REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL 51 OF 2011 & 183 OF 2010

HUMPHREY MUTETHIA……..……1ST APPELLANT

SILVESTER KIMATHI…….…….2nd APPELLANT

V E R S U S

REPUBLIC…….RESPONDENT

(**An appeal against both conviction and sentence by Hon. Kiarie W. Kiarie Senior Principal Magistrate in Meru Criminal case No. 587 of 2010 delivered on 18th October 2010**).

The Appellants were tried jointly before the lower court charged with two counts of offences. In count one both were charged with the offence of breaking into a building and committing a felony contrary to section 306(a) of the Penal Code. In the second count they were charged with robbery with violence contrary to section 296(2) of the Penal Code. After hearing the case, the learned trial magistrate convicted both Appellants with both counts. He sentenced both Appellants to death for the count of robbery with violence and imposed no sentence in count one. The Appellants were both aggrieved with the conviction and sentence and therefore filed this appeal.

In the petition filed by the 1st Appellant he raises the following grounds:

0. **That the learned trial magistrate erred in both law and facts in failing to make a finding that the alleged identification/recognition wasn't free from possibility or error.**

0. **That the learned trial magistrate erred in law and facts in failing to observe that the prosecution witnesses tendered contradictory and conflicting testimonies.**

0. **That the learned trial magistrate erred in law and facts in failing to note that the prosecution failed to group vital witnesses mentioned during the trial for a just decision to be reached.**

0. **That the learned trial magistrate erred in law and facts in convicting me the Appellant with**

offence or burglary and stealing while the prosecution failed to adduce enough evidence in support of the charges.

0. **That the learned trial magistrate erred in law in flouting section 169(1) of the Criminal Procedure Code**.

The 2nd Appellant also filed a petition of appeal in which he raised the following grounds:

1. The learned magistrate erred on a point of law and fact in failing to test and to properly examine the evidence on identification and further erred in making a finding that the Appellant was recognized as one of the robbers who committed the offence or robbery.

2. The learned magistrate erred on a point of law and fact in making a finding the prosecution had proved its case beyond reasonable doubt.

3. The learned magistrate erred on a point of law and fact in failing to take into account that the complainant had not mentioned the Appellant at the time they lodged their complaint with the police.

4. The learned magistrate erred on a point of law in rejecting the Appellant defence.

5. The learned magistrate erred on a point of law and fact in convicting the Appellant for the offence of house breaking and stealing when there was no evidence to support the said charge.

The Appellants appeals were consolidated as they arose from the same trial in the lower court.

This is the first appellate court. The duties for the first appellate court are now well set out. In the case of In the case of **Okeno Vrs. Republic 1972 EA 32** it was stated as follows:-

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic [1957] EA. (336) and 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 Vrs. R. [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 finding and conclusion; 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 Peters Vrs Sunday Post [1958] E.A 424."

As expected of a first appellate court we have carefully considered this appeal and have subjected the evidence adduced before the lower court to a fresh evaluation and analysis while bearing in mind we did not see or hear the witnesses and have drawn our own conclusions thereto.

The brief facts of the prosecution case were that at about 1 a.m on the 5th May 2010, the complainant, PW1 in the case was at home with her sister PW2, her daughter PW3 and her husband PW4, when robbers attacked them at home. The same people also broke into their shop and stole assorted shop goods. PW1 and 4 went out of the house to check the cause of some noises they had heard, that is when they saw spot lights coming towards them and they ran back to their house. According to the eye witnesses PW1, 2, 3 and 4, two people entered in their home to steal from them. They first entered the bedroom where they found PW1 the complainant. She was robbed off 6,000/- they then left and went to a room where PW2 and PW3 was sleeping. There was nothing to steal from them.

The complainant PW1 said that she was able to identify the two people who entered her bedroom and who also stole from her. She said the electricity light were on. She said that she identified Mutethia the 1st Appellant whom she said she had known for a long time. PW1 also identified the 2nd Appellant

whose name she gave as Mugambi. She said that the 1st Appellant was armed with a gun.

PW2 said the electricity lights were on in the bedroom when the two people entered. PW2 said that she recognized both as Mutethia the 1st Appellant and Mugambi the 2nd Appellant. She had known them for ten years and stated that she saw them daily because they bought cigarettes at her sister's shop (PW1). PW2 testified that their faces were not covered during the incident. PW2 stated that Mutethia was carrying a gun and Mugambi had a panga.

PW3 said that he recognized both Appellants because he knew them very well even by their names Mutethia the 1st Appellant and Mugambi the 2nd Appellant. PW3 said that the 1st Appellant had an object looking like a gun and had a cut on the left ear. The 2nd Appellant was carrying an iron bar.

