REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSOLIDATED CRIMINAL APPEALS NO. 152 & 154 OF 2011

(CONSOLIDATED)

(Appeals against both conviction and sentence of the Principal Magistrate's Court at Mumias in Criminal Case No. 335 of 2010 [E. K. MAKORI, PM] dated 21st July, 2011)

JAVAN OUMA MUTENYA ..... 1ST APPELLANT

HASSAN WAMALWA …..... 2ND APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

JUDGMENT

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

The appellants were jointly charged in the subordinate court with two counts of robbery with violence contrary to **Section 296 (2)** of the Penal Code. The particulars of count I were that on the 19th March 2010 at [particulatrs withheld], Mumias District within Western Province jointly with another not before court being armed with dangerous weapons namely pistols and rungus robbed A K G a mobile phone, and a Bluetooth valued at Kshs.60,000/= and cash Kshs.31,000/= and used actual violence to the said A K G.

The particulars of count II were that on the same day and place jointly with another not before court being armed with dangerous weapons namely a pistol and a panga robbed K I of her mobile phone make Nokia 2760 valued at Kshs.5,000/=, one blue tooth, office keys and cash Kshs.13,000/=.

The 2nd appellant (Hassan Wamalwa) was also charged in the alternative with handling stolen goods contrary to **Section 322 (2)** of the Penal Code. The particulars of the charge were that on the 3rd of April, 2010 at Session Club, Shibale otherwise in the course of stealing retained a blue tooth valued at Kshs.9,500/= the property of A K G knowing or having reason to believe the same to be stolen goods.

The 1st appellant, Javan Ouma Mutenya was in addition charged alone with indecent assault contrary to **Section 11 (6)** of the Sexual Offences Act. The particulars of the charge were that on 19th March, 2010 at [particulars withheld] unlawfully touched the buttocks, breasts and vagina of S W against her wish an act which was indecent.

The appellants denied the charges. After a full trial, the appellants were convicted of counts I & II. They were sentenced to suffer death. Being dissatisfied with the decision of the trial court, they have appealed to this court filing their respective petitions of appeal. The appellants also filed written submissions

which they relied upon. We have perused the same.

The learned Prosecuting Counsel, Mr. Oroni opposed the appeals. Counsel submitted that Identification parade was properly conducted, and the appellants positively identified.

In response to the Prosecuting Counsel's submissions, the 2nd appellant submitted that no Identification parade was conducted on him.

The facts of the prosecution case are that on the 19th of March 2010 at about 11.30 p.m., PW1 A K G, PW2, K I and PW3, S N were proceeding home from [particulars withheld] Restaurant Shibale in Kimilili, Mumias PW1 was the Manager of the restaurant. He had money which was collections from the restaurant as well as personal cash. At [particulars withheld], they stopped to await transport when three people emerged. These people were armed with a panga and 2 pistols. They attacked them from behind. They took the money from PW1's pocket as well as his passport and blue tooth. The 1st appellant then striped S N naked as she did not have money to give him, and touched her private parts. The assailants also robbed PW2, H I. There were street lights at the scene. The assailants then ran away. The three complainants then went to report the incident at Bookers Police Post.

Some days later, A K PW1, met somebody in the restaurant, which was also a night club. The meeting was at night. The person who was the 1st appellant had a Bluetooth. PW1 thought that the Bluetooth was his property. As he approached that person, the person ran away dropping the Bluetooth. The 1st appellant was arrested later due to the description given by PW1 arising from the meeting in the restaurant. The 2nd appellant was arrested because a few days later, at the same restaurant, he danced with PW3 who was a girlfriend of PW1. During the dance, he commented to PW3 that she was now wearing a dress. This prompted PW3 to think that the 2nd appellant was the person who had stripped her naked a few days earlier. An identification parade was later conducted, only in respect of 1st appellant. Both appellants were later charged with the offences.

Being put on their defences, both appellants elected to give sworn evidence. They denied committing the offences.

Faced with this evidence, the trial magistrate convicted both appellants on the two offences of robbery with violence. He acquitted them of the other charges. Each of the appellants was sentenced to suffer death. Therefrom arose the present appeals.

This being a first appeal, we are duty bound to re-evaluate all the evidence on record and come to our own conclusions and inferences, taking into account that we did not have the opportunity to see the witnesses testify to determine their demeanour and give allowance for that fact. See the case of **Okeno -vs- Republic [1972] EA 32**.

We have evaluated the evidence of record afresh. The conviction of the appellants is predicated on the evidence of visual identification. Before a court can convict on evidence of visual identification, it is imperative for it to warn itself of the special need for caution on the correctness of the said identification to eliminate the possibility of mistaken identity. See the case of **Wamunga -vs- Republic [1987] KLR 19**.

Having evaluated the evidence on record afresh, we find that the circumstances of identification herein were difficult. The incident occurred at night. Though there in a mention by PW1, 2 & 3 of the presence of security lights at the scene, the intensity and position of the source of that light was not given. Besides, no description was given of any of the appellants after the incident by any of the eye witnesses.

The appellants were arrested because of a later incident in the restaurant. The circumstances of that incidence cannot be described as an identification of the appellants visually. One of them (1st appellant) became a suspect because he was said to be in possession of a Bluetooth which PW1 thought it was his. The 2nd appellant was implicated because of a comment he made to PW3 that she was now wearing a

dress. PW3 took it to mean that he was the person who had stripped her naked a few days earlier.

Though the eye witnesses claimed to be able to identify the appellants, the evidence on record does not establish positive identification. Only the 1st appellant was subjected to an identification parade. However, even that parade had little evidential value taking into account the fact that the complainants did not give a prior description of the assailants and the circumstances of arrest of both had nothing to do with visual identification by eye witnesses. It cannot therefore be said that the appellants or any of them was positively identified.

The evidence on record against the two appellants is evidence of mere suspicion. It is trite that suspicion however strong cannot be a basis of sustaining a criminal conviction. See ***Sawe vs Republic [2003] KLR 364***.

In conclusion, we find that the conviction of the appellants was not safe. The prosecution failed to prove its case against the appellants beyond any reasonable doubt. We allow the appeals, quash the convictions and set aside the sentences imposed. We order that 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**

JUDGE **JUDGE**