



REPUBLIC OF KENYA

COURT OF APPEAL

AT MALINDI

CRIMINAL APPEAL 79 OF 2010

BETWEEN

MICHAEL TSUMA

MWAWAZA BENYOKA MWATHENJE ..... APPELLANTS

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Omondi & Odero, JJ) dated 18<sup>th</sup> March, 2010

in

HCCR.A NOs. 93 & 94 OF 2008)

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**JUDGMENT OF THE COURT**

The two appellants herein, namely **MICHAEL TSUMA**, the first appellant and **MWAWAZA BENYOKA MWATHENJE**, the second appellant, were tried and convicted by a Senior Resident Magistrate at Kilifi on a charge of robbery with violence contrary to **Section 296 (2) of the Penal Code**. The particulars of that charge were that on the night of 15<sup>th</sup> December, 2005, at Simakeni Village, Rabai Location in Kilifi District of the Coast Province, the two appellants together with others while armed with dangerous or offensive weapons, to wit a panga and an axe, jointly robbed **Peter Sila Muindi** of cash KShs.29,000/-, one mobile phone make Siemens C50 valued at KShs.4,000/-, one charger, one radio, assorted clothes and utensils and that at or immediately before or immediately after the time of such robbery, used actual violence to the said Peter Sila Muindi.

During the night of 14<sup>th</sup>/15<sup>th</sup> December, 2005, Peter Sila Muindi (PW 1) was asleep in his house; he was in the same house with his daughter **Fatuma Mohamed** (PW 2) and his son **Mwanaidi Ndumba Sila** (PW 3). They were then attacked by a group of four persons and according to the three witnesses, among the four persons were the 1<sup>st</sup> appellant who was an employee of Peter (PW 1) and the 2<sup>nd</sup> appellant who also used to work for Peter on a casual basis, that is, on and off. Peter and his two children

swore that they recognized the two appellants; there was light provided by a lantern which was on in the house. Both the appellants admitted that they and Peter and his family knew each other. In his unsworn statement in defence, the 1<sup>st</sup> appellant told the magistrate:

*“The complainant is known to me, I once worked for him at Rabai. The 2<sup>nd</sup> accused is a neighbour. ...”;*

and for his part, the 2<sup>nd</sup> appellant said:

*“... the accused is a neighbour and the complainant is known to me, he is a farmer there. ...”*

The complainant Peter, his daughter and son were saying that they were able to recognize the two appellants with the aid of light from the lantern; the two appellants were persons known to them. A report of the robbery was first made to the Chief of the area, Stephen Muta (PW 5). The report was made to him on the 15<sup>th</sup> December, 2005, and Stephen testified that the names of the suspects were given to him. Police Constable Kiplagat (PW 6) of Kaloleni Police Station also received the report of the robbery on the 16<sup>th</sup> December, 2005 and he also swore that the names of the suspects were given to him.

In a short unsworn statement, the 1<sup>st</sup> appellant was apparently saying that during the night of 14<sup>th</sup>/15<sup>th</sup> December, 2005, he was in his house the whole night and was surprised when he was arrested on the 19<sup>th</sup> December, 2005. The 2<sup>nd</sup> appellant for his part said nothing about the night of 14<sup>th</sup>/15<sup>th</sup> December, 2005, and merely talked about the 19<sup>th</sup> December, 2005, when he was arrested.

The trial magistrate who heard and saw all the parties give evidence before him found the two appellants guilty as charged and convicted each one of them. In finding them guilty, the magistrate concluded his judgment as follows:

*“According to the complainant the lantern in the house was on at the time and it is from that light that they were able to see their attackers. The Court is satisfied that for the two accused persons who were previously working there have been positively identified. The P3 form produced by doctor (sic) Kimanga shows Peter Sila’s head injuries and tenderness on the back. According to the witnesses, the attackers were armed with pangas and Peter was hit repeatedly. The ingredients of robbery with violence under Section 296 (2) of the Penal Code have been proved beyond reasonable doubt. The accused are found guilty and convicted accordingly.”*

The magistrate then proceeded to sentence each appellant to death. An appeal to the High Court followed and by its judgment dated and delivered on the 18<sup>th</sup> March, 2010, the High Court (Omondi & Odero, JJ) dismissed the appeals against the conviction of each appellant and confirmed the sentence of death imposed on each one of them. The appellants now come to this Court by way of a second appeal and that being so, the Court under **Section 361 of the Criminal Procedure Code** is only entitled to deal with issues of law.

Mr Adam O. Hamza, learned counsel for both appellants, argued two points before us. The first point we understood to be the one pertaining to the circumstances under which Peter and his two children purported to recognize the two appellants. Mr Hamza submitted that the witnesses did not talk about the intensity of the light emanating from the lantern and since the witnesses did not say how strong the light was and the two courts below did not consider that point, the appellants’ conviction was, in all the circumstances, unsafe. Mr Hamza also submitted that Peter (PW 1) was in control of the investigations because it was that witness who told the police to hold or not to hold an identification parade. In Mr Hamza’s view, the evidence of Peter regarding what was stolen was very general. Peter did not prove that he had with him the items allegedly stolen from him and since none of the stolen items was recovered, the appellants were convicted on insufficient evidence.

Mr Ondari, the Assistant Deputy Public Prosecutor, supported the appellants conviction which he said was based on the evidence of recognition by Peter, his daughter and son.

On the recorded material before us, there cannot be any doubt that Peter, his son and daughter knew the appellants and the appellants also knew them. We have already set out the portions of each appellant's evidence in which each of them said they knew Peter as a farmer in the area. Again, Peter and his two children said a lantern was on in the house when the robbers struck. The issue raised by Mr Hamza concerns the intensity of the light from the lantern not that there was no light at all in the house. The Judges of the High Court on the first appeal dealt with that issue in this manner:

*"... From the evidence of PW 1, there was a lantern burning which enabled him to see the appellants so the source of light was disclosed. PW 2 was in the same room and confirmed seeing the two appellants and recognizing them as their former workers. We do not know what other description PW 1 should have given, anyone who has grown up in a rural setting is fully alive to the nature of light that a lantern produces; it is certainly superior to, say a candle or the rudimentary tin lamp. This was not just restricted to identification of a stranger, but recognition of someone known to the complainant and PW 2 – there was no mistake in identification."*

On this aspect of the matter, Mr Hamza told us that it is also a notorious fact that when people go to sleep, they lower the intensity of the light so as to enable them sleep.

For our part, we are and cannot deal with theories or suppositions which are not borne out by the evidence. True, a court can take judicial notice of various matters but the kind of matters a court can take judicial notice of are set out in **sections 59 and 60 of the Evidence Act, Chapter 80, Laws of Kenya. Section 60** in particular, sets out in detail – from paragraph (a) to paragraph (p) – the matters of which a court can take judicial notice. The nearest to what Mr Hamza was saying could be in paragraph (o), that is:

*"all matters of general or local notoriety."*

We are not aware, and no evidence was led in any of the two courts below or before us that it is a matter of general or local notoriety that people using lanterns as a source of light turn them down to enable them sleep. In the appeal before us, Peter and the daughter Fatuma (PW 2), swore that they were able to recognize the two appellants with the aid of the light provided by the lantern. Nobody ever suggested to Peter that in compliance with the alleged notorious practice he had lowered the light provided by his lantern and therefore, was not in a position to recognize the appellants. On the contrary, the witnesses immediately gave the names of the two appellants to the local chief and to the police.

We have said, time without number, that on a second appeal such as this one, the court will only interfere with concurrent findings of facts where it is shown:

(a) *that the findings were based on no evidence at all;*

*or*

(b) *that if there was evidence it was of such a nature that no reasonable tribunal could have acted on it;*

(c) *that the two courts below failed to appreciate the nature or bearing of the material before it and hence reached an erroneous conclusion-*

see for example, **M'RIUNGU VS REP (1983) KLR 455** cited in **CRIMINAL APEAL NO. 194 OF 2007, BENARD KAGUMA WAMUNYU VS REPUBLIC (Unreported)**.

Mr Hamza did not contend before us that any of those principles applied in the circumstances of these two appeals. No proper identification parade evidence was led before the magistrate and neither of the two courts below relied on such evidence. Like the two courts below, we are satisfied that the appellants participated in the robbery in the house of Peter and that the conviction recorded against each of them was and still is safe. The sentence of death which was imposed on them was lawful. The sentences have now

been commuted to life imprisonment. There is, accordingly, no basis upon which we can interfere. That being the view which we take of the matter, the two appeals wholly fail and we order that they be and are hereby dismissed.

**Dated and delivered at Mombasa this 15<sup>th</sup> day of March, 2012.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**J. G. NYAMU**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**