PW4 said that after running back into the house he jumped into the ceiling and never saw the assailants. He claims that he heard and recognized the voice of one of the Appellants whom he knew very well by his name Mugambi. He identified him in court as the 2nd Appellant.

The two Appellants denied the charges. The 1st Appellant told the court that his wife was admitted in hospital on 3rd May, 2010 and was still in hospital on the material night. He said that he was taking food to his five year child at school when he met with PW4. He said the PW4 accused him of having stolen from his wife's shop and caused his arrest. He said that PW4 had a grudge against him because of money PW4 owed his employer. The 1st Appellant also stated that he had a grudge with Phanice PW4's daughter but did not disclose the nature of the grudge. He denied knowing PW4's wife or ever visiting her shop.

The 2nd Appellant denied the offence. He said that he met with PW4 on the 8th May, 2010 and was surprised to hear from him the accusation that he was one of the robbers who robbed the complainant. The 2nd Appellant said that he knew PW4 since his school days.

The Appellant called one witness, a police officer PC Kisoi. He produced OB 2 and 3 of 5th May, 2010. In OB No. 2 shows an entry of a report made by one Patrick Kinyua who reported that his cousin had called him saying that some thugs were breaking into his house were beating them and that they gave them money. OB No. 3 is an entry of a report of a scene visit to the complainant's home and shop. It is made by Cpl. Kithinji, PC Ngetich, PC Njeru, and PC Driver Korir. It shows that there was a break into complainant's shop where various goods were stolen and a robbery in the complainant's home where the complainant was also robbed.

The officer PC Kisoi produced the OB No. 67 of 8th May, 2010 which was a report by Senior Sgt. Nkondo. PC Kosoi, PC Digale and PC Yegon indicating that they had rescued two robbery suspects from members of the public who wanted to lynch them.

The 1st Appellant was appearing in person. He filed written submissions which we have considered. In those written submissions the 1st Appellant dwells on the content of OB extracts on the report of the robbery and burglary incidents and drew our attention to the facts that in the initial report to the police, no names of persons suspected to have been involved in the incident were given. He challenges the evidence of the prosecution witnesses who said that they had known him for a very long time and saw him at the time of the incident yet none of them gave their names to the police.

The 2nd Appellant was represented by Mrs. Ntaragwi. The learned Counsel's key argument is that all the eye witnesses to the incident PW1, 2, 3 and 4 testified that they had recognized the 2nd Appellant whom they knew very well before both physically, by voice and by name. Counsel raised issue with the fact that the witnesses said that they knew the 2nd Appellant by his name Mugambi, yet in the charge sheet the 2nd Appellant is does not bear such a name as Mugambi, not even as an alias name.

The Second point argued by counsel is that PW2 saw the assailants for less than one minute. While PW2 and 3 said they were hiding behind the door and wandered how they could have been able to identify any of the assailants.

The State was represented by Mr. Mungai learned State Counsel. Mr. Mungai opposed the appeals by both Appellants.

In regard to identification Mr. Mungai submitted that PW1,2 and 3 had sufficient time to see and recognize the Appellants because the Appellants spent a considerable time in the home during the robbery. Counsel emphasized the fact that PW2 knew the Appellant for 10 years and saw them daily while PW4 said that he recognized the voice of the 2nd Appellant.

The conviction against the Appellant hinges on the evidence of recognition. In regard to PW1, 2 and 3 the recognition was by visual recognition while that of PW4 was voice recognition. In considering the evidence of identification it is trite law that a court should examine the circumstances under which the identification was made in order to be satisfied whether that identification is accurate. For this preposition we are guided by the decision of ***Ngoya vs. Republic [1982] KLR 309***the court of appeal held:

"In accepting evidence of identification the court should take into consideration the circumstances at the time and assess whether or not the same favoured accurate identification".

The identification in this case was that of recognition. PW1, 2 and 3 testified that they were able to see and recognize both Appellants and said that they had known them for a long time and also saw them every week, and were therefore sure that they were the ones who committed the burglary and the robbery charged in this case. In determining whether the evidence of recognition was correct we are guided by the principles set out by the Court of Appeal decision in the case of ***PAUL ETOLE ANOTHER VRS REPUBLIC CA NO. 24 OF 2000 (UR),*** where the court stated as follows:

"The prosecution case against the second Appellant was presented as one of recognition or visual identification. The appeal of the second Appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made".

We shall consider the evidence of PW1 2 and 3 regarding visual recognition together with the evidence of PW4 of voice recognition. Regarding voice recognition the principles to be applied in receiving such evidence was set out by the Court of Appeal in the cerebrated case of **Choge vs Republic 1985 KLR 1** where the court held:

"**Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual recognition**. **In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. In the instant case, it was not safe to say that Okumu's identification of the 1st Appellant's voice was free from all possibility or error."**

We have carefully analyzed and evaluated a fresh the evidence regarding identification as adduced by PW1, 2, and 3. These witnesses were in different bedrooms when two assailants entered each of their rooms. It appears from the evidence that the first room to be entered was that of PW1 and 4. According

to PW1 the robbers followed her into the room from outside. PW4 was not there. PW1 said that the lights were on, that she sat facing both of them and gave them 6,000/- when they demanded money from her. The period of time the complainant had to see and observe the two assailants are not disclosed in evidence. Even though the complainant said that she recognized both Appellants, and even though she said she knew them by name, her statement to the police nowhere stated the names of the Appellants.

In regard to the evidence of PW2 and 3 both of them were in the same room when two assailants entered. PW3 said that herself and PW2 were hiding behind the door when the two assailants entered. They also said that they recognized the two Appellants because they had not covered their faces and because they knew them for a considerably long time. They even knew their names. We have noted that both witnesses were hiding behind the door at the time they claim they saw and recognized the Appellants. Both of them did not say how long they had the two assailants under observation and neither did they disclose the position and distance at which the two assailants were standing from them, at the time they saw them. Considering that they were hiding behind the door and considering that nothing was stolen from them and there was no evidence that the two assailants ransacked their room we are not satisfied that the prosecution has proved that PW2 and 3 had ample opportunity to see and recognize the two assailants who entered their room.

Regarding PW4 he was very clear that he had no opportunity to see any of the assailants and he gives the reason why that was so somewhere in his evidence which is that it was because he was hiding in the ceiling. His evidence was that he recognized the voice of one Mungambi, who he identified in court as the 2nd Appellant. In order to be satisfied that the voice heard by PW4 was that of Mugambi, it was necessary to interrogate whether PW4 knew the voice of Mugambi. More importantly it is was important to interrogate whether the words heard were sufficient to enable a correct identification of the voice.

PW4 said that he knew Mugambi for a long time and could therefore recognize his voice. The actual words that PW4 heard when he claims to have recognized the voice were not disclosed. We are therefore unable to access whether those words were sufficient to enable a correct recognition of the voice. The benefit of that omission should go to the 2nd Appellant.

We find that the evidence of the witnesses should be considered alongside other evidence which emerged at the trial. It emerged at the trial that none of the witnesses gave the names of the Appellants to the police at the time they made their initial statements. The initial report made at the Police station at the time the offence was committed did not contain any names of any suspects. It is therefore clear that as of 5th May, 2010 none of the witnesses had told the police that they had either identified or recognized any of those who robbed the complainant.

There was evidence that the witnesses recorded supplementary statements. We cannot however speculate what was contained in those statements as their contents were not an issue. However we noted from the record of proceedings of on the 28th July, 2010 shows that after the evidence of the complainant was taken the prosecutor applied to step her down to enable amendments to be made to the charges against the Appellants and to enable further statements to be recorded from witnesses. The reason given for taking further statements from witnesses was because of the amendments to the charge. The amendment involved splitting of the original charge of Robbery with violence in which the Appellants had been charged, into two counts one for burglary for the goods stolen at the shop and the second for robbery of the money stolen from PW1. It was not necessary for further statements to be made by the witnesses on that ground, as there was nothing new which had occured to necessitate the taking of such statements.

Whatever the story about the further statements was, it is very clear to us that none of the witnesses mentioned they had recognized any of the Appellants until the day they were arrested by PW4 and members of the public. The OB extracts produced by the defence together with the statements of the witnesses are proof of this fact.

We also noted that all the prosecution witnesses claimed that the 2nd Appellant was known as Mugambi.

However, the name, given in the charge does not carry that name Mugambi as one he is known by. That creates doubt whether the Mugambi the witnesses knew was one and the same as the 2nd Appellant. The prosecution needed to adduce evidence to create a nexus between the name Mugambi and the 2nd Appellant. This they did not do.

The learned trial magistrate quoted very good case law on the issue of identification however he came to the wrong conclusion that the evidence of identification could sustain convictions of both Appellants.

We have said enough to show that the evidence of recognition adduced against the Appellants by the four prosecution witnesses was barely sufficient to enable a correct identification to sustain a conviction. We therefore find merit in this appeal.

Accordingly we allow the appeal, quash the convictions, and set aside the sentences. We order that both Appellants be set at liberty forthwith unless they are otherwise lawfully held.

DATED SIGNED AND DELIVERED THIS 12TH DAY OF JULY 2012

LESIIT, J.

JUDGE.

J. A. MAKAU
JUDGE.