



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 42 OF 2015

BETWEEN

HENRY KIARIE NYAMBURA.....1<sup>ST</sup> APPELLANT

SYLVESTRE MURUA IGUKU.....2<sup>ND</sup> APPELLANT

AND

REPUBLIC.....RESPONDENT

*Appeal from a judgment of the High Court of Kenya at Nairobi (Mboghli & Achode, JJ) dated 3rd December, 2013*

in

HCCRA NO. 74 & 73 OF 2009)

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JUDGMENT OF THE COURT

1. **Henry Kiarie Nyambura** and **Sylvestre Murua Iguku**, herein referred to as the 1st and 2nd appellants respectively, were jointly tried and convicted in the Chief Magistrate's Court at Kibera on two counts of robbery with violence contrary to **section 296(2)** of the **Penal Code**. They were each sentenced to suffer death. The appellants being aggrieved by their conviction and sentence, appealed to the High Court. Their appeal which was heard by Mboghli Msagha & Achode JJ, was dismissed.

2. They are now before us in this second appeal. Each of the appellants filed grounds of appeal in person. In addition, their advocates filed supplementary grounds of appeal. The grounds include, *inter alia*, that the appellants constitutional rights were violated; that the learned judges of the first appellate court failed to re-consider and re-evaluate the evidence as required by law; that the judges of the first appellate court failed to follow precedents of previous decisions; that the evidence of identification was not sufficient; that the contradictions in the prosecution case went to the root of the prosecution evidence; that the lower courts relied on extraneous matters that occasioned grave prejudice to the appellants.

3. During the hearing of the appeal, learned counsel, **Mr. Wandugi** appeared for both appellants while **Mr. Moses Omirera**, Senior Assistant Deputy Public Prosecuting Counsel, appeared for the State. Mr. Wandugi submitted, that the evidence adduced against the appellants did not disclose the offences that the appellants were charged with; that although the prosecution case was heavily anchored on the evidence of identification, the two material prosecution witnesses did not give any description of their assailants; that although one of the complainants, Jane Nthenya Wambua (Jane) described her assailant as wearing a striped T-shirt, the 1st appellant was not wearing a T-shirt when arrested thirty minutes later; that no identification parade was carried out nor was there any evidence that the appellants were armed with any dangerous weapon. Counsel for the appellants pointed out that the judges of the first appellate court fell into the same error as the trial court, by relying on extrinsic factors. Counsel cited several authorities in support of his submissions and pointed out that there were irregularities in the record. Mr. Omirera conceded the appeal, submitting that although the appellants were robbed, the evidence regarding the identification of the appellants was not sufficient.

4. We have considered this appeal, the submissions made before us and the authorities cited. This being a second appeal, the jurisdiction of this Court is by virtue of **section 361** of the **Criminal Procedure Code**, limited to considering matters of law only. The main issue that has been raised before us, is the issue of identification and this is an issue of law, to be determined on the evidence.

5. According to the charge sheet, in the first count the victim of the robbery was Jane, who was robbed of a mobile phone, a bag, Equity

Bank ATM Card, Jubilee Insurance Medical Card and Uchumi, Nakumatt and Tusksys Smart Cards as well as Kshs.1,200/=. In the second count, Solomon Kaminda (Solomon), was robbed of a Nokia mobile phone. It was alleged that the appellants were armed with a pistol and a panga and that they threatened to use actual violence on Jane and Solomon. Therefore, in order to prove the charges against the appellants, the prosecution had to establish that the two appellants did jointly rob each of the complainants, and that they were armed and threatened to use violence. While the issue of the appellants having been robbed is not in issue, it is contended that the appellants have not been properly identified as the persons who robbed Jane and Solomon.

6. According to the evidence of Jane and Solomon, the robbery took place at about 4.00p.m. Although the witnesses did not say how long the incident took, it is evident that the witnesses were taken by surprise, and the whole robbery happened very fast. Jane concedes that she did not see the face of the 1st appellant who robbed Solomon. She saw him from the back and could not even recall what he was wearing. She claimed that the 2nd appellant who robbed her was wearing a striped T-shirt and jeans, and that she did not notice any particular mark on him. The trial magistrate noted that the 2nd appellant in fact had a healed scar on the left eye side. The description that the two witnesses gave to the policeman who found them at the petrol station was not distinctive at all. They identified the robbers as one tall and one short. The circumstances in which the witnesses identified the appellants, did not help, as the appellants were already under arrest and the possibility of the witnesses assuming they were the ones, cannot be ruled out. It is also noteworthy that although the arrest took place, a few hours after the robbery, nothing was recovered. In **Wamunga vs Republic [1989] KLR 424:**

*“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 a defendant depends wholly or to a great extent on the correctness of one or more identification 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.”*

7. In this case, it is evident that the identification of the appellants was not totally satisfactory. The possibility of a mistake albeit an honest mistake, cannot be ruled out. In the circumstances, we concur with Mr. Omirera and Mr. Wandugi that the appellants should be given the benefit of doubt. Accordingly we allow this appeal, quash the appellants’ conviction, and set aside the death sentence imposed upon them. The appellants shall therefore be set free unless otherwise lawfully held.

Those shall be the orders of the Court.

**DATED and delivered at Nairobi this 8<sup>th</sup> day of March, 2019.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I hereby certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR.**