



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 3 OF 2014

BETWEEN

STANLEY MWALE MUSINYA.....1<sup>ST</sup> APPELLANT

BENJAMIN SHITSUKANE SHIVACHI.....2<sup>ND</sup> APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from a Judgment of the High Court of Kenya at Kakamega (Chitembwe & Wasilwa, JJ.) dated 10th December, 2013*

in

HCCRA NO.286 OF2012)

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**JUDGMENT OF THE COURT**

1. The appellants were charged with four counts of robbery with violence contrary to **Section 296 (2)** of the Penal Code and two counts of gang defilement contrary to **Section 10** of the Sexual Offences Act. In the alternative to the gang defilement charges, the appellants were also charged with committing an indecent act with a child contrary to **Section 11 (1)** of the Sexual Offences Act.

2. They pleaded not guilty to all the charges but after trial before the Principal Magistrate at Kakamega they were convicted and sentenced to death on the robbery charges and to fifteen years imprisonment on each of the two counts of committing an indecent act. Save for the death sentence on count 1, the others were held in abeyance.

3. On appeal to the High Court, the appellants' appeals on the two counts of committing an indecent act were allowed but those on their convictions and sentences on the' four counts of robbery were dismissed. They have now come to this Court on a second appeal against that dismissal.

4. In their joint memorandum of appeal, the appellants fault the learned Judges of the High Court for failing to find that their identification was flawed; for failing to properly re-evaluate the evidence on record; and for failing to find that the case against them had not been proved beyond reasonable doubt.

5. On identification, Mrs. Onyango, learned counsel for the appellants, argued that the failure by the prosecution witnesses to include in their statements to the police the claim that they recognized the appellants as people they had known before, dealt a fatal blow to the prosecution case. She argued that since the prosecution witnesses claimed they had previously known the appellants, there was absolutely no need of holding an identification parade for them to pick people they already knew. She therefore dismissed the identification parade as superfluous.

6. Still on identification, counsel argued that even if the parade was necessary, the same was flawed as it was not conducted in accordance with the Forces Standing Rules. This is because the identifying witnesses claimed that the appellants had unique facial marks but there is no evidence to show that those marks were concealed or that the other members of the parade had similar marks. Moreover, she further argued, the 2<sup>nd</sup> appellant does not have a twisted mouth as PW1 claimed.

7. The other flaw in the identification of the appellants was that upon arrest, the appellants and the identifying witnesses rode on the same vehicle to the police station thus giving the witnesses an opportunity of seeing them before they picked them in the subsequent identification parade.

8. On the other grounds of appeal, Mrs. Onyango argued that had the High Court properly re-evaluated the evidence on record, it would have come to the conclusion that the prosecution had failed to prove the case against the appellants to the required standard. She therefore urged us to allow this appeal.

9. Opposing the appeal, Mr. Sirtuy, learned Principal Prosecution Counsel, submitted that this was a case of recognition as opposed to one of mere identification. He said the identifying witnesses told the area Chief they knew their robbers and gave him their names. In the circumstances, he urged us to dismiss this appeal as it lacks merit.

10. Having considered these rival submissions, we find that the major issue for our determination in this appeal is whether or not the two appellants or either of them were properly identified as being in the gang that robbed the victims of the four counts of robbery. Although this is a second appeal in which, by dint of **Section 361** of the Criminal Procedure Code, we are forbidden from entertaining matters of fact, to determine this issue of identification, which is itself a legal issue, we need to examine the evidence on record on identification.

11. The first two counts of robbery were allegedly committed on 2<sup>nd</sup> May 2011, at about 11:00 pm in the house of A M, PW1. She was at that time sleeping in her house with her daughter, P A M PW3 and her niece E L PW4. The three testified that they were able to see the two appellants with the help of light from three powerful torches that the appellants and their confederates kept flashing during the one hour period they (the robbers) were in their house.

12. The second two counts of robbery were allegedly committed at Lusui bus stage in the early morning of 3<sup>rd</sup> May, 2011 at about 5:00 a.m. PW2 and PW5 who were the victims of that robbery were robbed of their possessions and stripped naked. They also claimed that they were able to see their attackers by the aid of light from torches that the appellants and their confederates flashed around. PW6 who was with the two of them gave the appellants' names to the Chief claiming that he used to see them at that bus stage. The Chief called Administration Police who arrested Stanley, the first appellant, at the same stage that morning just before 6:00 a.m. The second appellant was found sleeping in his house at about 8:00 a.m. that morning. We do not think that the first appellant could have robbed people at Lusui bus stage and remained there.

13. Evidence of visual identification can cause a miscarriage of justice if not handled with care -**Enos Mbanja Okuru Vs Republic, Criminal Appeal No. 112 of 2005**. Before basing conviction on evidence of visual identification, the trial court should be satisfied that the conditions at the scene of crime were suitable for a positive identification- **Wamunga Vs. Republic [1989] KLR 424 at p. 426**.

14. In this case we are uncomfortable with the identification of the appellants. First, we are not told if the robbers flashed torches on the faces of each other. Secondly, PW1 claimed that she had known the

appellants prior to the incident of robbery but she did not give their names to the police. PW3 and PW4 did not give the appellants' descriptions to the police either.

15. The details of the identifying witness' first report to the police or to the people who go to his aid are of crucial importance. They enable the court to determine the witness's consistency. The names or descriptions given by the witness to the police or people in authority in the first report assists the court to determine the witness's surety of their identification or recognition of his attacker(s) and removes any doubt or claim that the witness's testimony in court is not an afterthought. See **David Masinde & Another Vs Republic, Criminal Appeals Nos. 33 & 34 of 2004 (Consolidated)**.

16. The victims of the robbery at Lusui bus stage travelled with the appellants to Kakamega Police Station in the same vehicle. Their evidence of identification of the appellants cannot in the circumstances be relied upon. PW11, who claimed that some of the stolen items were found with the first appellant, changed his story in cross-examination and said they were found at the bus stage.

17. Taking all these factors into account, we find that the evidence of recognition and identification of the appellants raises doubts. We agree with counsel for the appellants that had the High Court properly re evaluated the evidence on record, it could not have sustained the appellants' conviction. Consequently, we allow this appeal, quash the appellants' conviction and set aside the death sentence. The appellants shall be set free unless otherwise lawfully held.

**DATED and delivered at Kisumu this 14<sup>th</sup> day of May, 2015.**

**D.K.MARAGA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**