IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), KIAGE & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 125 OF 2013

BETWEEN

ELVIS OPEE NDAYARA …..……....…....…… 1ST APPELLANT

EDWIN MULAMA SHILIBWA ..... 2ND APPELLANT

AND

REPUBLIC ….……...…….. RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nairobi (Achode & Ochieng', JJ) dated 28th February, 2012

in

HC. Cr. A. No. 169 of 2008)

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JUDGMENT OF THE COURT

1. The two appellants in this appeal, ***Elvis Opee Ndayara*** (hereinafter referred to as the 1st appellant), and ***Edwin Mulama Shilibwa*** (hereinafter referred to as the 2nd appellant) and a third accused, Ahmed Sheriff Salah, were indicted before the Chief Magistrate at Nairobi, on a charge of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The particulars of the offence were that on 24th June, 2006 at City Centre, Fedha Towers in Nairobi within Nairobi area, they, jointly with others before the Court, while armed with dangerous weapons namely AK 47 rifles, robbed Ahmed Yussuf Omar of Kshs. 58 million and a wrist watch, and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Ahmed Yussuf Omar.

2. At their trial, the prosecution called 12 witnesses and the defence called four witnesses. At the end of the trial, the Senior Principal Magistrate (Mrs. M. W. Murage), found all the accused guilty as charged and convicted them accordingly. They were sentenced to suffer death as prescribed by law. All three appealed to the High Court against their conviction and sentence.

3. In their petitions, they raised a number of grounds: The 3rd accused claimed there was no interpretation during the trial; that the evidence against him was speculative and inadmissible; and

that nothing that was claimed to have been stolen was recovered from him. The 1st appellant alleged that the evidence of identification was flawed; that the prosecution evidence was contradictory and inconsistent; and that the offence of robbery was not proved as against him. The 2nd appellant complained that the evidence of identification was insufficient and that exhibits recovered from him were no proof of complicity.

4. The High Court analysed and evaluated the evidence against each appellant, bearing in mind that it did not see or hear the witnesses called at the trial. In the case of the 3rd accused (Ahmed Sheriff Salah), the first appellate court found that the evidence against him was unreliable and based on suspicion. The court found no evidence to sustain Salah's conviction and allowed his appeal. His conviction was quashed and sentence set aside. The court however upheld the convictions and sentences handed down to the 1st and 2nd appellants, and dismissed their appeals.

5. The 1st and 2nd appellants have now filed this second appeal in which they challenge the findings of the first appellate court. In sum, they challenge that court for failing to note that there was a variance between the charge and the evidence adduced; for relying on circumstantial evidence upon which to base the convictions; for relying on unreliable and contradictory evidence; and for failing to consider their respective defences.

6. Mr. Njagi Nderitu, Senior Assistant Director of Public Prosecutions, did not oppose the appeal. In submissions, he stated that there were major discrepancies in the evidence adduced and the charge sheet, which rendered the convictions unsafe. He further submitted that two prosecution witnesses were neither sworn nor were they affirmed, thus a conviction based on this evidence cannot be sustained.

7. As has been pointed out before, this Court is not bound by the views of counsel in determining appeals. Sitting on appeal, we are still bound to assess the matter before us and make our conclusions on the propriety of the conviction and sentence. This duty was outlined by this Court in ***Norman Ambich Miero & Another v Republic*** ***[2012] eKLR (Criminal Appeal No. 279 of 2005)*** where it was stated that:

"We restate that this Court is not bound by the views of the State Counsel as we have a duty to reassess the matter and make our own findings on whether or not the evidence presented before the trial court which was confirmed by the High Court support the conviction of the appellants."

8. The concurrent findings of the courts below were that Ahmed Yusuf Omar (PW1), (Ahmed) a Director at the Forex Exchange Bureau at Hazina Towers, was on the material day in the basement of Hazina Towers. He and Ahmed Sherrif Salah were heading to the airport to take the sum of Kshs. 58 million to Mombasa. The money was contained in various denominations of different currencies. A few minutes later, five attackers came and accosted Ahmed and took away the bag of money that he had. The robbers escaped in a motor vehicle registration KAU whose digits he did not see.

9. The 1st appellant was arrested three weeks after this robbery. The evidence against him was that he had hired a motor vehicle, registration No. KAU 946E Nissan Bird on 23rd May, 2006. He returned the vehicle a month later in June 2006. He was arrested in Mombasa three weeks after the robbery in a brand new vehicle KAV 026J whose transfer documents had not yet been processed. A sum of Kshs. 111,000/= was found in the vehicle and a further Kshs. 400,000/= in a house belonging to a friend, Mr. Benjamin Kimathi, to which he had led the police.

10. The 1st appellant admitted that motor vehicle KAV 026J belonged to him. He said he had bought it before the robbery with money that he had earned from the sale of a truck load of potatoes. However, he neither produced receipts to back up the sale, nor gave particulars of the lorry he had hired to transport the potatoes from Nyandarua to Nairobi. He also confirmed that the police recovered money from the vehicle, and from his friend when he was arrested. After the 1st

appellant's arrest, Ahmed identified him as one of the attackers.

11. The 2nd appellant was positively identified by Ahmed who stated that he saw him in the basement. The basement was well lit enabling him to look at the attackers. Ahmed's evidence was that the 2nd appellant is the one who forcefully grabbed the bag containing the money from him.

12. On 26th June, 2006, two days after the robbery, the 2nd appellant had visited his brother, Denish Shilibwa (PW4), at his work place on Mombasa Road. He asked the 2nd appellant for a loan of Kshs. 100,000/= which he promised to pay back. The 2nd appellant gave him this money within two days.

13. There was also evidence from two witnesses Francis Mwangi (PW8) and Nicholas Kamau (PW11) that in June 2006, the 2nd appellant took them to Mombasa by air where they saw him buying two motor vehicles at a show room in Mombasa. One was a Nissan van for which he paid Kshs. 800,000/=, and the other was a Nissan Primera for which he paid Kshs. 600,000/=. After the purchase, the two witnesses drove the vehicles to Nairobi and parked them at Edwin's house in Umoja. They were paid for their services. Police also recovered high value household goods valued at Kshs. 300,000.00 from a house in Uhuru Estate believed to be the 2nd appellant's house.

14. Edwin (2nd appellant) gave evidence on oath in his own defence. He said he was arrested on 22nd July, 2006 in Nanyuki for reasons he did not know and charged with an offence he knew nothing about. He told the court he was a businessman dealing in computers and transport. He confirmed that the van registration No. KAU 290W belonged to him and that he bought it after 24th June, 2006. He admitted that Alice Wangui who was found in the house in Uhuru Estate is his wife but he said all the household goods found in that house belonged to her. But he admitted that all those goods and the two motor vehicles were purchased after 24th June, 2006. He said he knew nothing about the money recovered from his brother (PW4).

15. This being a criminal case, the burden of proof lay throughout on the prosecution to prove the guilt of the appellants beyond any reasonable doubt. There was no burden on the appellants. But having chosen to testify, they assumed a probative burden of offering a reasonable explanation as to how they all of a sudden acquired so much money, motor vehicles and household goods all of which were facts within their special knowledge under ***section 111*** of the Evidence Act. They admitted buying all those things but offered no explanation as to where the money they used to buy them came from. One claimed he had bought a huge load of potatoes from Kinangop but offered no details of the transaction. The other claimed to be in computer business, and also to be in transport business, but again gave no details. Even Denish Shilibwa (PW4) Edwin's brother who turned hostile could not shed any light on Edwin's business. Cross-examined by the prosecutor, he said:

"My brother is in business of selling computers. I do not know where he operated from. I do not know how big the business was. He lived in Uhuru Estate. I do not know house number."

16. Having chosen to give evidence, the trial court and the High Court were obliged to analyse their evidence to determine its credibility. Both courts found the evidence was false. The behaviour of these appellants soon after the robbery indicated they were involved in the robbery. The evidence of PW1 that he identified the appellants at the scene was reliable and credible. The basement was brightly lit and he had the opportunity to see the appellants clearly. Both appellants claimed to have been doing business but did not produce an iota of evidence in support of that claim.

17. Both appellants did allege that the charge was defective for the fact that it mentioned the sum of Kshs. 58 million, whereas the evidence adduced indicated that what was stolen was actually foreign currency that was equivalent to that sum. We find that the High Court properly dealt with this issue when it stated that there was no discrepancy since the value of the currency was consistent. In addition, the appellants stated that while the charge sheet indicated the complainant

as Yussuf Omar, the record indicated the complainant as Yusuf Aoma, a discrepancy that cast doubt on the conviction. We do not agree. In our view, these discrepancies are minor, and have not caused any prejudice to the appellants, as the evidence against them remains cogent and clear.

18. As a second appellate court, we are bound by the findings of the courts below, unless we find that that no reasonable tribunal could, on the evidence on record, come to those concurrent findings. See ***P. K. W. v Republic*** ***[2012] eKLR (Criminal Appeal No. 186 of 2010).***

19. In the final analysis we have come to the conclusion that the learned Judges were right in coming to the conclusion that the appellants were rightly convicted. Accordingly, we dismiss both appeals and confirm the sentences of death imposed by the trial court.

Dated and delivered at Nairobi this 23rd day of January, 2015.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

P. O. KIAGE

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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.

DEPUTY REGISTRAR