REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 142 & 143 OF 2012

(CONSOLIDATED)

(Being appeals against both conviction and sentence of the Chief Magistrate's court at Kakamega in Criminal Case No. 2057 of 2010 delivered on 21st June, 2012 [S. M. SHITUBI, CM])

ANTONY ASHINYIKWA BURENGA ……. 1ST APPELLANT

CHRISANDUS AMUNZA IMBWAKA …..... 2ND APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

JUDGMENT

The two appeals were consolidated and heard together as they arose from the same proceedings in the subordinate court.

The appellants were jointly charged with another in the subordinate court with two counts of robbery with violence. In count I the particulars were that on 26th October 2010 at Bulovi trading centre in Kakamega East District within Western Province jointly with others not before court while armed with home made guns and other crude weapons, robbed Samuel Omusotsi Mayabi cash Kshs.29,000/=, customers mobile phones of various makes worth Kshs.38,000/= and a DVS make AFRON worth Kshs.7,000/= and at the time of such robbery used actual violence to Samuel Omusotsi Mayabi. In count II the particulars of the offence were that on 29th October 2010 at Shingodo village, in Kakamega North District within Western Province jointly with others not before court while armed with homemade guns robbed Hellen Kaskon cash Kshs.68,000/=, 2 axes and a panga all worth Kshs.1,200/= and at the time of such robbery used actual violence against Hellen Kaskon.

They denied the charges. After a full trial, their co-accused was acquitted. The two appellants were however, found guilty and convicted on both counts. They were sentenced to suffer death as prescribed by law.

Being dissatisfied with the trial court's decision, they have appealed to this court against both the conviction and sentence. With the permission of the court, each of the appellants filed written submissions, which we have perused.

The learned Prosecuting Counsel, Mr. Oroni opposed the appeals. Counsel submitted that PW1 to PW6 were able to identify the appellants using electricity light. Counsel emphasized that there was even a discussion at the time between the appellants and PW1.

In brief, the prosecution evidence is that on 27th October 2010, PW1 was at his shop or bar at 8.00 p.m. His wife PW2 was at the back of the bar. There was electricity light. Suddenly, some people arrived dressed in what appeared to be police uniform. The assailants demanded for the safe with money. After some discussion they proceeded to the cash box. They took the money therein and also robbed PW2 of some beer. They hit both PW1 and PW2 with weapons, injuring them. That was the subject of count II.

With regard to count I, the same people went to the shop of PW3. They attacked him, hit him with a blunt object, he became unconscious. They took cash Kshs.29,000/=, mobile phones which were being charged for customers and a DVD set.

All the three victims later went for treatment. PW4, a Clinical Officer attended to them less than 2 hours after the incident. They were found to have suffered injuries.

The appellants and their co-accused were traced and arrested later on 12/11/2010 on information on anonymous source. An Identification parade was conducted by PW10. The two appellants were identified by the three witnesses/victims at the parade. They were then charged with the offences.

When put on their defences, the appellants gave detailed defences on oath. They denied the charges levelled against them. They were cross-examined.

After considering the evidence on record, the learned trial magistrate convicted both the appellants but acquitted the co-accused. In the magistrate's view, the identification of the appellants was positive. They were sentenced to suffer death. There from arose these appeals.

This being a first appeal, we have to start by reminding ourselves that we are duty bound to re-evaluate all the evidence on record and come to our own conclusions and inferences bearing in mind that this court has neither seen nor heard the witnesses testify and to give due allowance in this. See the case of ***Njoroge -vs- Republic [1987] KLR 19***.

The conviction of the appellants was predicated on their identification by the eye witnesses, on sight and at identification parades. It is trite that an accused person may be convicted on the evidence of visual identification. However, the court must evaluate the evidence of identification critically to ensure that there is no possibility of mistaken identity. In the case of ***Wamunga -vs- Republic [1989] KLR 424 at pg 430***, the Court of Appeal stated thus, with regard to evidence of identification -

"whenever the case against a 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."

In our present case, none of the eye witnesses gave a description of the intensity of the electricity light at the time of the alleged robberies. None described how far he or she was from the source of light and how far any of the appellants was from the source of light when the witnesses identified him. In addition, the said witnesses, who were treated by the Clinical Officer PW4 less than 2 hours after the incident, did not inform PW4 they were able to identify any of the appellants. To add to this, the report to the police and statements did not give any description of the appellants.

The appellants were also arrested on information whose source and content was not disclosed to the court. Further, the identification parade appears to have been meddled up. This rendered the same worthless of evidential value. The learned magistrate, in the judgment underscored the meddling up of the parade when the court stated -

> ***"I have considered the flaws in the identification parade especially in respect of 2nd accused. It is admitted by PW3 that he was the only one in the parade without a shirt. It is also admitted by the officer who conducted the parade that he used the same members that had been used earlier in the first accused parade when he was positively***

identified. This is a flaw of the same witness having identified the 1st accused would easily have picked the new comer who happened to the 2nd accused. The same goes for the officer's use of police officers and members of the public from outside in the parade for both. The danger is that the accused persons coming from police custody may not have exhibited the same confidence as the other members. For police officers have unique hair cuts that distinguish them from ordinary Kenyans, and more so suspects coming from police cells. The choice of members was wrong."

From the above observations, the learned magistrate was clearly in doubt as to the regularity and evidential value of the identification of both appellants at the parade. She however discounted her doubts by relying on the visual identification at the scene. That, in our view, was a mistake. The description of the appellants given by the prosecution witnesses fell far short of what could be called identification at the scene. None of the witnesses described any of the appellants to anybody or even to members of the public or police. There was no record that any of the eye witnesses had identified the appellants at the scene. We are of the view that none of the two appellants was identified as having participated in the crimes. There being no evidence of positive identification of the appellants, we are of the view that they should not have been convicted.

In addition to the above, the appellants were arrested on information, and also with the use of modern technology through the mobile phone provider system. No evidence was however tendered regarding what information was relied upon how technology was used to arrest the appellants. There is no evidence on record that their arrest was due to the alleged robberies herein. PW6, who claimed to have arrested the appellants, admitted under cross-examination that the appellants were actually arrested by officers from the Special CrimeI Prevention Unit from Nairobi. These were Cpl. Chebii, Cpl. Ondari, Cpl. Owino. PC Keter, and PC Adrian Mwita. Only these officers would have explained the circumstances and reason for the arrest of the appellants. They were not called to testify. What remains on record is therefore evidence of suspicion. Such evidence of suspicion, however strong cannot be the basis of sustaining a conviction in a criminal case – see ***Sawe –vs-Republic [2003] KLR 364.***

Having re-evaluated all the evidence on record, we are of the view that the conviction of both the appellants is not safe. We find merits in the two appeals. We allow the appeals, quash the convictions and set aside the sentences. We order that each of the appellants be set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kakamega this 11th day of February, 2014

SAID J. CHITEMBWE **GEORGE DULU**

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