**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: NAMBUYE, ASIKE-MAKHANDIA & ODEK, JJ.A.)**

**CRIMINAL APPEAL NO. 81 OF 2018**

**BETWEEN**

**STEPHEN JIRONGO SHICHETI ..... 1ST APPELLANT**

**ALEX SHITERA SHIMAMBO.....2ND APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Eldoret* ***(D.O Ogembo, J.)*** *dated 16th March, 2017*

**in**

**HCCRA NO. 181 & 183 OF 2014)**

****************

**JUDGMENT OF THE COURT**

**Stephen Kipkoech Kener,** the complainant in the criminal case leading to this appeal resides at Kamonjil in Kapsabet and works with the Kenya Army. At the time he was serving at the Lanet Military Academy. On the night of 21st July, 2013 at 2.00pm, the complainant went to Kapsabet town and withdrew Kshs. 20,000/= some of which he loaded in his M-pesa and retained some in his wallet as he wanted to have drinks with a friend. Whilst in town, he rented a room in a lodging going by the name **Dainbora Guest House.** He was issued with a receipt for the room by the 2nd appellant who also doubled up as the watchman of the facility.

Having had enough of the drinks, he proceeded to his room at around 2.00am. On reaching the guest house, he didn't find the 2nd appellant at the gate. He knocked at the gate severally in vain and then decided to go around the building in order to knock from the other side hoping to get someone to open the gate for him. Suddenly he was attacked by four men, one of whom he recognized as the 2nd appellant. During the attack, he was slapped, thrown to the ground and robbed. In the process of the robbery, he was hit by a metal bar on his leg and pierced by a pair of scissors and clippers on his thigh and backside. Luckily, he was able to hold onto to the 2nd appellant until members of the public came to his rescue. They arrested the 2nd appellant while the rest including the 1st appellant fled the scene. In the process, his wallet with some money and other personal documents was stolen.

Meanwhile, PW2, **Raymond Kiptoo Cheruiyot**, who was a caretaker in a nearby building saw four people on a motorbike heading towards the lodging on the material day. When he shouted at them they hit a nearby light bulb and the light went off. PW2, immediately knew those people were up to no good. He immediately heard noise from the guest house and on checking saw some of the attackers running away. He then proceeded to report the incident to Kapsabet Police Station. PW4, **Corporal Peter Simiyu**, attached to Kapsabet Police Station was on duty on the night of 21st July, 2013 when PW2 reported that someone had been arrested by members of the public and was being beaten. PW4, together with Police Constable Betty, accompanied PW2 in their vehicle to the scene of the crime. They found the 2nd appellant lying on the ground with the members of public around him while in possession of pliers and scissors. The complainant told them that the 2nd appellant was among four people who had attacked and stolen from him. The 2nd appellant was promptly re-arrested while the 1st appellant was arrested later in the day following interrogation of the 2nd appellant who gave him away.

**PW3**, **Silas Ruto**, a clinical officer at Kapsabet District Hospital attended to the complainant. He observed that the complainant had tenderness on the posterior inferior wing of the scapular having been hit by a metal bar. He also had a superficial cut on his left 1st digit on

the upper limbs. On the lower limbs, he had a cut wound on the right inferior lateral. He assessed the degree of injury as harm and the weapon used blunt.

After thorough investigations, the appellants were jointly charged with the offence of robbery with violence contrary to **section 295** as read with **section 296(2)** of the **Penal Code** with particulars being that; *on the 21st day of July, 2013 at Kapsabet town within Nandi County jointly with others not before court while armed with dangerous weapons namely pangas, Iron bars, pliers and scissors robbed STEPHEN KIPKOECH KENER of cash Kshs. 10,000/=, a co-operative bank ATM card, a Military Service Card and a National ID card and immediately before or after the time of such robbery threatened to use actual violence to the said STEPHEN KIPKOECH KENER.*

Put on their defence, the 1st appellant gave an un-sworn statement of defence and denied the offence. He asserted that on 20th July, 2013, he was in Serem area. On 21st July, 2013 at about 11.00am he came to Kapsabet. A friend of his by the name **Raymond Kiprop** called. He asked him to come to Kapsabet stage where he worked. When the friend came, he was accompanied by three people among them, the complainant. He was then arrested and taken to Kapsabet Police Station so as to assist in some investigations. At the station, he was told that together with the 2nd appellant, they had robbed someone. He was surprised because he never committed the offence. As far as he was concerned this was a trumped up charge because of disagreement over a girl.

The 2nd appellant likewise gave an un-sworn statement and denied the charge. He claimed that on 21st July, 2013, at about 5.00am he was sleeping in his room. He was a conductor in a lorry. The driver called him and on leaving his room, he saw people following him shouting that he was a thief. He was then attacked and beaten until he lost consciousness. When he came to, he found himself at Kapsabet Police Station. He was subsequently brought to court and charged with an offence he knew nothing about.

The trial court having evaluated the evidence tendered by both the prosecution and defence rendered its decision on 14th November 2014 in which it found the appellants guilty of the offence. Upon conviction, the trial court sentenced each of the appellants to death.

Aggrieved by the conviction and sentence, the appellants preferred an appeal to the High Court. That appeal was heard by D.O Ogembo J, who dismissed it as he was satisfied that the prosecution had proved the offence against the appellant beyond reasonable doubt.

Aggrieved further by the judgment of the High Court, the appellant have now moved to this Court by way of a second and perhaps last appeal on the grounds that the learned judge erred in law by; convicting them based on an unsafe identification; misdirecting himself on the evaluation of evidence; convicting them in reliance on contradictory evidence and that the prosecution failed to prove the ingredients of the offence of robbery with violence.

When the appeal came up for hearing, **Mr. Too,** learned counsel appeared for the appellants whereas **Ms. Oduor**, Principal Prosecuting Counsel appeared for the State. Both parties had filed written submissions and relied on them entirely.

In his submissions, counsel for the appellants dwelt mainly on the issue of identification. He appears to have abandoned the other grounds of appeal. Counsel submitted that from the evidence, it was clear that the complainant had drunk alcohol going by his own testimony. Thought he never mentioned how many beers he had taken, it was clear that he must have consumed several. He must therefore have been drunk, counsel submitted. In that state he was impaired and therefore incapable of making a proper identification of the appellants. In the same vein, counsel argued that there wasn't proper lighting at the scene of crime, since PW2 testified that the attackers hit a bulb and the light went off. Therefore there was no light at the scene and this must have affected the accuracy of identification of the attackers by PW1. Furthermore, the prosecution did not offer evidence as regards wither there was adequate light for purposes of proper identification. Counsel submitted that the circumstances were not therefore favourable for positive and accurate identification of the appellants. Counsel maintained that the identification of the appellant could not be said to have been free from possibility of error. Counsel relied on the case of **Karanja & Another v Republic (2004) 2 KLR 140**, **147** and **Kiilu & Another v Republic (2005) 1 KLR 174**, for all these propositions.

**Ms. Oduor,** in turn submitted that the ingredients of the offence of robbery with violence were proved, that the complainant was attacked, robbed and injured in the process. For this proposition counsel relied on the case of **Simon Ndungu Kinuthia v Republic (2016) eKLR**.

On identification, counsel submitted that the 2nd appellant was arrested at the scene of crime as the complainant clung on him until help arrived. PW2 and PW3 found him at the scene of the crime. To counsel, therefore, his identification was free from any possibility of error. She relied on the case of **Pius Otianga v Republic [2006] eKLR** in support of his submission.

With regard to the 1st appellant, counsel submitted that he was recognized by the complainant as the watchman of the premises who had earlier in the day booked him the room and issued him with a receipt. He was even a neighbor at home. He was therefore identified by way of recognition. Counsel relied on the case of **Mohamed Ringi Ali v Republic (2002) eKLR** in support of this proposition. All in all, it was the position of counsel that the appellants were positively identified.

This is a second appeal and our jurisdiction is limited by dint of **section 361(a) of the Criminal Procedure Code** to dealing with matters of law only. In the case of **Karingo -vs- R (1982) KLR 213,** this Court stated:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"***

As already stated the single most issue of law for determination in this appeal is whether appellants were positively identified as the perpetrators of the crime. On matters identification and or recognition, a trial court is required to examine the evidence before it carefully and be satisfied that the circumstances of identification were such that they were free from possibility of error. This caution was reiterated by this Court in the case of **Patrick Kimanthi v Republic [2018] eKLR** thus:-

> ***"This Court has in a myriad of cases stated that evidence of visual identification is of great importance in criminal cases but if not properly evaluated and tested can cause a miscarriage of justice to an accused person."***

Mr. Too cast doubts as regards positive identification of the appellants. He submitted that the circumstances obtaining at the scene of crime were not favorable for an accurate identification. The said circumstances included the fact that there was no light at the scene of crime, and the fact that PW1 was drunk at the time of the attack. It was his contention that the identification of the appellants under such circumstances could not be free from possibility of error. Ms. Oduor on the other hand submitted that the 2nd appellant was arrested at the scene of the crime and the circumstances of his arrest were corroborated by PW2 and PW4. On the other hand the 1st appellant was identified by the complainant by way of recognition as a person who had earlier booked him the room and issued him with a receipt. Therefore, counsel submitted his identification was free from error. All in all, it was counsel's view that the appellants were properly identified.

In matters identification, this court in the case of **Wallen Nyando Makomere v Republic [2016] eKLR**; stated:-

> ***"The evidence of identification at dawn must be tested with the greatest care using the guidelines in Republic - v- Turnbull, (1976) 3 All ER 549 and must be absolutely watertight to justify conviction. (See Nzaro -v- Republic, 1991 KAR 212 and Kiarie - v- Republic, 1984 KLR 739). In the case of Maitanyi - v- Republic 1986 KLR 198, this Court stated that in determining the quality of identification using light, it is at least essential to ascertain the nature of the light available, what sort of light, its intensity and its position relative to the suspect."***

From the record, the following was the testimony of PW1 concerning identification of the 1st appellant. Under cross-examination by the 1st appellant he stated:-

> *"…You saw me remove the money. I was attacked at 1 – 2am. There was security lights so I did identify you…"*

From the foregoing, it is not correct as submitted by counsel for the appellants that there was no light at the scene of the crime. His submission must have been on account of the evidence of PW2 that the robbers hit the light bulb before attacking the complainant. However there was basis to assume that the bulb that was hit belonged to the guest house. It is common knowledge that security lights do not remit feeble light. Furthermore, PW2 and PW4 arrived at the scene of the crime and clearly saw the 2nd appellant cornered by members of the public. This is also a pointer to the fact that there was adequate light at the scene.

It is instructive that PW1 knew the 1st appellant prior to the commission of the crime. He knew 1st appellant as watchman in the area, and was even a neighbor. Further he was the one who booked the complainant the room in the lodging and issued him with the receipt. Even after the complainant came from the bar, he went looking for him to open the gate but could not find him. This evidence demonstrates that the two had interacted to a point that PW1 could easily recognize him as he was not a stranger. Further in PW1's testimony he stated that he recognized the 1st appellant among the 4 as they came towards him. Prior to the attack PW1 had a conversation with the attackers meaning that he had some time to see their faces before the attack began. There is no evidence that the 1st appellant had disguised himself as to make his recognition impossible or difficult or tried to conceal his identity in any way. The 1st appellant's identification by recognition cannot be faulted. As stated by this Court in **Anjononi v Republic [1980] KLR 59** at page 60:-

> **"...Recognition of an assailant is more satisfactory, more assuring, and reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in one form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v Republic (unreported)".**

Further it is instructive that this appellant disappeared from his place of work immediately after the incident. This is not a conduct of an innocent person. Mr. Too claimed that the complainant must have been drunk thereby impairing his ability to recognize the 1st appellant. However, this issue was not raised before the two courts below. It is being raised for the first time before us for the very first time. We must therefore reject argument on that basis. In any event the appellants did not adduce any evidence to advance that narrative. The mere fact that the appellant had been drinking does not necessarily mean he was drunk as to impair his judgment.

As for the 2nd appellant, there is unchallenged evidence that he was arrested at the scene. Indeed, in his own defence, he places himself at the scene. He claims though that he was a victim of circumstance. That cannot be correct in view of the evidence of the complainant that he held on him until help arrived. The complainant did not know the 2nd appellant before then. There is no reason why he could have falsely testified against him. We are thus satisfied just like the two courts below that the appellants' identification and recognition was free from possibility of error or mistake.

On our own motion we must consider the legality of the death sentence meted out on the appellant's which was upheld by the High Court. We are cognizant of and bound by the dicta by the Supreme Court in **Francis Karioko Muruatetu & another – v- Republic [2017] eKLR**; that:-

> ***"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust, and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has nonetheless to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right."***

This Court has also pronounced itself on the same in various cases including **Christopher Ochieng – v- R [2018] eKLR** and **Jared Koita Injiri - v- R, Kisumu Criminal Appeal No. 93 of 2014.** In the instant appeal we believe that the death sentence under the circumstances

was too harsh and excessive.

Consequently, the appeal on conviction fails to the extent that the appellants were positively identified as the perpetrators of the crime. On the sentence, it is appropriate that we interfere with the same. We accordingly substitute the sentence of death with 15 years' imprisonment with effect from 24th November, 2014, when the trial court imposed the earlier sentence.

Orders accordingly.

**Dated and delivered at Eldoret this 17th day of October, 2019.**

**R. N. NAMBUYE**

**.....**

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**OTIENO-ODEK**

**.....**

**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR**