IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 76 OF 2014

BETWEEN

SILA IMENDE MBINJI …………....……..……………..… 1ST APPELLANT

MICHAEL AUKA AURA ………………………………….2ND APPELLANT

AND

REPUBLIC …………………………...……………………. RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kakamega, (Lenaola & Onyancha, JJ.)

dated 25th October, 2010

in

H.C.CR.A. NOS. 205 & 193 OF 2009)

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JUDGMENT OF THE COURT

[1] The two appellants have appealed against the judgment of the High Court **(Lenaola & Onyancha, JJ. as they then were)** dismissing the appeal of each against conviction and sentence for robbery with violence and robbery.

[2] The two appellants were jointly charged before Senior Resident Magistrate (SRM) Butere, with two charges. In the 1st count, they were jointly charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code.** The particulars of the charge stated that on the night of 23rd April, 2009 at Itoko Village, the two appellants jointly with others not before the Court, robbed **Charles Obadiah Ogoti** *(1st complainant)* of a mobile phone and cash Shs. 153/= all valued at Shs. 2,153/=. The charge further stated that the appellants were armed with a rungu, panga and stone at the time of the robbery and that they wounded the 1st complainant. In the 2nd count, the appellants were charged with robbery contrary to **Section 296 (1)** of the **Penal Code**. They were alleged to have robbed **Joseck Otunga** *(2nd complainant)* of one spot light valued at Shs. 300/= on the night of 23rd and 24th April, 2009 at Eshikomere. The 1st appellant **Sila Imende Mbinji** ***(Sila)*** was the 2nd accused in both counts while the 2nd appellant **Michael Auka Aura** ***(Michael)*** was the 1st accused. The two appellants were convicted after trial and each sentenced to death for the 1st count and to 14 years imprisonment for the 2nd count. The sentences were ordered to run concurrently. Their respective appeals were consolidated and were ultimately dismissed by the High Court.

[3] The 1st complaint in his evidence at the trial gave a detailed account of the robbery. He was on the material day a watchman at **Lukoye Community Centre**. On 24th April, 2009, at about 1.00 am while at the gate of the premises, he flashed his torch and saw two young men who were armed with rungus. He identified the two appellants at the trial as the two young men he saw. The 1st appellant had a torch. The two appellants were joined by a third person who had a bag of stones. Other two people joined to make a total of five people. The 1st complainant was ordered to sit down and a struggle ensured during which the 1st complainant was viciously assaulted and his torch, mobile phone, identity card and wallet taken from his pockets.

[4] On 24th April, 2009, at about 2.00 am, the 2nd complainant was asleep in his house when he heard people walking outside. He opened the window and flashed his torch outside. He saw Sila and Michael outside and Michael snatched the torch from him. The 2nd complainant saw five people outside and raised an alarm.

[5] The two robberies were reported at Kwisero Police Post and **PC Jackson** visited the two scenes of crime and took the 1st complainant to hospital. On 26th April, 2009, Michael the 2nd appellant was arrested by members of the public and taken to the police station. On 28th April, 2009, **IP Mulinya** of Butere Police Station conducted an identification parade where the 2nd appellant, Michael, was identified by the 1st and 2nd complainants. Later, on 29th June, 2009, the 1st appellant *(Sila)* was also arrested by members of the public and handed over to the police. No identification parade was conducted in respect of the 1st appellant.

[6] The 1st appellant in his unsworn statement at the trial denied committing the two robberies and stated that he was arrested in his shamba on 29th June, 2009, taken to the police station and later charged jointly with a person that he did not know.

The 2nd appellant in his unsworn statement at the trial also denied committing the offence and stated that he was arrested at his house and taken to the police station.

[7] The learned Magistrate made a finding partly thus:

> **"I went through the prosecution case. The two complainants had opportunity as they had their torches they saw the accused clearly *(sic)*. The 1st complainant struggled with the accused for a long time and had ample time to see them.**
>
> **I am satisfied with the conducting of identification parades after accused were arrested."**

[8] The High Court observed that the trial magistrate had not deeply analysed the evidence before arriving at his decision. The High Court considered the evidence of the 1st and 2nd complainants and said:

> **"In our view the importance of PW2's evidence is two-fold. First, it links the robbery at the house of the 1st complainant to that of the 2nd complainant. The robberies took place within one hour. The 1st complainant's identification of the 1st appellant at the police parade as one of the attackers is corroborated and lent credence to by identification of the 1st appellant by the 2nd complainant.**
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> **Secondly, it is in our view unlikely that PW1 and PW2 would make a similar mistake of identifying the same people as the attackers over incidents occurring in the same night in a similar neighbourhood. In addition, there was credible evidence from PW2 to the effect that he saw and identified positively the two appellants before one of them snatched away his torch. His mention of the name of the appellants immediately after the attack confirmed, that the two complainants' evidence was credible and therefore reliable. Identification of the 1st appellant at the police identification parade sealed the appellants' fate, although clearly, PW2's attendance at the parade was unnecessary since he knew the appellants before and had given out their names."**

[9] The appeal is based on three main grounds of appeal in the memorandum of appeal dated 21st December, 2015, namely: that the High Court erred in law in failing to re-evaluate the evidence; in failing to take into account the contradictory evidence and to resolve the contradictions and, in failing to make a finding that the identification or recognition of the appellants was faulty and unreliable. **Mr. Kirenga**, learned counsel for the appellants referred to the contradictions in the evidence of the complainants regarding the clothes each appellant was wearing on the material date. He submitted that, whereas the 1st complainant testified that the 1st appellant was wearing a dark green sweater and the 2nd appellant a black sweater, the 2nd complainant testified that the 1st appellant was wearing a black cap and the 2nd appellant was wearing red and black T-shirt. Mr. Kirenga, further submitted that since the 1st complainant was held from behind and was beaten until he was unconscious, he could not have identified the appellants.

As regards the identification parade, counsel submitted that the High Court erred in finding that the two appellants were identified at the identification parade; that the identification parade was used to convict both appellant and that the identification parade was held only in respect of the 2nd appellant. **Mr. Ketoo**, the Prosecution Counsel submitted that the identification of the appellants was free from error; that the High Court evaluated the evidence and that there were no material contradictions in the evidence of the two complainants.

[10] We have considered the grounds of appeal. The conviction of the appellants was dependent on visual identification. As correctly found by the High Court, the trial court did not adequately evaluate the evidence. The appellants now claim that the High Court made the same mistake – that is it failed to re-evaluate the evidence. The appellants also fault the High Court for failing to find that the alleged identification of the appellants was unreliable.

[11] In respect of the first count of robbery with violence contrary to **Section 296 (2)** of the Penal Code, the only material witness was the 1st complainant - Charles Obadiah Ogoti. He was attacked by five people whom he did not know before. He had a torch and some of the people had torches. He testified at the trial that he identified the two appellants from the torchlights as the robbers beat him and as he struggled with them until they took his torch. This was identification at night by a single witness in circumstances which were not favourable to positive identification.

In respect of the second count of robbery contrary to **Section 296 (1)**, the complainant Joseck Otunga was the only material witness. He testified at the trial that he saw five people outside his house when he opened the window and flashed his torch and that he recognized the

two appellants whom he knew before. He also testified that Aura – the 2nd appellant and the 1st accused at the trial snatched the torch from him. He further testified that Sila, the 1st appellant in the appeal had a black cap. Again, the evidence against the appellants to support the 2nd count was from a single identifying witness. The identification was at night and in circumstances which were not conducive to positive identification.

[12] The High Court should have considered and evaluated the evidence on identification of the appellants by each complainant separately, because, the offences were committed at different places and at different times. However, it is clear from the excerpt of the judgment quoted at paragraph 8 above that, the High Court linked the two robberies and used the evidence of one complainant on identification to support the evidence of the other complainant on identification. The justification for that according to the finding of the High Court is that the incidents occurred in the same night in a similar nighbourhood. However, there was no evidence to support the finding that the two robberies occurred in *"similar neighbourhood."*

The particulars of the charge in the 1st and 2nd counts indicated that the offences were committed at Itoko village and Eshikomere village respectively. There is no evidence of the distance between the two villages. The second robbery occurred about one hour after the first robbery.

Furthermore, the evidence of the 2nd complainant on which, the High Court relied as providing the link was of poor quality. Apparently, the 2nd complainant merely saw the robbers who were outside the house very briefly through the window using a torch light. His evidence does not rule out the possibility of mistaken identification. The evidence of PC Jackson, the investigation officer showed that the appellants were arrested by members of public at different times and that the 1st appellant was arrested in connection with another offence. The investigation officer did not state that the complainant gave the names of the two appellants.

[13] We find from the foregoing that the High Court misdirected itself in linking the two robberies and in using the complainant in each robbery to support the evidence of the other complainant. By so doing, the High Court failed to apply the established tests for the reliance of a single identifying witness at night in unfavourable circumstances in respect of each robbery. This misdirection has no doubt caused great prejudice to the appellants. Had the High Court directed itself properly, and re-evaluated the evidence, it would come to the conclusion, as we do, that, the identification of each appellant by each complainant in the circumstances described was not free from the possibility of error and that the convictions of the appellants in respect of each count was not safe.

[14] For the above reasons, the appeal of each appellant is allowed. The conviction of both appellants in each of the two counts is quashed and the respective sentences set aside. Both appellants shall be set at liberty unless otherwise lawfully held.

Dated and Delivered at Kisumu this 15th day of March, 2018.

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 certify that this is a true copy of the original.

<u>DEPUTY REGISTRAR.</u>