IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 75 OF 2014

BETWEEN

SAMSON LWEMBULI MWANGE ……..1ST APPELLANT

YASSIN CHOGO JUMA ……. 2ND APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Kakamega, (Chitembwe, J.) dated 28/5/2014

in

HCCRA. NO. 204 OF 2012)

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JUDGMENT OF THE COURT

1. The Magistrate's Court at Vihiga convicted the appellants, **Samson Lwembuli Mwange** and **Yassin Chogo Juma,** for the offence of robbery with violence contrary to section 296(2) of the Penal Code and sentenced them to death. Their appeal against the conviction and sentence to the High Court was dismissed in a judgment delivered on 28th May 2014.

2. In this second appeal, confined, as it must, to questions of law by reason of section 361(1) of the Criminal Procedure Code, [See **M'Riungu vs. R [1983] KLR455**], the only question is whether the convictionwas safe based on the evidence of identification presented by the prosecution.

3. According to Mr. C. W. Kouko, learned counsel for the appellants, the circumstances under which the offence was committed were not conducive for positive identification of the perpetrators; the victims, namely the complainant and his wife were forced to lie down during the robbery and were therefore not in a position to identify their attackers; the lighting conditions were not good; there was no identification parade and the offence was not proved to the required standard.

4. On his part, Mr. D. N. Ogoti, Senior Assistant Deputy Public Prosecutor, submitted that the

victims of the offence, namely the complainant and his wife, were able to see the attackers and to positively identify them as the appellants; that the torch light emitted from the attackers' torches enabled them to do so; that the incident took long enough and the complainant and his wife had ample opportunity to see who their attackers were; that in the circumstances an identification parade was not necessary and the evidence of identification was watertight.

5. Undoubtedly, a court should satisfy itself that evidence of identification is watertight and that possibilities of mistaken identity are eliminated before convicting an accused person based on evidence of visual identification. In **Cleophas Otieno Wamunga v R Criminal Appeal No. 20 of 1989 at Kisumu** this Court stated that:

> *"Evidence of visual identification in criminal cases can bring about a 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 alleged 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."*

6. What then were the circumstances in this case? The prosecution case was that on 14th May 2010 at Chango sub location, Central Maragoli within the then Vihiga District, the complainant, Ronald Mugoyia Busaka (PW1) and his wife, Wilkister Mugoyia (PW2), were at their home asleep when their bedroom door was broken. Two people with raised pangas entered the bedroom and ordered them to lie down and face the ground. A third person remained by the door. The attackers had bright torches. Ronald and his wife complied with the order, got out of bed and lay on the floor. Ronald saw one of the attackers ransacking through his wife's purse and later through his trouser pockets; he saw him pick things and put them in his pockets. The attacker enquired from Ronald: "uko na laptop?; as he responded, Ronald was looking at him. One of the attackers then left the bedroom leaving behind one of the other attackers breaking drawers and picking things. Ronald then rose and held the attacker who had remained in the room; he coiled his hands around him and a struggle ensued; in the course of the struggle he recognized the attacker as "Chogo", the 2nd appellant, a person he knew previously.

7. Under Ronald's grip, Chogo called for assistance and the other robbers who were still within the house came to his rescue. Ronald recognized one of those who came to Chogo's rescue. He knew him by the name "Rwimburi'. It was the first appellant.

8. Ronald's wife, Wilkister Mugoyia (PW2), corroborated her husband's testimony.

9. Shortly after the attackers left, neighbours came to assist in response to screams from Ronald, his wife and Ronald's nephew who was also in the house. Ronald and his wife reported the matter to the police and gave the names of the appellants as the persons who had attacked them. Indeed the appellants were arrested on the basis of the report made to the police by Ronald and his wife. Both Ronald and his wife were cross-examined at length by the appellants. Their testimony was not shaken. Based on the testimony in chief and the cross-examination, there cannot be any doubt that the appellants were well known to the complainant and his wife.

10. Both lower courts came to that conclusion. On its part, the trial court having reviewed the evidence had this to say:

> ***"it is evident that the two accused persons were positively identified by both PW1 and PW2 (sic) who saw them in the house and vividly recognized them, they were persons who hailed from their neighbourhood."***

11. The High Court on its part after reviewing and reevaluating the evidence stated:

> "***From the evidence on record we do find that the circumstances were conducive for positive identification. The 2nd appellant was alone with the victims in the bedrooms. The victims blocked the door to the bedroom and the torch light enabled the victims to identify the 2nd appellant. The 1st appellant went to rescue the 2nd appellant and in the process he was recognized. We do find that the torch light was sufficient for positive identification. PW1 and PW2 knew the two appellants very well and this was a case of recognition."***

12. The concurrent findings were based on evidence. We have no basis for interfering with those findings. As this Court stated in **Adan Muraguri Mungara vs. R [2010] eKLR**, we must:

> "***Pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere***."

13. The result is that this appeal has no merits and we must dismiss it.

Orders accordingly.

Dated at Kisumu this 27th day of May, 2016

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. **K. MURGOR**

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR