no demonstration of any material contradictions; that the five prosecution witnesses were consistent and logical in their evidence and that there was no contradiction at all. The first appellant gave unsworn statement and called no witness; that the 2nd appellant gave sworn statement and called no witness; that the Appellants defences were considered before judgment was delivered. He submitted that he was not served with a supplementary affidavit if any was on record.

7. The Appellants did not respond to the learned State Counsel submissions.

8. The facts of the prosecution case are that PW1, Francis Mutethia, the complainant was on 22nd September 2010 at midnight, guarding miraa with Julius Kirimi M'Mwirambuia, PW5, when Charles Kabwi Laiboni the 1st appellant, Fredrick Ntoiti Muturia, the 2nd appellant and Kanyiri went where PW1 and PW5 were. PW5 asked them who they were and the 1stappellant answered that he is the sub-area and he had come to arrest Mutethia the complainant because the complainant's father had reported him to the 1st appellant. Appellant and his two companions arrested PW1; tied him with a rope and took him to the tarmac. The 1st appellant removed Kshs. 1600/- and a phone 1200 from PW1's pocket and began beating PW1. PW5 had remained behind. PW1 screamed and Kanyiri covered his mouth with a scarf so that no one could hear his screams; the three took PW1 near his home. The 1st appellant asked Kanyiri to look for a stone. The 1st appellant told PW1 to put his hand on the stone so as to cut it. PW1 resisted, the 1st appellant held PW1 by force as he beat him. PW1 was frightened and put his hand on the stone. The 1st Appellant cut PW1's left thumb. Kanyiri told him to cut the other as PW1 was struggling, the 2nd appellant hit him with the forked jembe stick on the back of the head forcing PW1 to put his hand on the stone and the 1st appellant cut PW1's right thumb. PW5 came to the scene after PW1's both thumbs had been cut. PW1 heard him asking them why they were killing him and they had told him they were only arresting PW1. They then turned to cut PW5 who fled screaming. PW5 went and came back with PW1's father and PW1's sister PW2 one Purity Kagendo. The neigbours also came to the scene. PW5 and PW2 asked the appellants and Kanyiri why they had cut the thumbs of PW1 and did not take him to the law.

The 1st Appellant answered that they did not know the law. PW1's father and Julius carried PW1 home to arrange to take him to the hospital; that by 5.00 a.m. PW1 became unconscious and he later found himself at Methodist Hospital on a drip. He was admitted there for 3 days. He was referred to Meru General Hospital where he was admitted for 7 days; that PW2 meanwhile made a report to Mutuati Police Station. PW1 took P3 form to Maua General Hospital where it was completed and he returned it to the police station. He was given warrant of arrest. The two appellants were subsequently arrested. PW1 had recorded his statements with police before the appellants were arrested; that the two appellants were known to PW1. PW5 stated that on the tarmac road there was electricity lights and he was able to see the appellants as he stayed with them for an hour. He gave their names as Charles, Ntoiti and Kanyiri.

9. PW2 Purity Kagendo testified that the appellants are known to her and that PW1 is her step-brother; that on 22ndSeptember, 2010 at 2.00 a.m. PW2 was asleep when PW5 who was staying with PW1 went to PW1's father's home calling PW1's father. PW2 opened the door and asked PW5 what was the matter. He screamed saying Charles the 1st appellant and others had taken Mutethia saying their father had reported him; they all got up and PW5 led to where the three were. PW5 told them he had left PW1's thumbs having been cut, and he was tied. PW5 took them to where he had left PW1. PW2 found the 1st appellant Charles, the 2nd appellant Ntoiti and Kanyiri at a distance. She saw PW1 had been cut and he was bound. PW2 asked the 1stappellant why they had done this toPW1 instead of taking him to the law and he answered there was no law nowadays. PW2 checked and confirmed PW1 had been injured and she unbound him. PW2 collected one thumb which she produced and showed court at the time she was giving evidence; they took PW1 to hospital. PW2 made a report at Mutuati police station the same night. The Appellants were arrested after PW1 had left the hospital. PW2 testified that PW1 had told them he lost a phone and Kshs. 1600/- at the time of the robbery. PW2 testified at the scene of crime there were electricity lights as it is in town. She testified that she has no grudge with any of the appellants.

10. PW3 No. 757799 PC. Robert Aruke the investigating officer testified that on 6th October 2010 at 2.00 p.m. PW1 in company of his sister PW2 made a report that on 22nd September, 2010 a few minutes after midnight PW1 was at miraa farm with PW5 when the 1st and the 2nd appellants cut PW1's 2 thumbs as PW5 was following them. PW5 raised alarm. PW5 went to the scene and found PW1 bleeding from the injuries. PW2 untied PW1 and took him home with PW5. PW1 was then taken to the hospital. PW3 issued PW1 with P3 form which was completed and returned and showed injuries as grievous harm. PW1 informed PW3 that during the incident he was robbed of Nokia 1200 mobile phone valued at Kshs. 2000/- and cash Kshs. 1600/-. PW3 recorded statement. The 2nd appellant was arrested on 20th October, 2010 and the 1st appellant on 26th October, 2011 and charged. He testified the stolen items and weapon of assault were not recovered.

11. PW4 NtongaiM'Matthewa Clinical Officer at Nyambene District Hospital testified that on 8th October 2010 he examined PW1 complaining of having been assaulted by people known to him on 22nd September, 2010 at around midnight. He was treated at Meru Hospital; Nyambene District Hospital. On examination he had cut wounds on Occipital region, swollen nasal bridge; traumatically amputated two (2) thumbs; legs swollen and tender. The injuries were 16 days old. The probable type of weapon was both blunt and sharp. He assessed injury as grievous harm. He signed P3 form on 8th October 2010 and produced it as exhibit 1.

12. PW5 Julius Kirimi M'mwirambua testified that on 22nd September 2010, at around midnight, he was at his home guarding his miraa with PW1, Mutethia as he had hired him; that the 1stappellant, Charles Laiboni, Ntoiti and another person he did not know came to his farm. PW5 talked to them; that Charles the 1st appellant who is a sub-area told him that PW1's father had reported him to the 1st appellant for having stolen his miraa and that they want PW1. The appellants and the other took PW1 away. PW5 followed them up to Mutuati town. That at Mutuati town the three covered PW1s eyes using a cloth and tied his hands; that they were on the road; that they placed PW1's thumbs on a stone. The 1st Appellant cut both thumbs with a panga as PW5 was standing nearby. PW5 asked them(appellants) whether they were arresting PW1 to take him to police or kill him. PW5 went to PW1's home awoke PW2 and

informed her what had happened toPW1. They returned to the scene and carried the thumbs which had been amputated. They found PW1 in the shamba nearby; they took PW1 to the hospital. PW5 testified that he knew both the appellants before the incident. He further testified that where the PW1's thumbs were amputated there were electricity lights and he saw the appellants clearly.

13. The 1st Appellant gave unsworn defence stating that there is a land dispute between the complainant and the mother of the 2nd appellant; that the 2nd appellant is his cousin and that the complainant fabricated this case against him.

14. The 2nd appellant gave sworn defence and testified he did not commit the offence adding that the complainant and PW2 know him very well since his birth. He testified PW2 reported that PW1 was robbed by Charles Kabwi and others he did not know. That there is a land dispute between the 2nd appellant and the complainant; that PW1 told PW3 he was attacked by 3 people he did not know;that he was arrested on 20/10/2010 and PW1 recorded statement after the 2nd appellant was arrested; the 2nd appellant testified the arresting officer did not testify;that PW1 admitted that there was a land dispute; that the charge is fabricated against him; that PW1,PW2 andPW3 gave contradictory evidence and did not mention the source of light as it was midnight.

15. The appellants in their written submissions submitted that the charge of robbery with violence as framed was defective. The ingredients of a valid charge of robbery with violence under**Section 296 (2) of the Penal Code** has three distinct ingredients which are as follows:-

> ***a) The offender is armed with any dangerous or offensive weapon or instrument; or***
>
> ***b) The offender is in company with one or more other persons; or***
>
> ***c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.***

On the ingredients see the following cases namely; **CA CRA No.1 of 2002 Suleiman Juma alias Tom v Republic, Mohamed Juma v Repuboic [2006] eKLR** and **Jackson KinuthaiKungu v Republic[2004] eKLR**. The ingredients as we have pointed out are distinct and proof of any one of them or more of them would found a conviction. They are not inextricable in nature. PW1, PW2 and PW5 testified that assailants were three in number and were armed with a panga which was used to cut PW1's thumbs;that the assailants stole his mobile phone and Kshs. 1600/-. PW4 produced a medical report in which injuries were assessed as grievous harm.

16. We have very carefully gone through the charge sheet and have noted that it has all the necessary ingredients required for an offence of robbery with violence to be proved. The assailants as per the prosecution evidence, were three(3) in number, they were armed with a dangerous weapon, a panga,that they robbed PW1 before and thereafter, used violence on the complainant. We therefore find that the charge of robbery with violence as framed is not defective and find no merits in the appellant's ground that the charge is defective. The same fails.

17. The conviction of the appellants was based on evidence of recognition. It is very important when assessing the evidence of the offence committed at night to examine the conditions of lighting at the time the recognition is made and whether there was other mode of recognition to satisfy oneself that the conditions prevailing at the time of recognition were conducive to positive recognition of the culprits.

18. What one has to look for in such evidence has been set out by the Court of Appeal in several cases In the case of **CleophasOtienoWamunga v Republic 1989 KLB 424** the court addressed itself as follows:-

> ***"The 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 the defendant depends wholly or to a great extent on the correctness of one or more identifications 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 Lord Widgery CJ. In the well-known case of R. Vs Turnbull 1976 (3) All E.A. 549 at Pg.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."

19. We have very carefully and closely examined the evidence of the prosecution, PW1, PW2 and PW5 and the basis upon which they claim they saw and recognized the appellants. Our first observation is that PW1, PW2 and PW5 mentioned the names of the appellants as the people they saw attack the complainant. PW1 was with the appellants on the street where there was electricity light for over onehour as they bound him after robbing him of his mobile phone 1200 valued at Kshs. 2000/- and Kshs. 1600/- PW1 talked to the appellant all thetime of the incident and he knew them. He knew both of them as his neighbours and the 1st appellant as sub-area. PW5 talked to the appellants when they came for PW1 and they even discussed the matter. PW1 and PW2 told them what they wanted. PW5 was able to listen to conversations of the appellants and PW1 as they tormented the complainant.There was electricity light on the street. He saw the appellants who even threatened to cut him with a panga; that when PW5 went to inform PW2 and father to PW1, he gave the appellants' names to PW2. PW2 came and saw the appellants with the aid of electricity light. DW2 admitted that PW2 gave the name of assailants including that of the 1st appellant. He admitted that PW1, PW2 and PW5 knew them. PW3 the investigating officer was given the names of the appellants by PW2 and PW1. We have after consideration of the prosecution evidence been satisfied that the prosecution discharged the burden ofproof to the required standards; That the evidence of the prosecution witnesses placed the appellants at the scene of the attack and the role played by each appellant was sufficiently stated by PW1, PW2 and PW5. The two appellants were mentioned by PW1,PW2 and PW5 as being amongst the three attackers. We therefore find that the appellants were properly recognized on the material night of the attack of PW1.

20. PW1 the complainant testified that when PW5 asked the three who they were, the 1st appellant answered that he is the sub-area and had come to arrest Mutethia because his father had reported to him. PW1 described how PW1 removed Kshs. 1600/- and a phone 1200 from his pocket; that Kanyiri produced a scarf and tied his mouth; that 1stappellant cut his thumb; that Ntoiti hit him with a forked jembe stick at the back of his head and cut his thumb. PW2 found Charles the 1st appellant, Ntoiti the 2nd appellant and Kanyiri at the scene that was well light and talked to them. The 1st appellant told PW2 that there is no law nowadays. PW5 testified he talked to Charles Laiboni; Ntoiti on 22/9/2010 at around midnight. He saw them take PW1 away and followed them up to Mutuati town and described the role each played. We have noted there was sufficient electricity lighting from the evidence of PW1, PW2 and PW5, which enabled them to recognize the appellants. The light was described as electricitylight. We have further taken into consideration that the appellants had been known by the prosecution witnesses PW1, PW2 and PW5 for a long time, a fact which the 2nd appellant and the 1st appellant never challenged. The assailants talked for a long period with PW1, and PW2. We have no doubt that the appellants having been known by PW1, PW2 and PW5 for a long time they were recognized through the electricity light and voice. We find voice recognition to be safe and reliable in respect of this case as the appellant are neighbours to PW1, PW2 and PW5 and they had been known to each other for a longtime. We further find that the evidence of PW1, PW2 and PW5 squarely placed the appellants at the scene of the incident at the material time.

21. We are therefore satisfied that the learned trial magistrate carefully evaluated the complainant's evidence with that of his witnesses as regards the conditions of light and what enabled the complainant and the witnesses to make the recognition of attackers of PW1. We note there was electricity light at the street at the scene of the crime, and we are satisfied its intensity was sufficient to enable the appellants to be recognized. There was also voice recognition of the appellants by PW1, PW2 and PW5. We are

satisfied in view of the long conversations between the complainant,PW2 and the appellants and the duration of the conversation there was in our view proper recognition of the appellants by PW1. PW2 and PW3. We have further considered the prosecution witnesses evidence and we are satisfied that the evidence of PW1 was corroborated by evidence of PW2, PW3, PW4 and PW5. We did not find any material contradictions or inconsistences in the prosecution case to warrant us interfere with the trial court's judgment.

22. The appellants in their grounds of appeal faulted the learned trial magistrate for not making a finding that the prosecution failed to summon vital witnesses mentioned during the trial for a just decision to be reached. We have gone through the court's proceedings and have noted that the 2nd appellant in his defence stated that the arresting officer did not testify in this case. The appellants in their submissions did not point out the names of the vital witnesses who did not testify. PW1, PW2 and PW5 gave evidence on how the appellants were arrested. We have considered their evidence and found the same to be consistent and credible. The trial court believed their evidence and we have no doubt the trial court came to the correct decision after evaluating the evidence. In the case of **Tetu Ole Septra v R Court of Appeal Criminal Appeal No. 5 of 2005** the court addressed itself as follows:-

> ***"Although the evidence of AdministrationPolice would have buttressed the prosecutioncase,there was sufficientevidence which placed the appellant at the scene of the crime and therefore,the commission could not have been the best of any adverse influence."***

23. In view of theevidenceof PW1, PW2 and PW5 which placed the appellants at the scene of the crime,which evidence we have evaluated we have no doubt that the appellants were arrested. We find the omission to call the arresting officer cannot be a basis for drawing any adverse inference and after all the appellants do not deny that they were arrested and charged with the offence of robbery with violence.

24. The appellants gave evidence and called no witnesses. The 1st appellant in his unsworn defence he did not give any evidence concerning the material date of incident that is 20th September 2010. He did not challenge the evidence of PW1, PW2 and PW5 as regards his identification. He did not state his interest in the land case between the complainant and the mother of the 2nd appellant. He claimed the complainant fabricated this case against him because of the said land case. That issue was never raised nor put to PW1 in cross-examination. We have considered the 1st appellant's unsworn defence and find that the learned trial magistrate considered the same. We do not see any merits in appellants' contention that the complainant fabricated this case against him. He has not stated why PW2 and PW5 would fabricate this case against him. We therefore find that the 1st appellant's defence was considered and was found to have no merit. We also find no merits in the 1st appellant's defence and hold that the same was properly rejected.

25. The 2nd appellant denied committing this offence and claimed that PW1, PW2 and PW3 did not mention him in their statements to the police.He stated that there was a land dispute between him and the complainant. He also stated that the witness did not mention the source of light. PW1, PW2, and PW5 in their evidence in chief stated that the 2nd appellant was their neighbor and was one of the assailants. PW1 and PW5 gave the role played by the 2nd appellant at the time of attack. PW1,PW2 and PW3 stated that the source of light was electricity on the street within Mutuati Town. The 2nd appellant said that when PW1 reported to the police he stated that he was assaulted by three (3) unknown persons, the trial court considered the 2nd appellants defence and noted that the alleged witnesses' statements were not exhibited in court nor was that issue raised in cross-examination. We have observed that the 2nd appellant did not cross-examine the complainant on the alleged land dispute between him and the complainant. We therefore find that there is no basis in the 2nd appellants contention that his defence was not considered. We have evaluated the whole evidence in light of the 2nd appellant's defence and find no merits in it. It is in our view, an afterthought.

26. Having carefully considered the evidence adduced before the learned trial magistrate we are satisfied

that the condition prevailing at the time of the incident was positive and reliable for correct recognition of the appellants. We are convinced that the evidence in this case was safe to found a conviction. We accordingly uphold the conviction and confirm the sentence that was imposed by the learned trial magistrate.

DATED, SIGNED AND DELIVERED AT MERU THIS 1ST DAY OF OCTOBER 2015.

R.V.P. WENDOH **J.A. MAKAU**

JUDGE **JUDGE**

1.10.2015 **1.10.2015**