IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 644 OF 2010 (R)

BETWEEN

RICHARD MUTUKU MUTISYA ……..... 1ST APPELLANT

JOHN NGUMBAU PETER ……....…….…… 2ND APPELLANT

AND

REPUBLIC ……..……..…… RESPONDENT

(Appeal against the decision of the High Court of Kenya at Machakos (Ojwang & Lenaola, JJ.) on the 22nd April, 2008

in

HC. CR. A. No. 57 & 58 OF 2005)

JUDGMENT OF THE COURT

The appellants were convicted and sentenced to death on a charge of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the 3rd day of August, 2004 at Kangundo Township in Machakos District within the Eastern Province, jointly while armed with a dangerous weapon namely a knife, robbed Albanus Mutisya Mweu of one jacket valued at Kshs.1,200.00 and a pair of leather shoes valued at Kshs.1,500.00 and cash Kshs.200.00 and at or immediately before or immediately after the time of such robbery used actual violence to the said Albanus Mutisya Mweu.

Being dissatisfied with the said conviction and sentence, the appellants preferred an appeal to the High Court of Kenya, (Ojwang and Lenaola, JJ.).

Upon re-evaluation of the evidence tendered before the trial court, the High Court dismissed the appeal and affirmed the aforesaid conviction and sentence. The appellants then moved to this Court and filed a second appeal.

In their homemade memoranda of appeal, the appellants raised several grounds of appeal but **Mr. Edward Rombo**, the appellants' learned counsel, chose to argue only two of them which may be stated as hereunder:

i. The first appellate court erred in law in upholding the appellants' conviction without sufficient evidence on identification of the appellants.

ii. The first appellate court erred in law in upholding the appellants' conviction when no exhibits had been produced before the trial court.

The brief facts of the case that gave rise to this appeal were that on the material day, between 9.30 p.m. and 10.15 p.m., **Police Constable Urbanus Mutisya, PW1**, was walking home within Kangundo town along Kangundo-Mwala Road. There was bright moonlight. As he passed an area where there were electric lights, two men emerged from the left hand side of the road heading to the opposite direction. As he was by passing them, he was grabbed on his shoulders by one of them. The assailants demanded money from PW1 but he told them that he did not have any. They dragged him to the edge of the road and sensing danger, PW1 punched one of the attackers, who in return stabbed him on his left hand. The attacker was standing in front of PW1 and that enabled PW1 to see and recognize him as Ngumbau, the second appellant, since he was well known to him. Ngumbau demanded money with menaces and stabbed PW1 on the stomach.

PW1 sat down and he recognized the second man (the first appellant) as Mutisya, a person he had known for a long time. The appellants stole the complainant's jacket, shoes, Kshs.200.00 and took off. Shortly thereafter, a motorist stopped and carried PW1 to Kangundo Hospital for treatment. The incident was reported at Kangundo Police Station that same night. PW1 told his parents that he had been attacked and robbed by the appellants and a search for the robbers was mounted. The second appellant was arrested on the same night while the second appellant was arrested after a week. The arrest of the second appellant came after the two appellants attacked and robbed another person, **Mwanza Mulwa, PW2**. The second appellant was well known to PW2. The second appellant was arrested by members of the public and was wearing the black jacket that had been stolen from PW1. He was also in possession of the complainant's shoes. The shoes and the jacket were shown to PW1 during the trial and he was able to identify the same without any difficult at all. In respect of the recovered items belonging to PW1, the trial court's record of his testimony is as follows:

> ***"My jacket dark green in colour is before court. I have been with (sic) this jacket since the year 2002. It is mine, because I have been using it for long. I was wearing this jacket at the time of the attack. It has blood stains, and even the hole mark by the knife which penetrated into my stomach can be seen. The penetrating wound is before court*** *(sic).* ***It is the accused 1's knife that cut through the jacket and also cut me. The knife is before court – MFI 2. The shirt I was wearing on this day has a knife hole that penetrated into my stomach and is also blood stained – MFI 3. The shoes I was wearing on this day are before court. They are black shoes size No. 10. I have been having them since 2002. The black shoes will be marked as MF14."***

The evidence regarding recovery of the jacket and shoes belonging to PW1 was corroborated by **Josephine Mutomo Kitusa, PW3** and **Michael Ngumbao, PW4.**

Regarding the arrest of the appellants, Police Constable **Absalom Wandabwa, PW6,** testified that on the night of the said robbery at about 11.00 p.m., he re-arrested the second appellant, who had earlier been apprehended and beaten by members of the public. He took him to the same hospital where PW1 was being treated. PW1 was able to recognize the second appellant as one of the two people who had earlier robbed and assaulted him. The first appellant was arrested at Tala Market.

The appellants' counsel submitted that there were no favourable circumstances for a positive identification of the appellants by PW1. Although the witness had testified that the scene of the robbery was well lit by electric light, there was no evidence as to how bright the light was. Further, the trial court should not have convicted the appellants on the uncorroborated evidence of PW1, Mr. Rombo asserted.

Regarding recovery of the complaint's jacket and shoes, counsel submitted that the said items had not been produced in court as exhibits, they had only been marked for identification. Failure to produce

the said items was fatal to the prosecution case, Counsel stated. On those grounds, he urged this Court to allow the appeal.

In response, **Mrs. G. Murungi,** Senior Assistant Director of Public Prosecutions, for the respondent, submitted that there was bright moonlight and electric light that enabled the complainant to see and recognize the appellants. One of the appellants was found in possession of the complainant's stolen items, a jacket and a pair of shoes, minutes after the robbery. The complainant was able to identify the said items as being the ones he had been robbed of. Although the recovered items were not formally produced as exhibits before the trial court, that was not prejudicial to the appellants because their conviction was based on PW1's evidence of their recognition. She urged the court to dismiss the appeal.

To determine this appeal, we must consider whether the evidence of PW1 was sufficient and reliable. Was his recognition of the appellants reliable and free from any possibility of error? It has long been established that evidence of visual identification in criminal cases can occasion a miscarriage of justice in case of mistaken identification, hence the need to examine carefully such evidence. See **R v TURNBULL [1956] 3 ALL ER 549.**

In this appeal, the robbery took place at night. The scene of the robbery was along a tarmac road, an open place that was well illuminated by bright moonlight and electric light. The complainant, PW1, saw the two appellants walking towards him from the opposite direction.

The two appellants were well known to him. PW1 testified that the second appellant was from his home area and he had known him for a long time. He had also seen the first appellant several times in the company of the second appellant. He was able to describe in minute detail the role played by each of the appellants in the robbery. Immediately after the robbery, PW1 told his parents that he had been attacked and robbed by the appellants. The appellants did not dispute that they were known to the complainant.

Taking into consideration all the above we are satisfied that there existed favorable circumstances for positive identification, nay, recognition of the appellants by PW1. As was stated in **ANJONONI & OTHERS v REPUBLIC, [1980] KLR 59,**

> ***"Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on personal knowledge of the assailant in some form or other."***

Did the evidence of PW1 require corroboration before it could form the basis of the appellants' conviction? We do not think so. In **ABDALLA BIN WENDO & ANOTHER**, **[1953] 20 EACA 166**, the Court delivered itself thus:

> ***"Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."***

We have already held that there was sufficient light to enable the complainant to recognize his assailants and even if his evidence had not been corroborated, the trial court's conviction of the appellants cannot be faulted in the circumstances. We therefore reject the first ground of appeal.

Turning to the second ground of appeal, the trial court's record does not reveal that the various items that were marked for identification were ever produced as exhibits. That included the complainant's blood-stained jacket, shirt and pair of shoes. All those items were shown to the court and the complainant confirmed that they were his. We think there was an oversight on the part of the

prosecutor in failing to have the investigating officer formally produce the marked items as exhibits. That oversight, in our view, did not occasion any miscarriage of justice or prejudice to the appellants. **Section 382** of the **Criminal Procedure Code** states that:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

The appellants' conviction was not entirely based on recovery of the said items but rather on strong evidence of recognition as earlier stated. The second ground of appeal must also fail.

Having carefully considered the entire record of appeal, we find no merit in this appeal and dismiss it in its entirety.

Dated and Delivered on this 22nd day of November, 2013.

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

…….……..

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