IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CRIMINAL CASE NOS. 103 &104 OF 2014 & 10 OF 2015

BETWEEN

JULIET S. MOHAMED …….…….…….. 1ST APPELLANT

SALIM MOHAMED ……..……... 2ND APPELLANT

SAID ABDALLA SAID ……..…….. 3RD APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Odero, Muya, JJ.) dated 18th February, 2014

in

HC.CRA. NO. 94 OF 2010)

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JUDGMENT OF THE COURT

Although Salim Mohamed (the 2nd appellant) and Said Abdallah Said (the3rd appellant) were separately charged, respectively with preparation to commit a felony and being in possession of narcotic drugs for which they were convicted and sentenced, it is their conviction, jointly with Juliet Mohamed (the 3rd appellant) for the offence of robbery with violence that has elicited this appeal.

The robbery is said to have been committed on 15th February,2009 at about 9pm at the Likoni Ferry area and that it involved three suspects, two men and a lady. The victim who was the only complainant recalled how the lady, who he identified as the 1st appellant lured him aside, away from the rest of the people around the ferry area. Once isolated the complainant was attacked by three men, among them the 2ndand 3rd appellants. From the manner the robbery was executed, the complainant concluded that the 1st appellant was acting in concert with the three men. As the 2nd appellant held the complainant by the neck, the 3rd appellant ransacked the complainant's pockets making away with his wallet containing Kshs. 4,000 and a Safaricom phone line. The 2nd appellant passed over these items to the 1stappellant who in turn stuffed them in her brazier before, in the company of the 3rdappellant and the third person, she fled

from the scene. The 2nd appellant was not lucky. The complainant got hold of him and as it became apparent that he was determined not to let him go, the 2nd appellant in the course of the struggle removed his shirt and T-shirt and ran away on a bare chest.

The complainant's sister-in-law, PW2, who had a kiosk for *mnazi* nearby noticed the struggle and rushed to the scene. She witnessed the 2ndappellant pick something from the complainant's pocket and passed it to the 1st appellant who in turn hid it in her brazier. She testified that the 1st and the2nd appellants were people known to her prior to the date of the robbery and that with the aid of electricity light as well as her proximity to the scene; she was able to positively identify the two. She was however not able to identify the third person because he was a stranger. Because the 1stand 2ndappellants were known to her, the next day she directed the police to where they could be found. The 2nd appellant, upon seeing the police, began to flee but was chased and arrested shortly. He was searched and found in possession of bhang. The 3rd appellant was arrested on the third day and was similarly found with bhang. Although no evidence was presented by the prosecution on how the 1st appellant was arrested, it was her evidence in defence that police officers went to her house on 16th May, 2009 at 3am, a day after the robbery and arrested her alleging she had committed an assault but later she was charged with robbery with violence.

All the three were subjected to an identification parade conducted by PW 3 who corroborated the testimony of PW2, that while the complainant was able to pick out the three appellants,PW2 was only able to identify the 1st and 2nd appellants.

The appellants denied involvement in the robbery, with the 2nd appellant insisting that the only offence he had committed was to have had in his possession bhang. The 3rd appellant for his part testified that he was arrested for carrying a knife and expected to have been charged with an offence relating to being in possession of a knife. We have explained in the previous paragraph the 1st appellant's defence.

The trial court was convinced beyond doubt that all the three appellants, acting jointly and with common intent robbed the complainant and upon convicting them passed a death sentence upon each one of them. Their appeal to the High Court was dismissed after the learned Judges (Odero & Muya,JJ.) found that the evidence of identification was overwhelming as the offence was committed where there was sufficient lighting; that the complainant's evidence was corroborated by that of PW2 who recognized two of the robbers; and that that evidence was further strengthened by evidence of the police identification parade. They rejected the appellants'respective defences.

This consolidated appeal has been brought to challenge that decision. Briefly the appellants through their respective advocates, Mr Odera,Ms. Otieno and Mr.Muchiri, are complaining that ,in confirming the convictions the learned Judges failed to re-evaluate the entire evidence but merely relied on that presented by the prosecution; that the evidence regarding the exhibits was contradictory; that the two courts below did not warn themselves of the danger of relying on the evidence by the alleged eye witness when prevailing conditions were not suitable for positive identification; that the witnesses did not explain the intensity and proximity of the source of light; that the identification parade was not reliable having been conducted three months after the robbery; that the case could not have been proved to the required standard without the testimony of two crucial witnesses ,the doctor and the investigating officer; that the identification parade was conducted in contravention of the Police Standing Orders because the 2nd and 3rd appellants were allegedly identified in the same parade; that the parade did not take into account similarities of features of the parade members; and that the courts below erroneously rejected the appellants defences.

Opposing the appeal, Mr. Ayodo, the Senior Principal Prosecution Counsel urged us to dismiss the appeal for,in his assessment the learned Judges properly directed themselves to the law and facts and came to the correct conclusion that the evidence against the appellants proved their participationin the commission of the offence beyond any reasonable doubt.

We have considered these arguments and hold the view that the only question in controversy is whether

the appellants were properly identified as the persons who robbed the complainant on the night of 15th February,2009. This question is central because it is a common factor that the robbery was committed at night and secondly,because the appellants denied being involved and raised a defence of *alibi.*

Identification of a suspect in criminal proceedings is a question of law that entitles us under **section 361** of the Criminal Procedure Codeon second appeal to entertain this appeal. See**M'Murungi vs. Republic** Criminal Appeal No. 155 of 1984 (UR).

The question of identification is central in this appeal as it was the basis upon which the appellants were convicted even though they maintained that they were not at the sceneof crime at the time of the robbery.The*ratio decidendi*enunciated in the celebrated decision of the English decision in**ReginaV Turnbull**(1977)QB 224,and before it in the local decision of **Abdullah bin Wendo** (1953)20 EACA 166, has over the years been the foundation of the law on identification. See**Kamau V R**(1975)EA 139 and **Wamunga V R(1989)** KLR 424, among a host of others. These decisionswarn of the dangers of relying on the evidence of identification to found a conviction when it is apparent that the prevailing conditions may have been difficult for positive identification. In **Wamunga** (supra), the Court emphasized this point in the following oft-cited passage;

> **"Evidence of visual identification in criminal cases can bring about miscarriages 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 identifications 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. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well known case of R v Turnbull [1976] 3 All E.R. 549 at page 552 where he said:**
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> > **'Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made''.**

The robbery in the appeal before us was committed at night,as we have said, and the complainant was a stranger to all the three appellants. There is evidence,however, that he spent some considerable time with the 1st appellant. First,they went to PW2's *mnazi* kiosk where the latter informed the 1st appellant that the complainant was her brother in-law. She also warned the complainant to be careful as the 1st appellant kept bad company. Shortly after they left the complainant was attacked and robbed as PW2 watched. According to the complainant he was able, with the aid of electricity light and the proximity to the robbers, to see all the three clearly. Regarding the 2nd appellant, the complainant held onto him for sometime as they struggled and the former was only able to free himself from the complainant's grip by removing his clothes.

PW2 who knew the 1st and the 2nd appellants was also able to identify them. She maintained that the 1st appellant was a daily visitor to her kiosk. She referred to her as "*Shiroo*", perhaps the name she knew her by. In addition, there was evidence that in her first report of the robbery, PW2 informed the police that she knew two of the robbers.

The only evidence of identification of the 3rd appellant at the scene was that of the complainant himself. He recalled clearly the role each of appellants played during the robbery. He explained that it was the 3rd appellant who frisked through his pockets and picked the wallet. Both the complainant and PW2 agreed that there was light in the area, a fact both courts below accepted. The complainant also spent some time with those who robbed him and had sufficient chance and opportunity to see them clearly. The evidence of identification of all the appellants was ultimately confirmed through the identification parade, which was not challenged at all.

We think from these events there was a proper basis for the two courts below to arrive at the conclusion that the identification of the appellants was free from any error. They similarly made the correct decision to reject the appellants' defence.

The appeal lacks substance and is accordingly dismissed in its entirety.

Dated and delivered at Mombasa this 17th day of February, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR