



**IN THE COURT OF APPEAL**

**AT KISUMU**

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

**CRIMINAL APPEAL NO. 22 OF 2014 (R)**

**BETWEEN**

**ALBERT BARASA ..... 1<sup>ST</sup> APPELLANT**

**ELPHAS ALI LUVISIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An Appeal from a conviction and/or Judgment of the High Court of Kenya at Kakamega (Lenaola & Onyancha, JJ.) dated 20<sup>th</sup> October, 2011***

**in**

**HCCRA NO. 152 OF 2009)**

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**JUDGMENT OF THE COURT**

1. The appellants were jointly charged with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. They were convicted and sentenced to death before the Senior Resident Magistrate's Court at Butali. Their first appeal to the High of Kenya at Kakamega was unsuccessful, hence this second appeal.
2. The particulars of the aforesaid charge were that on the 17<sup>th</sup> day of September, 2008 at Mugai village, Shirugu location in Kakamega North District, the appellants, while armed with pangas and rungu, jointly robbed Janet Nanyeni of cash Kshs.32,000/= and at or immediately after such robbery used actual violence to the said lady.
3. The complainant's evidence was that on the material day at 5.30 a.m. she started a journey to Webuye town. She had earlier on telephoned a motor cyclist, **Charles Luseno, PW2** to go to a road near her home to pick her up.
4. As she walked along a rough road to the place where she was to meet PW2, with the aid of torch light,

she saw someone following her. She recognized the person as **Elphas Luvisia**, the 2<sup>nd</sup> appellant, who asked her why she was spotlighting him. She put off the torch light and started to run.

5. The complainant then saw another person ahead of her and she put on the torch light again, which helped her recognize the second person as **Albert Barasa**, the 1<sup>st</sup> appellant. She began to scream and within no time the 1<sup>st</sup> appellant caught up with her, grabbed her hand and pulled her towards the main road. The 1<sup>st</sup> appellant snatched her handbag that contained Kshs.32,000/= and threw it to the 2<sup>nd</sup> appellant. The two appellants assaulted the complainant and then ran off.

6. PW2 arrived at the scene. With the aid of his torch light he saw the 2<sup>nd</sup> appellant running away. He telephoned the complainant's husband who picked her up and took her to hospital.

7. Later on the complainant reported the incident to the area Assistant Chief and to Malava Police Station. She mentioned the names of her assailants. The appellants had gone missing from their respective homes and remained in hiding for about six months. When they re-surfaced they were promptly arrested and subsequently arraigned in court.

8. In their defence, the appellants denied the charge and only testified as to how they were arrested.

9. The appellants, in their memorandum of appeal filed through **M. Kiveu Advocate**, stated that the first appellate court did not properly evaluate the evidence on record, misdirected itself in law on the issue of identification/recognition of the appellants and thereby reached a wrong conclusion.

10. **Mr. Masake**, learned counsel for the appellants, submitted that there was no evidence as to how bright the torch light was, and whether it was sufficient to enable the complainant recognize her assailants. He made similar submissions regarding the evidence of PW2, who testified that he had seen the 2<sup>nd</sup> appellant running away. In his view, the evidence of recognition was not weighty enough to sustain a conviction.

11. Mr. Masake further submitted that there was no sufficient evidence that the appellants had disappeared from their respective homes following the robbery, saying that neither the area Assistant Chief nor the village elders were called to testify on the issue, instead the court relied on the evidence of the investigating officer only.

12. **Mr. Ogoti**, Senior Assistant Director of Public Prosecutions opposed the appeal. He submitted that the evidence of both PW1 (*the complainant*) and PW2 was sufficient to show that they had recognized the appellants.

13. We have carefully considered the evidence on record as well as submissions by counsel. The principles that a court ought to take into consideration when relying on visual identification to sustain a conviction were set out in **WARANGA V REPUBLIC [1989] KLR 424** where this Court stated:

**“It is law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”**

The appellants' conviction was based on their recognition by both PW1 and PW2. PW1 said that the two appellants were well known to her. The 1<sup>st</sup> appellant is married to a daughter of the complainant's aunt while the 2<sup>nd</sup> appellant was her tenant. PW1 was able to see her assailants with the aid of torch light. The 1<sup>st</sup> appellant even called out the complainant's name.

14. PW2 had known the 1<sup>st</sup> appellant since 2007 and said that he saw him when he was fleeing away from the scene. The evidence of PW2 corroborated the complainant's evidence. As was held in **ANJONONI**

**& OTHERS V REPUBLIC [1981] KLR 854**, recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger.

15. When the complainant made a report to the police she named the appellants as the persons who had assaulted and robbed her.

16. We do not agree that the first appellate court did not re-evaluate the evidence that was adduced before the trial court. We are satisfied that it did so and arrived at a well found conclusion.

17. We find no merit in this appeal and dismiss it in its entirety.

**Dated and Delivered at Kisumu this 29<sup>th</sup> day of July, 2016.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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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.*

**DEPUTY REGISTRAR**