REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, KIAGE & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 620 OF 2010

BETWEEN

RAPHAEL MUTUA MUTEVU…….....…1ST APPELLANT

BONIFACE MUTUKU KIMONDIU …….....……..2ND APPELLANT

AND

REPUBLIC …….....…..…..RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi by

(Lenaola & Warsame, JJ) dated 28th May, 2006 in

H.C.CR.A. NOS 162 & 163 OF 2006)

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JUDGMENT OF THE COURT

The appellants were jointly charged, tried and convicted and sentenced to death by the Chief Magistrate's Court in Machakos on a single consolidated charge of robbery with violence contrary to **section 296(2)** of the **Penal Code**.The particulars of that charge were to the effect that on 21st December 2004 at Kiima Junction, Kilome Division of Machakos District of the former Eastern Province, they had, jointly with other persons not before court, and while armed with dangerous weapons namely knives and rungus, robbed one Felix Ndolo Yulu (PW1) of his mobile phone and KShs. 5000 in cash. In the course of that robbery they threatened to use personal violence on their victim.

Dissatisfied with their conviction and sentence, the appellants each preferred a first appeal before the High Court sitting in Machakos. The appeals were consolidated and heard by Hon. Lenaola J sitting with Hon. Warsame J (as he then was). The learned Judges considered the appeal and by a judgment delivered on 28th May 2010, dismissed it, provoking this appeal.

The appellants filed before this Court separate documents titled **"Grounds of Appeal"** raising five and eight points of grievance respectively against the judgment of the High Court. At the hearing of the appeal however, their learned counsel, Mr. Rombo, elected to argue Ground four only of the 1st

appellant's appeal, which is that the learned Judges faulted to evaluate the entire evidence afresh to the standard by law required, abandoning the rest. With regard to the second appellant, counsel abandoned all the grounds save the first that challenged that appellants' alleged identification or recognition at the scene. Even though counsel said he would also be arguing grounds 7 and 8 which faulted the alleged rejection of the appellants' defence and failure to give due weight to the OB entry at Salama Police Station and his defence, no submission on these points were made before us. We have nevertheless taken those grounds into consideration.

On the complaint by the 1st appellant that the learned Judges did not evaluate the evidence that was tendered before the trial court, Mr. Rombo submitted that had they done so, they would have noted the glaring omission that the complaint's first report of the robbery to the police did not mention the 1st appellant by name, notwithstanding his claim to know him well. The complaint ties in with that of the 2nd appellant who attacked the identification or recognition evidence as insufficient to found a safe conviction.

We have perused the record fully mindful that the appellants were indeed entitled to expect and demand of the High Court, as a first appellate court, a fresh and exhaustive, re-evaluation in and analysis of evidence before arriving at its own independent conclusion as to their guilt or otherwise. See **OKENO –VS- REPUBLIC [1972] EA 32; WAGIDE –VS- REPUBLIC [1983] KLR 569**. Having done so, we find no substance in the appellants' claim that the evidence was not properly re-evaluated or that they were not properly identified at the scene.

The robbery incident incontestably occurred in broad daylight at about 10.00 am. The robbers, whom the complainant (PW1) identified as the appellants herein, were people that PW1 knew. In fact, the 1 st appellant in his unsworn defense confirmed that the complainant was his friend. PW1 knew the second appellant physically and told the police that were he to see him, he would recognize him, and he did.

Other than the recognition evidence of PW1, there was also the evidence of **PATRICK LUNGAHO MWAKE** a boda boda cyclist who witnessed the robbery and even came to PW1's aid only to be confronted by the appellants' club-wielding accomplice and so ran for dear life. He gave a very detailed account of what each of the robbers did as they relieved the complainant of his possessions and money.

The case confronting the appellants and the evidence tendered clearly left no room for mistake as to the identity of the robbers, namely themselves. It was broad daylight; the robbers did not cover their faces or otherwise attempt to conceal their identities; the appellants were not just identified but actually recognized; it was not a single witness but two who testified as to the identity of the robbers as the appellants. The totality of the circumstances surrounding the robbery leave no doubt that the identification evidence, which was in the nature of recognition and therefore more assuring and satisfactory **(ANJONONI –VS- REPUBLIC [1980] KLR 59)**, was solid, cogent and iron clad leaving no room for doubt or mistake. We are satisfied that the learned Judges properly addressed the evidence as to the identification of the appellants and arrived at the correct conclusion that their conviction was sound. They were also justified in rejecting the 1st appellant's defence that he too was a victim of the robbery. That defence was clearly an afterthought given the overwhelming and unshaken evidence of his involvement in the robbery as testified to by PW1 and PW2.

The two courts below made concurrent findings of fact on this aspect and we, as a second appellate court confined to matters of law, cannot interfere in the circumstances, see **Section 361** if the **Criminal Procedure Code**; **KARINGO –VS- REPUBLIC [1982] KLR**

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In the result, we agree with Miss Oundo, the learned Assistant Director of Public Prosecutions that this appeal is devoid of merit. It is accordingly dismissed.

Dated and delivered at Nairobi this 18th day of July 2014.

P. M. MWILU

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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

b/c