**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL APPEALS NO. 107 OF 2013 (CONSOLIDATED WITH H.C.CR.A 106 OF 2013)**

**1. TITUS KASYOKI MUTUA**

**2. DOMINIC MWANZA KIMONYE.....APPELLANTS**

**VERSUS**

**REPUBLIC**

***(Being an appeal from the conviction and sentence of the Principal Magistrate Sd. P.A Olengo***

***delivered on 27/11/2012 in Kajiado Principal Magistrate Criminal Case No. 1345 of 2011)***

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***(Before Beatrice Thuranira Jaden J and L. Mutende J)***

**J U D G M E N T**

1. The Appellants, **Titus Kasyoki Mutua** and the 2nd Appellant **Dominic Mwanza Kimonye** were charged jointly with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

The particulars of the offence were that "on the 14th day of October 2011 at **Bissil Service Station** in **Kajiado District** within **Rift Valley Province**, jointly with others not before court while armed with crude weapons namely, swords, iron bars and mattock robbed **Nkoyian Ole Koikai** cash Kshs.4,700/= and immediately after such robbery wounded the said **Nkoyian Ole Koikai**".

2. When The Appellants were arraigned before the trial court, they pleaded not guilty. The case proceeded to a full hearing.

3. The case for the prosecution was that on the material day at about 1.30 a.m., the complainant, PW1 **Nkoyian Ole Koikai** was at his place of duty at **Bissil Petrol Station** where he worked as a guard. One person went to the Petrol Station with a jerrican and asked for Petrol. The complainant replied that he could not get petrol. The said person then threw the jerrican down and called five other people. The six people proceeded to where the complainant was seated inside a parked motor vehicle, held him by the waist and attacked him. The complainant was cut on the finger and robbed of Kshs.4,700/=. The complainant screamed for help. Members of public responded to the screams and gave chase to the attackers. After about 100 metres they managed to arrest two people, who are the Appellants herein. The Appellants were subjected to mob justice. A sword, hammer, mattock, metal bar, two ropes, two cell

phones, a jerrican and a wallet were recovered from the scene. The complainant's money was however not recovered. The Appellants were re-arrested by police officers and after investigations they were charged with the present offence.

4. In his defence the 1st Appellant gave unsworn evidence. No witnesses were called. The 1st Appellant stated that on the 13/10/11 at about 9.30 p.m. he left the butchery where he worked. On his way home he stopped at a bar where he played at the pool table. On the way home he met two people who were carrying spades. These people attacked him. Later police officers came and tied him up and placed him in the boot and took him to hospital then to **Kajiado Police Station**. He was then charged with the offence before court.

5. The 2nd Appellant gave unsworn evidence. No witnesses were called. The 2nd Appellant stated that on 13/10/11 he went to a club after work. He took some beers and left the club at about 12.00 noon. On the way home he was stopped by police officers who arrested him and beat him up calling him a thief. The 2nd Appellant was then tied up and put in a motor vehicle and taken to hospital then to **Kajiado Police Station**. He was then charged with the present offence which he denied.

6. At the conclusion of the trial, the trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubts. The Appellants were convicted and sentenced to death. The Appellants were aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:-

- **That the circumstances were not favourable for positive identification.**
- **That the case was a frame up.**
- **That the prosecution case was not proved beyond reasonable doubts.**
- **That all the witnesses were not summoned.**
- **That the rights of the Appellant to a fair trial were violated in that the Appellant was not supplied with statements.**
- **That the defence case was not considered.**
- **That the evidence adduced by the nurse (PW5) was inadmissible.**

- **That the provisions of** section 169 **of the** Criminal Procedure Code **were not complied with.**

7. The two separate appeals were consolidated and heard as one. During the hearing of the appeal, the Appellants relied on their grounds of appeal and written submissions. The written submissions essentially reiterated the grounds of appeal.

8. The learned counsel for the State opposed the appeal. It was submitted that there were security lights at the Petrol Station and that there was a full moon which enabled the witnesses to see the Appellants. That the Appellants were arrested after about 100 metres and the complainant never lost sight of the attackers during the chase and therefore there was no room for making a mistake.

9. This being a first appeal court, we have an obligation to re-evaluate all the evidence given during the trial and come to our own independent conclusions. *See* **Okeno –vs- Republic (1972) EA 32**.

10. From the evidence of the complainant, PW1 **Nkoyian Ole Koikai**, there is no doubt that he was attacked and robbed of Kshs.4,700/= and cut on the finger in the process. The evidence of the complainant (PW1) on the fact of robbery is corroborated by that of PW2 **David Kago Ndirangu** and PW3 **Peter Mbuska** who responded to the complainant's screams and participated in chasing the attackers.

11. The question to grapple with is whether the Appellants were the people who attacked the complainant. It is clear from the evidence on record that the offence took place at night. The evidence of PW1, PW2 and PW3 establishes that there were security lights at the Petrol Station where the attack occurred and that there was moonlight which the witnesses described as 'bright moonlight'. None of the aforestated witnesses knew any of the Appellants before or any of the other attackers. The complainant

(PW1) testified that they chased the attackers for a distance of about 100 metres and that he did not lose sight of the attackers. Although it does not come out from the complainant how long the attack took, it is observed that the attack took place inside a motor vehicle. The distance of the motor vehicle from where the security lights were positioned has not been described. The intensity of the light inside the motor vehicle was not described either.

12. Although PW2 is one of the witnesses who responded to the complainant's distress call, PW2's evidence also failed to give the distance between him and the attackers who he saw at the pickup motor vehicle except the 1st Appellant who he stated stood next to him at some point. PW2 did not participate in the chase and did not identify the 2nd Appellant.

13. The evidence of PW3 does not help matters as his evidence also fails to state the distance between him and the pickup where the attackers were. PW3's evidence also fails to mention whether his eyes were trained on the attackers throughout during the 100 metre chase that he described.

14. With the foregoing, we agree with the Appellants' position that the circumstances of the offence were not favourable for positive identification. There was no identification parade. Dock identification of a suspect is generally worthless evidence unless other evidence is adduced to corroborate the same. (*See* **Gabriel Njoroge v Republic (1982-88) 1KAR 1134**).

15. On whether the Appellants were supplied with copies of statements of prosecution witnesses, our perusal of the record reflects that on 7/2/2012 and on 23/3/2012. The Appellants applied to be supplied with statements. By the time the trial commenced on 24/4/2012 no entry was made in the court record to reflect whether the Appellants had been supplied with the said statements or not. The matter was however not raised again when the trial commenced. It is not possible to tell from the court record to reflect whether the Appellants were provided with the statements or not. Our view is that a trial court ought to clearly reflect on the record if the documents requested by the defence have been supplied.

16. On whether all the witness who had recorded statements testified, it depends on whether they were crucial witnesses or not. Our evaluation of the lower court record has not revealed any crucial witness who was not called to testify.

17. The Appellant raised the issue that the nurse (P5) was not competent to give medical evidence. Although the nurse testified that she holds a Diploma in Nursing, we have perused the **Nurses Act Cap 257 Laws of Kenya** but we have not seen any entry that empowers a nurse as a "medical practitioner" as is the case for example, with persons registered under the **Medical Practitioners and Dentists Act Cap 253 Laws of Kenya** or a person registered to render medical and dental services under the Clinical Officers (**Training, Registration** and **Licensing) Act Cap 260 Laws of Kenya**.

The evidence of the nurse fails to disclose whether she is qualified to render medical services and fill in P3 forms. The learned counsel for the state did not comment on the issue. We hold that the nurse was not competent to produce the P3 form and therefore her evidence was inadmissible.

18. We have said enough to conclude that the appeal herein has merits and must succeed. Consequently, we quash the conviction and set aside the sentence. The 1st and 2nd Appellant are at liberty unless otherwise lawfully held.

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**B. THURANIRA JADEN** **L. MUTENDE**

**JUDGE** **JUDGE**

**Dated** and **delivered** at **Machakos** this **16th** day of **July 2014**.

**B. THURANIRA JADEN**

**JUDGE**