IN THE COURT OF APPEAL

AT ELDORET

(CORAM: ONYANGO OTIENO, KARANJA & KOOME, JJ.A.)

CRIMINAL APPEAL NO.179 OF 2010

BETWEEN

MARTIN BERA alias SICHAKA…….....….....….1ST APPELLANT

MAURICE KIMINGWA NABANA.....2ND APPELLANT

PAUL KIPROP.....3RD APPELLANT

AND

REPUBLIC…….....…….....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Bungoma (Onyancha & Muchemi, JJ.) dated 3rd June, 2010

in

H.C.CR.A NO.90 of 2008)

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JUDGMENT OF THE COURT

This appeal raises one legal issue of whether the appellants were positively identified as the perpetrators of the offence of robbery with violence that took place at [Particulars Withheld] in Mt. Elgon Area on the night of 30th June, 2004. The three appellants, Martin Bera alias Sichaka, Maurice Kimingwa Nabana and Paul Kiprop were arraigned before the Principal magistrate, Bungoma with the offence of robbery with violence and a second count of rape.

The appellants pleaded not guilty and after trial that comprised evidence of than three witnesses, they were all found guilty and convicted of the charge of robbery with violence. Upon conviction, they were sentenced to death. Their appeal before the High Court was unsuccessful. Onyancha and Muchemi, JJ. were in concurrence with the learned trial magistrate that the two complainants were able to identify the appellants through recognition.

The three appellants have filed separate grounds of appeal. However the only issue of law that cuts across all the grounds filed by each of the appellant, which was also the only issue that Mr. Mwinamo, learned

counsel for the three appellants based his submissions on, was the issue of identification. The evidence that led to the appellants' conviction was given by the complainant E.N.O (PW1), her husband M.R.O (PW3) and her mother in law P.O (PW2).

Briefly summarized, on 30th June 2004 at about 2.30 a.m, while PW2 was asleep, she was woken up by people who demanded that she should open the door as they were police officers. When she refused to open the door, the intruders who were three in number and were armed with a gun and panga, kicked the door open. They ordered PW2 to get dressed, and to get out of the house. While outside the house, the thugs ordered PW2 to request her daughter in law (PW1) to open her house. PW1 opened her house as requested by her mother in law; the thugs pretended they were police officers looking for "a Mugishu" who was hidden in the area. After ransacking the house and not finding anything they demanded to be given money. They took a wrist watch from PW2 and ordered her to go back to sleep. They took a total of Kshs.670/= from PW1; a hat belonging to her husband and some 16 kgs of beans.

The thugs then ordered PW1 to accompany them. They led her to a maize plantation where she was raped by one of the assailants described in the trial court as 1st accused person, but as the 2nd assailant was preparing to continue with the rape, the whole orgy was interrupted by a sound of a passing motor vehicle. The thugs ordered PW1 to get up and follow them but along the way, PW1 parted ways with the assailants. The route PW1 took, led her to a certain home where she knocked and was let in, she was also given some clothes to wear. At dawn she returned to her home and found a group of people, whom she briefed what had happened. The matter was reported at the police station and PW1 was treated at Kapsokwony Health Centre.

Both PW1 and PW2 testified that they were able to recognize the assailants as people from the neighbourhood. Maurice Kimingwa Nabana and Paul Kiprop (2nd and 3rd appellants respectively) were arrested from their homes apparently with the help members of public led by PW1 who followed the trail of beans and footprints that led to the homes of the 2nd and 3rd appellants. Martin Bera, (1st appellant) was not arrested until almost a year later on 11th May, 2005. He was arrested by members of the public with the help of PW3 after PW3 was informed by PW1 that she had spotted the 1st appellant at Chwele Shopping Centre. After the arrest, he was taken to the Chief's Office and was apparently charged with the same offence but in a different case Criminal Case No.1258/05 which was consolidated with the Criminal Case No. 1950 on 9th March, 2006. This appeal arises from the trial in Criminal Case No.1950 of 2004. PW1 who had given evidence was recalled and the trial which was characterized with several adjournments prompted by the prosecution took over three years to conclude.

The record shows the prosecution was eventually unable to secure the attendance of the Investigation Officer; however the learned trial magistrate was satisfied with the evidence of the three witnesses especially PW1 and PW2 that the prosecution had discharged the burden of proof as their evidence was credible and cogent. Except for the count of rape which the learned magistrate found was not supported by sufficient evidence, the appellants were found guilty of the main charge of robbery with violence. They were convicted and sentenced to death.

The appellants appeal to the High Court was also unsuccessful. The learned Judges of the High Court concurred with the findings by the trial Court that the two witnesses knew the assailants by recognition and were aided by the torch light during the robbery to identify them. In particular the evidence of PW1 was found credible because she was with the assailants for a considerable time when they raped her, she was forced to walk with them for some distance and there was moonlight.

The learned Judges pointed out in part of their judgment as follows:

"This is a case of recognition since the assailants were known by the witnesses before the incident. Therefore there was no need of an identification parade. The evidence of recognition is overwhelming and rule out the possibility of mistake or error. We agree with the magistrate that the witnesses were truthful."

This is the crux of this appeal that turns on the point of law as to whether there was positive

identification of the appellants.

In the case of ***Wamunga vs R [1989] KLR 424*** this court held:

"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction"

Mr. Mwinamo learned counsel for the three appellants in his submission emphasized the fact that although PW1 insisted that she knew the appellants by name as they were her neighbours, nonetheless their names or descriptions were not given when the matter was reported to the police; that her evidence of recognition was not consistent, especially the bit that the 2nd appellant was arrested after they followed a trail of beans that fell after the robbery and that together with footprints led them to the home of the 2nd appellant. As regards the 3rd appellant both witnesses identified him as "Maboni" yet no identification parade was conducted to rule out a possibility of mistaken identity. The 1st appellant was arrested one year after the incident by PW3. Lastly Mr. Mwinamo urged us to find that the robbery took place at night, and that the learned trial Magistrate or even the High Court failed to address themselves and to weigh the evidence regarding the intensity of the light emitting from the torch, and to the fact that none of the stolen items were recovered from the appellant.

Mr. Chirchir learned Senior Principal Counsel opposed this appeal. He based his arguments on the evidence that the incident occurred at 2.30 a.m and both PW2 and PW3 were able to recognize the appellants. Moreover, PW1 who withstood the ordeal for over two hours had ample opportunity to identify her attackers. PW3 the husband of PW1 also told the Court that she had described to him the 1st appellant that is how he was arrested.

We have considered the evidence on record and the disputed issue of identification by recognition, while bearing in mind the principles set out by the House of Lords in the case of ***R v Turnbull (1976) 3 ALL ER 549*** at page 552, these same principles have also been cited with approval by this Court in a long line of authorities. The House of Lords stated:

"Recognition may be more reliable than identification of a stranger, but even when the witnesses are purporting to recognize someone whom he knows. The jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

Was there a possibility of mistaken identification in this case? As regards the arrest of the 2nd appellant, PW1 said they followed a trail of beans and footprints that led them to his home. In this case, no evidence was adduced from the investigation officer who could have shed some light on whether PW1 gave the names and descriptions of the 2nd appellant to the police when the offence was reported. It would appear that this issue of the failure by the prosecution to call the investigating officer was not called to challenge. Although we would not dwell on the issue in this second appeal, if the evidence of PW1 is left as it was, that is PW1 and members of public who arrested 2nd appellant, followed a trail of beans and footsteps up to his home, more questions arise as to how the 1st appellant was identified just before he was arrested; whether it was by recognition or identification. If it was by recognition, PW1's evidence should have indicated so and stated how he was arrested.

While this issue is still lingering in our minds, it is to be noted that the items that were robbed from PW1 and PW2 were not recovered. The evidence of identification of the 3rd appellant is also not without problems, PW2 stated in her evidence that she identified him as a neighbour known by the name "Maboni," while PW1 merely said she was able to identify the 3rd appellant as she had seen him the previous day. At the appellate level, we find these were mere dock identifications which could not be verified from the witness statements given to the police. There was no evidence to show that the witnesses knew the assailants and therefore recognized the 3rd appellant and gave his name to the police

or to the people they reported the incident to. It is not also clear from the evidence on record whether 3rd appellant was also known as "Maboni." Similarly the 1st appellant was apprehended a year later by members of public led by PW3 the husband of PW1, and the same issue arises whether his name or descriptions were given to the police immediately after the robbery.

Further questions abound on whether the 1st appellant was trying to evade arrest as it took almost one year to arrest him. All these questions were not answered, they left gaps in evidence and with respect, had the learned Judges re-evaluated the evidence of identification by recognition, they would have arrived at the conclusion that the prosecution's evidence did not meet the required test.

In the circumstances, we allow the appeal, set aside the conviction and quash the death sentence. Unless the appellants are otherwise lawfully held, they are set at liberty forthwith.

Dated at Eldoret this 30th day of January, 2013.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. KARANJA

….....

JUDGE OF APPEAL

M. K. KOOME

….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR