IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 43 OF 2012 (R)

BETWEEN

MICHAEL NYONGESA …...................................... FIRST APPELLANT

GEOFREY KHAEMBA …................................. SECOND APPELLANT

AND

REPUBLIC …... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kakamega (Onyancha & Lenaola, JJ.) dated 8th March, 2012

in

H.C.CR.A. NO. 175 & 176 OF 2009)

****

JUDGMENT OF THE COURT

1.The appellants were jointly charged with robbery with violence contrary to **section 296 (2)** of the **Penal Code.** The particulars of the offence were that on 19th June, 2008 at Mayure Village, Lukume Sub-Location in Kakamega North District with others not before court, while armed with crude weapons robbed **Elphas Wasike** of cash K.Shs.20,000/=, half bag of beans, four jembes and assorted clothes, all valued at K.Shs.35,000/= and at or imediately before or immediately after the time of such robbery used actual violence to the said person.

2. The appellants were tried, convicted and sentenced to death as by law prescribed. Their first appeal to the High Court was unsuccessful. The High Court held that the appellants were well known to the complainant and were therefore recognised because there were favourable circumstances for a positive identification. Undeterred, the appellants preferred a second appeal to this Court.

3.This being a second appeal, **section 361** of the **Criminal Procedure Code** enjoins us to consider only issues of law. In such an appeal, the Court cannot interefere with concurrent findings of fact by the two courts below unless such findings were made on no evidence at all or in a perversion of the evidence, or if no court would ordinarily have come to such conclusion, if it had properly analysed the evidence before it. See **M'RIUNGU V REPUBLIC [1983]** KLR 455.

4. The evidence that was tendered by the prosecution before the trial court, briefly stated, was that on 19th June, 2008 at about 9.30 p.m., **Jafred Humbe Wasike, PW 1,** and his wife, **Dorice Lumbe, PW 2,** were sleeping in their house when robbers, who numbered more than ten, broke into their house.The robbers tied the hands and mouth of PW 1. The robbers had torches and one of them wielded a gun and were all dressed in police sweaters and jackets.

5. Because of the torch light, PW 1 and PW 2 said that they recognised the two appellants as being part of the gang of robbers. They were however unable to recognise the other robbers.PW 1 testified that it was the 1st appellant who stole K.Shs.18,000/= from a cupboard inside the house and other household items.

6. **Elphas Wasike, PW 3,** and his wife **Esther Wanjala, PW 4**, also alleged that on the same date and time, that is 19th June, 2008 at 9.30p.m., they were also attacked by robbers and robbed of K.Shs.20,000/=. They also purported to have recognized the two appellants herein as being part of the gang of more than 10 robbers that invaded them in their house. Both PW 3 and PW 4 testified that they were able to recognize the appellants, whom they knew before, because the robbers had torches.

7. **Malik Maina Shangala, PW 6,** was an Assistant chief of Lukume Sub-Location, received the report of the robbery and visited the homes of the victims. The victims told him that they were able to identify the appellants as being among the gang of robbers that attacked them. The Assistant Chief arrested the appellants and escorted them to the Police Station.

8. On 21st June, 2008, PW 1, PW 2 and PW 4 went to Kabras Police Station and reported the robbery to police constable **Elphas Gatira, PW 7.** The 4 complainants told PW 7 that they were able to recognize the appellants.

9. In his statement of defence under oath, the 1st appellant said that he was a preacher and on the material night he was unwell and was at his home with his family members. While in bed, his children rushed there and told him that there were police officers outside their home who were demanding a television set from him. When he woke up and stepped out of the house he heard screams from the neighbouring homes. He decided to go to the home of PW 1 where some of the screams were coming from. He learnt that there had been a robbery. After sometime he returned to his home.

10. On 21st June, 2008 at about 6.00a.m. two administration police officers, the area sub-chief, a village elder, PW 1 and PW 3 went to his home and conducted a search. They did not recover anything that had been stolen from the complainants. It was only after the search that they informed him that he had been implicated in the robbery by the complainants. Having recovered nothing, the police did not arrest him. The 1st appellant remained at home and continued with his normal duties.

11. On 2nd July, 2008 the 1st appellant was summoned by the area sub-chief to his office and when he went there the area sub-chief escorted him to Malava Police Station.

12. The 1st appellant further stated that his land and that of PW 1 share a boundary and he had severally complained to PW 1 that whenever he cut trees along their common border he was damaging his crops and as a result a dispute developed between them. He attributed his arrest to the boundary dispute that he had with PW 1.

13. The 2nd appellant is a son of the 1st appellant. He adopted his fathers defence that they were both at their home on the material night and that his father and PW 1 did not have a good relationship.

14. The appellants called as a witness, Jackline Khaemba, the daughter of the 1st appellant, who corroborated their defence in every material aspect.

15. The memorandum of appeal filed through Jamsumbah and Company Advocates raises four grounds of appeal as follows:

"1. The learned judges erred in both law and fact in upholding the conviction of the appellants when the evidence on record clearly shows that the prosecution had failed to prove their case beyond reasonable doubt;

2. The learned judges erred in law and in fact in failing to find that the identification of the appellants was improper and not in accordance to the law;

3. The learned judges erred in law and in fact in upholding the conviction of the lower court without carefully re-evaluating the evidence on record as required by law;

4. The learned judges erred in both law and fact by failing to put weight to the testimony and/or evidence of the appellants."

16, Arguing the appeal, **Mr. Jamsumbah** submitted that there were no favourable circumstances for positive identification of the appellants.There was sufficient light to illuminate the faces of the appellants, he contented.

17. Counsel referred to the evidence of PW 1 who testified that the attackers were spotting torch light on mud walls where light would reflect back. That way he was able to see the faces of the appellants. The robbers were more than ten and they had gotten into a small room, which PW 1 said measures 4 feet wide, and had forced him and PW 2 to lie down. In those circumstances, counsel submitted, it was not possible for PW 1 and PW 2 to see any of the robbers.

18. The appellants' counsel submitted that PW 3 and his wife were also forced to lie down by the attackers and wereviciously assaulted.Considering that the robbery occurred shortly after PW 3 and PW 4 had gone to bed and put off their lights, the only source of light was from the torches that the robbers had.

19. Counsel faulted the two courts below for failing to give due consideration to the appellants' defence of alibi. He added that there was no evidence that the appellants were indeed not in their home on the material night as they had stated.

20. Mr. Ogoti, Senior Assistant Director of Public Prosecutions, opposed the appeal. He submitted that there was sufficient light to enable the complainant to see and recognize the appellants. He discounted the appellants' contention that there existed a land dispute between the appellants and PW 1 saying that PW 1 had denied that such dispute existed.

21. The prosecution case against the appellants was that of recognition or visual identification. It is trite law that whenever a case against an accused person depends wholly on correctness of identification, the court should warn itself of the need for caution before reaching a conviction. The court should examine closely the circumstances under which the identification was made to determine if they were favourable for a positive identification.See **PAUL ETOLE & ANOTHER V REPUBLIC [2000] eKLR, KIARIE V REPUBLIC [1984] KLR 739.**

22. In this appeal, the robbery took place at about 9.30p.m. In the two incidents of the robbery, the victims were attacked by a gang of more than fifteen robbers and the only source of light was from torches that were held by the robbers.

23. There is no evidence that any torch light was beamed directly on the faces of the appellants, although PW 2 said that they were spotting torches on each other. What PW 1 stated is that the torch light was reflecting against the mud walls that are not painted. PW 1 stated:

"The wall is not painted, it is just mud wall. … All the attackers had torches. And they were spotting the wall and the image comes back and I identified them."

It is doubtful whether in the circumstances of this case, that reflection, if at all, could enable a robbery

victim who was lying down to see his or her assailants.

24. As was held in **Kiarie V Republic** *(supra)*, it is possible for a witness to be honest but mistaken and for a number of witnesses to be all mistaken. The fact that four prosecution witnesses alleged to have recognized the appellants out of the more than ten people that attacked and robbed them does not necessarily mean that the four were not mistaken. In our view therefore, there were no favourable circumstances for a positive identification.

25. The appellants raised a plausible defence of alibi. In **Peter Kioko Kisilu V Republic [2006] eKLR,** it was held that:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable; Said Vs Republic [1963] E.A.6.***

26. In **KARANJA V REPUBLIC [1983]** KLR 501, this Court held that theburden of proving the falsity, if at all, if an accused's defence lies on the prosecution. Seealso **VICTOR MWENDWA MULINGE V REPUBLIC [2014]** eKLR.

27. If during the robbery the complainants truly saw the appellants among the robbers who had attacked them, nothing stopped them from organizing to have the homes of the appellants searched immediately thereafter. That way they would have been able to either recover some of the stolen items from their homes or establish if indeed the appellants were there or not. Further more, after the robbery, PW 3 and PW 4 went to the home of PW 1 and PW 2 where they spent the night. PW 1 and PW 2 did not tell PW 3 and PW 4 that they had also been attacked on the same night.

28. Considering all the evidence in its totality, we are not satisfied that the appellants were properly convicted. Consequently, we allow the appeal, quash the conviction and set aside the death sentence that had been pronounced against each of the appellants. The appellants are set at liberty unless otherwise lawfully held.

DATED AT KISUMU THIS 9TH DAY OF OCTOBER, 2015

D. K. MUSINGA

…..........................

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

…..............................

JUDGE OF APPEAL

A. K. MURGOR

…..............................

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR