IN THE COURT OF APPEAL
AT NYERI

(CORAM: OMOLO, ONYANGO OTIENO & VISRAM, JJ.A)

CRIMINAL APPEAL NOs. 357 & 359 OF 2009

BETWEEN

STEPHEN KIBUTHA M'MWONGO
SILAS MARETE ……. APPELLANTS

AND
REPUBLIC …… RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Meru (Kasango & Emukule, JJ) dated 20th November, 2009

in

H. C. Cr. A. No. 165 & 166 of 2006)
****

JUDGMENT OF THE COURT

The appellants, ***Stephen Kibutha M'Mwongo*** and ***Silas Marete***, were tried by the Senior Resident Magistrate at Meru (Mrs. M. S. G. Khadambi) on a charge of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The particulars of the charge were that on the 19th day of December, 2004 at Thinyaine location in Meru-North District within Eastern province, jointly with others not before court, while armed with offensive or dangerous weapons namely pangas and rungus they robbed ALUBINO NDIMBO one radio cassette, one blanket, one wrist watch, one mobile charger and one spot light all valued at Kshs.2,650/= and at or immediately before or immediately after the time of such robbery wounded the said ALUBINO NDIMBO. They were also charged with the offence of assault causing actual bodily harm contrary to ***section 251*** of the Penal Code.

The evidence adduced against the appellants was that on the 19th December, 2004 at about 9.00 pm Alubino Ndimbo (PW 1) (the complainant) and his wife Christine Rugiri Ndimbo (PW 3) (Christine) were watching TV in the sitting room of their home in Meru when suddenly they heard a bang on their door, and found two men standing at the door way. They carried pangas, and were followed by several other men, all with pangas. The only lighting in the room was from a hurricane lamp. The complainant immediately grabbed the first man by his legs, with both men landing outside the door, where it was dark. As he lay on top of the intruder, the other gang members began attacking him, and the man, who he had initially over-powered, attacked him with a panga, cutting his fingers, and the right side of his body. Other members of the gang removed his wrist watch. Meanwhile, Christine, his wife, was also under attack and screaming loudly. This attracted the attention of the neighbours, several of whom responded by pelting stones on the house. The robbers panicked and escaped. None of the neighbours saw

them. The complainant and Christine, who allegedly saw the robbers, did not mention the names or the identities of the robbers to the neighbours at that time. The injured couple were taken to the hospital for treatment, and then to the police station to file the report. It is at the police station that they gave the names of the two appellants, as being part of the gang that attacked and robbed them. Both related how they recognized the two appellants as being their neighbours who they had known for ten years.

Based on this report, and the description given by the complainant and Christine, the two appellants were arrested. The first appellant was arrested on 19th January, 2005 at his house, while the second appellant was arrested in March, 2005 – almost three months after the incident – also at his home. None of the items allegedly stolen were recovered.

The Senior Resident Magistrate heard and recorded the evidence from six prosecution witnesses, while both the appellants gave unsworn statements, denying the charge, and raising alibi. Both alleged that they had been "set-up" on account of a pending land dispute with the complainant and his wife, a case that was then in court. The second appellant, Silas Marete, told the court that at the material time – from 10th December, 2004 to 23rd December, 2004, he was actually in the Mbeu area working as a casual employee harvesting tobacco.

However, at the end of it all, the Senior Resident Magistrate believed the prosecution case; rejected the appellants' testimony; convicted both the appellants and duly sentenced them to death.

The appellants appealed to the superior court, and by its judgment dated 20th November, 2009 that court (Kasango & Emukule, JJ) dismissed the appeals against conviction and confirmed the sentences of death.

The appellants are now before us on this second and final appeal and that being so the jurisdiction of this Court is confined to considering only issues of law – see ***section 361*** of Criminal Procedure Code. The appellants drew up home-made memoranda of appeal, raising four grounds relating mainly to the issue of identification and their defences not having been given due consideration.

However, in a supplementary memorandum of appeal filed on their behalf by their learned counsel, Mr. Maitai Rimita, the appellants raised five grounds of appeal as follows:

"1. The Learned Judges of the High Court erred in Law in upholding the conviction and sentence of the subordinate court.

2. The Learned Judges of the High Court erred in Law in finding that the appellant had been sufficiently identified or/and recognized.

3. The Learned Judges of the High Court erred in Law in that they failed to find that the prosecution case was full of contradictions and had not been proved beyond reasonable doubt.

4. The Learned Judges of the High Court erred in Law in not finding that the Appellant's defence was not considered or sufficiently considered and therefore prejudicing the appellant's case which was against the law.

5. The decision of the Judges of the High Court is bad in Law."

At the hearing before us, Mr. Rimita chose to combine the grounds and argue them broadly. He argued that the superior court failed to analyze and evaluate the evidence in order to come to its own conclusions; that the identification of the appellants was unreliable; that none of the stolen items were recovered; and that the appellants alibi defences, and claims of having been "set up" were neither investigated nor given due consideration. With respect specifically to the issue of identification by recognition, Mr. Rimita submitted that given the poor lighting conditions at the material time, there were serious doubts that the appellants were "recognized", and further that the complainant's and Christine's failure to mention the appellants' names to the neighbours immediately after the incident created a doubt whether they had indeed recognized the appellants.

Mr. J. Kaigai, learned Principal State Counsel, on the other hand, submitted that there was no error in identification as the incident took place in an area where there was sufficient light; and that the robbers were known to the victims for some ten years.

The two main issues here are identification, and whether the alibi defences of the appellants, together with their claims that this was a "set-up" had any merit.

Let us turn to these defences. In their unsworn statements before the trial court, both the appellants denied the charges and raised alibi. Both alleged that they had been "set up" on account of a pending land case with the complainant and Christine. The second appellant also claimed that he was in Mbeu area working as a casual labourer.

However, this alibi, together with the explanation relating to the land dispute was not investigated, and the lower court went ahead to find the two appellants guilty of the charge, and sentenced them to death.

In a brief two-page judgment, the lower court expressed itself, in part, as follows:

"PW 1 Alubino Ndimbo M'Ni Mwingi, and PW 3 Christine Rugiri Ndimbo, the two complainants were at home watching television. The two are man and wife. On 19/12/05 at 9.00 pm their door was banged loudly and it opened, to reveal the two accused with other men in tow, all armed with pangas. The complainant saw the attackers using the bright hurricane lamp that was on the table in the room measuring 12 feet square. Both accused are close neighbours to the complainants and they had not worn any masks and/or covered their heads with any hats."

The learned Senior Resident Magistrate then concluded:

"Having heard both parties herein, I find that the prosecution witnesses were quite consistent and straight forward. I have no doubt in my mind that the hurricane lamp was bright enough for both complainants to see and clearly recognize the assailants, the two accused. I do not find that the other criminal case the parties have could have been the motivation for the complainants to frame up the accused. I am also satisfied that the complainants presented their initial report of robbery by naming the two accused, so that they did not need to give a further physical description. I am fully satisfied that all the ingredients that go towards the formation of a robbery with violence case have been met. The defence presented did not raise any triable issue(s)."

The reference to "triable issues" is unfortunate, as, indeed, the burden in a criminal case is on the prosecution to prove the case beyond reasonable doubt.

In dismissing the appeal, the superior court delivered itself, in part, as follows:
"We in turn fully agree with that finding of the learned magistrate. The evidence is clear that the complainants recognized the appellants, who were known to them for a long time, as they stood by the door way of their sitting room which was lit by a hurricane lump. We note that the robbery took place at night but both complainants were very clear that there was sufficient light from the hurricane lamp. This was the case of recognition and in the case of *R. Vrs. Turnbull* *[1976] 3 ALL ER 549* the court found that recognition is more reliable than identification of a stranger. We are all aware that even identification can have errors. This indeed was the finding of the Court of Appeal in the case of *Abdalla Bin Wendo Vrs REG* *[1953] EACA 166*, where the Court of Appeal of East Africa had this to say:-

'…… but on identification issue a witness may be honest yet mistaken and may make erroneous assumption particularly if he believes that what he thinks is likely to be true ……'

We are however persuaded that there was no error in the identification of the appellants since this was not a case of a single identifying *(sic)* rather recognition of the appellants. PW 1 and III were clear in their evidence that they saw and recognized both the appellants who had not disguised themselves when they appeared at their door step. The fact that there existed a case between one of

the appellants and PW III in our view does not detract from the efficacy of the evidence of recognition. It is sufficient and meets the required standard of proof. The defence offered by the appellants does not displace that evidence. Moreover, the defence was given by way of unsworn testimony."

On our reading of the evidence on record, and with great respect to both the courts below, we are of the view that the identification of the appellants as the robbers was questionable for the following reasons: given that the entire prosecution case rested on the credibility and proper identification by the complainant and his wife, Christine, the two courts below failed to note two serious issues that compromised the credibility of these witnesses. First, given the poor lighting conditions at the house, the courts did not inquire into the time the robbers took with the victims to determine if it was sufficient to "recognize" the appellants. Secondly, the fact that the victims failed to give the names of their attackers to the neighbours who came to their rescue, and did so only to the police much later, lent credence to the appellants' claim that they had been set-up. Christine's attempt to explain that omission during trial, and in cross-examination, that she did not mention the names of the attackers immediately was to "protect them from being lynched". That kind of an explanation is highly questionable, in our humble view. It would be difficult to accept that a victim would want to "protect" her attacker. Rather, it would appear to have been an after-thought, given the appellants' claim that there was a pending land dispute in court between them and the victims. In a criminal case, the accused cannot be penalized for giving unsworn defence as that is his legal right.

Secondly, both the appellants had an alibi – that they were elsewhere at the time of the incident. In the second appellant's case, he was away for almost three months in the Mbeu area harvesting tobacco. They also claimed that there was a pending land dispute between them and the complainant and Christine. None of these claims were investigated. The burden is not on the appellants to prove their innocence. It is on the prosecution to prove them guilty beyond reasonable doubt. We are of the view that the prosecution did not discharge this burden.

Accordingly, we find the convictions to be unsafe, quash the same, set aside the sentences imposed on both the appellants, and order that they be released from prison forthwith, unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nyeri this 7th day of July, 2011.

R. S. C. OMOLO

…….……
JUDGE OF APPEAL

J. W. ONYANGO OTIENO

…….……..
JUDGE OF APPEAL

ALNASHIR VISRAM

…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR