



IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NOS. 170 & 171 OF 2011 (CONSOLIDATED)

BETWEEN

BERNARD KARIUKI MBURU

RAJAB IDD MBARAKAPPELLANTS

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kitale (Ombija & Mwili, JJ.) dated 20th June, 2011

in

H.C.CR.A. Nos. 14 & 15 OF 2007)

JUDGMENT OF THE COURT

1. The appellants were upon trial before the Chief Magistrate at Kitale for the offence of robbery with violence, convicted and sentenced to death. Their appeals to the High Court having been dismissed, they have come to this Court on a second appeal.
2. The main complaints raised in the 8 grounds of the appellants’ supplementary memorandum of appeal is that the learned Judges of the High Court erred in sustaining their conviction based on their purported identification and recognition by a single witness and that their alibi defences were ignored.
3. Presenting the appeal before us, Mr. Akelo, learned counsel for the appellants, argued that had the High Court properly re-evaluated the evidence on record as it was obliged to do, it would have found that the evidence of the appellants’ identification and recognition by PW1 was flawed and totally unreliable. He said this was because the conditions at the scene of crime at the material time were not favourable for a positive identification. Counsel further argued that although PW1 maintained that he recognized the appellants as his assailants as they are people he had known

very well, he was certainly mistaken. Counsel reminded us that a witness can be honest but mistaken. As the appellants testified, they were nowhere near the scene of crime at the material time. The first appellant was in his house while the second appellant was at the 24 Hour Pub. In the circumstances, counsel urged us to allow this appeal.

4. Opposing the appeal, Mr. Omwenga, learned Assistant DPP, submitted that with the aid of security lights from the nearby Cereals Board Stores, the complainant was able to see and recognize the appellants. They were very close to him when they assaulted and robbed him and that is why he was even able to recall the role each played. That coupled with the fact that soon after the robbery he gave their names to the police who later arrested them leaves no doubt in the complainant's identification of them. He therefore urged us to dismiss this appeal.
5. We have considered these rival submissions and carefully read the record of appeal to ascertain if indeed the High Court failed to properly re-evaluate the evidence on record. We have also perused the authorities counsel cited to us.
6. Although counsel for the appellants took issue with the absence of the appellants' names from the complainant's statement to the police as proof that he did not give their names to police, we have no doubt that he did. That is how the police managed to arrest the appellants in the absence of the complainant. We are, however, uncomfortable with the appellants' conviction based solely on the evidence of identification/recognition by the complainant.
7. As this Court stated in the case of **Stanley Mwale Musinya & Another v. Republic, Criminal Appeal No. 3 of 2014 (CA Kisumu)**, it is now trite law that evidence of visual identification can cause a miscarriage of justice if not handled with care. See also **Enos Mbanja Okuru v. Republic, Criminal Appeal No. 112 of 2005**. To base a conviction on evidence of visual identification therefore, the trial court should be satisfied that the conditions at the scene of crime were suitable for a positive identification - **Wamunga v. Republic [1989] KLR 424 at p. 426**. It is also trite law that to base a conviction on the evidence of a single visual identifying witness, that evidence must be watertight. See **Kiarie v. Republic [1984] KLR 739**.
8. In this case, it is not in dispute that the appellants' conviction was solely based on the identification/recognition evidence of PW1, the complainant. The complainant testified that he was able to see the appellants with the aid security light from the Cereals Board Stores near the scene of crime. He did not give the intensity of that light. He did not say how far the Cereals Board Stores were from the scene. As a matter of fact, he said those lights were flickering on and off. Under those circumstances, the appellants' identification and recognition by the complainant cannot be vouchsafed.
9. We have no reason to question the credibility of PW1. However, as this Court has repeatedly stated, a witness can be honest but mistaken. See the case of **Enos Mbanja Okuru v. Republic** (supra). We are satisfied that the complainant in this case could have been honest but mistaken.
10. In the circumstances, we have to give the appellants the benefit of the doubt that we entertain in this matter. Consequently, we allow this appeal, quash the appellants' convictions and set aside the sentence imposed upon them. The appellants shall be set free forthwith unless otherwise lawfully held.

DATED and delivered this 10th day of December, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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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