IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, GITHINJI & AGANYANYA, JJ.A.)

CRIMINAL APPEAL NO. 383 OF 2009

BETWEEN

1. **QUERESH MULI MUTINDA**
2. **ANTONY MUSANGO NDUNDA**
3. **JULIUS NDALI MULI .....APPELLANTS**

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Machakos (Ochieng & Lenaola, JJ.)

dated 23rd September, 2009

in

H.C.CR.A. NOS. 91, 92 & 93 OF 2007)

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JUDGMENT OF THE COURT

Although **Julius Ndali Muli** is shown as a 3rd appellant in this appeal, that is an error by the registry as he died on 10th July, 2007 before his appeal in the superior court was heard. Indeed, the superior court marked his appeal as abated on 15th July, 2009. As a consequence, the record of appeal is rectified by deleting his name to reflect **QURESH MULI MUTINDA** as the first appellant and **ANTONY MUSANGO NDUNDA** as the second appellant.

The two appellants and the deceased were convicted by the Senior Resident Magistrate Machakos of robbery with violence contrary to **Section 296 (2)** of the *Penal Code* and sentenced to death. The appellants' first appeals to the superior court were dismissed hence the present appeal.

The appellants were alleged to have robbed **Richard Mutinda Nzioka** (complainant) of cash Shs.6,700/= and a pair of safari boots on the night of 13th September, 2006 at 12.30 a.m.

The 1st appellant **Queresh Muli Mutinda** and the 2nd appellant **Antony Musango Ndunda** were the 2nd and 3rd accused respectively at the trial while the deceased **Julius Ndalu Muli** was the 1st accused.

The complainant testified at the trial, among other things, that on 12th September, 2006 he sold bricks for Shs.7,000/=; that the bricks were carried by a tractor in turns; that the tractor ultimately had a puncture; that after the punctured wheel was pressurized with air, the tractor left; that at about 10.00 p.m. he went to a bar at Thwangu market in the company of the tractor driver; that as they were taking beer, the two appellants and the deceased all of whom he knew before entered into the bar; that the three started making noise causing the complainant and the tractor driver to leave the bar; that the deceased held the tractor driver as he was leaving the bar and both started struggling; that the 1st appellant and the 2nd appellant came out of the bar; that the deceased asked the tractor driver why he had come from afar to work in the area and hit the tractor driver; that the complainant asked the 1st appellant why they were harassing the tractor driver; that the complainant and the tractor driver left; that thereafter, the 1st appellant pushed the complainant on to a stone before he reached a river. The complainant described what happened, thereafter, thus:

"Accused 2 is the one who pushed me and accused 3 hit me with a club. Accused 1 held my hands while accused 2 held my legs. They threw me through a barbed wire and I fell on the other side. They reached for me again and pushed me to the wire again. Accused 1 had a knife, accused 2 had a club. I was able to see them clearly because there was full moonlight. Acccused 2 cut me with a panga on my right leg near the knee. He also hit me on the left hip. Accused 1 stabbed me twice on my left hand. Accused 2 demanded for money. I told him the money was in the rear right pocket. Accused 1 reached for my wallet which contained Kshs.6,700/=. He then told the others to leave but accused 2 suggested that they check in the shoes. Accused 3 and accused 2 checked in the shoes. Accused 2 started shouting that I had robbed him of his mobile phone and even people at home heard it. I called accused 2 by his name – Muli and asked him if he could indeed do that to me and he said he could even kill me".

The complainant reported at the Chief's camp on the following day. As the complainant was reporting the 1st appellant appeared at the Chief's camp whereupon the complainant reported that he was one of the robbers. On being questioned, the 1st appellant denied the robbery. The appellants were arrested on 15th September, 2006. The house of the deceased was searched and a pair of shoes which the complainant later identified as his were recovered.

The 1st appellant testified at the trial that he did not commit the offence and that he did not know anything about it.
On his part, the 2nd appellant made unsworn statement at the trial that he knew nothing about the robbery.

The trial magistrate considered the evidence and said in part:

"Although the evidence of the complainant was uncorroborated, the same was nevertheless truthful and reliable. He knew all the accused persons before and saw them clearly because there was full moonlight. He even called out accused 2 by his name Muli and since the complainant had no reason to frame up the accused persons coupled with the fact that he accompanied PW2 and PW4 to where the accused persons were and arrested them. I find that the accused persons jointly robbed the complainant of cash Shs.6,700/=".

On its part, the superior court re-appraised the evidence and concluded:

"Of course, there was only one identifying witness in this case. It was therefore incumbent upon us to satisfy ourselves that the recognition of the appellants were free from any doubt. In this case we are satisfied that the evidence pointing to the guilt of the appellants, although based on the testimony of a single identifying witness can be safely accepted as free from the possibility of any error.

Having come to the conclusion that the appellants were positively recognized by the complainant, who went on to describe the exact role played by each of them, it does follow that the defences of the appellants cannot be true because the appellants cannot have been in two places at the same time. In effect, the defences did not cast any shadow of doubt on the case put forward by the prosecution".

Mr. OndiekI, learned counsel for the appellants, mainly relied on the grounds of appeal contained in the supplementary memorandum of appeal in which the appellants complained in essence, that, the superior court erred in law in relying on evidence of identification which did not meet the required legal standards; that circumstantial evidence did not meet the required legal standards; that the superior court erred in law in failing to take into account the defence of intoxication; that the superior court erred in law in confirming the conviction on the basis of uncorroborated evidence and that the superior court and the trial court erred in law in shifting the burden of proof.

In support of the appeal, Mr. Ondieki submitted, among other things, that the identification of the appellants was not free from error; that the complainant had taken alcohol on the material day from 10.00 p.m.; that the complainant did not describe the intensity of the moonlight; that the 2nd appellant's defence of intoxication was not considered; that the trial magistrate shifted the burden of proof in requiring the appellants to explain where they were on the material night; that the appellants were not given a fair trial in that the trial court convicted them before considering their defence, and, in failing to re-call witnesses after the charge was substituted. On the other hand, Mrs. Ouya, the learned Deputy Prosecuting Counsel supported the conviction and sentence and submitted, among other things, that this was a case of recognition; that there was full moonlight; that the complainant had sufficient time to recognize his attackers; that the complainant gave the names of the robbers; that the superior court appreciated that this was a case of a single identifying witness at night; that the trial court did not shift the burden of proof and appellants received a fair trial.

Section 361 (1) of the *Criminal Procedure Code* allows a second appeal, such as the present one, only on a matter of law. As this Court held in **M'Riungu vs. Republic** [1983] KLR 455, where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation of treating holdings of fact as holdings of law or mixed findings of fact and law and further that, the appellate court should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence no reasonable tribunal could have reached that conclusion (see also **Mwita vs. Republic** [2004] 2 KLR 60).

The Court further held in **M'Riunga's** case that whether an accused person could be convicted on the evidence of a single identifying witness in circumstances rendering identification difficult would be a question of mixed fact and law (see also **Kamau vs. Republic** [1975] EA 139).

The main ground of appeal relates to the evidence of identification of the appellant. In this case, the trial court made findings of fact, among other things, that there was full moonlight; that the appellant saw the three robbers clearly; that the complainant had seen the three robbers earlier in the bar; that the complainant knew the three robbers before; that the complainant called the 1st appellant by name; that the complainant had no reason to frame up the appellants; that the complainant accompanied **Sabastian Kiilu Ndungi** (PW2) and **APC Raphael Mutune** (PW4) to where the appellants were arrested and that the complainant was truthful and reliable.

The superior court on its part made findings that, the complainant had known the appellants before the incident; that there was lighting from full moon; that the complainant was in close proximity to the appellants; that the complainant had a good opportunity to recognize the robbers; that the complainant

reported the incident and named the attackers at the earliest opportunity; that the complainant described the exact role played by each appellant and that the complainant positively recognized the appellants.

There were thus concurrent findings of material facts. The trial and the first appellate court appreciated that the prosecution case was dependent on the evidence of identification by a single witness at night. Nevertheless, the two courts below after considering all the circumstances found the evidence of the complainant to be reliable and free from any possibility of error.

The trial court made a specific finding that the evidence of the complainant was truthful and reliable. Neither the superior court nor this Court can interfere with the findings which were based on the credibility of the complainant unless, among other things, no reasonable tribunal could have made such findings. The two courts below tested the evidence of the complainant with circumspection before relying on it.
The appellants in their respective defences merely made a bald denial of the charge.

Regarding the submission that the superior court erred in relying on the evidence of the complainant who had taken alcohol, it is true that the complainant testified that he and the tractor driver went to a bar on the material night at 10 p.m. It is also true that the charge sheet indicates that the complainant was robbed at 12.30 a.m. There was, however, no evidence of how many beers the complainant took or evidence that he was drunk by the time he left the bar to such a degree that he could not recognize anybody. Furthermore, the appellants who were represented by a counsel in the superior court did not raise the issue of drunkenness.

As for the next ground that the burden of proof was shifted raised by the appellants counsel on record in the superior court, we say this: It is true that the trial magistrate commented that the appellants did not say where they were on the material night after he had already found them guilty. However, the trial magistrate expressly stated that the appellants had no burden to discharge. The comment made by the trial magistrate though unfortunate did not occasion any failure of justice as what the trial magistrate said in essence is that the appellants had not raised a defence of alibi.

It is not, with respect, correct that the 1st appellant raised a defence of intoxication at the trial. Indeed, he did not say in his evidence in chief that he was intoxicated. However, it is true that he stated in his evidence in cross-examination that he did not remember what happened on 12th September, 2006 at 10 p.m. and added:

“If I was in the bar then I was too drunk. I had taken a lot of beer”.

The 1st appellant did not admit that he was in the bar at Thwangu market on the material day nor stated that he robbed the complainant but was intoxicated to the extent that he did not know it was wrong or that he did not know what he was doing. It is clear that the 1st appellant did not infact raise the defence of intoxication as known to law.

The complaint that the appellant did not receive a fair trial because they were not allowed to re-call witnesses after the charge was substituted has no merit.

The appellants were charged with one count of robbery with violence in the original charge. When the charge was substituted, the original charge of robbery with violence was retained. The only new count in the new charge was an alternative charge against the deceased of having suspected stolen property contrary to **Section 323** of the *Penal Code* to wit a pair of safari boots. The appellants were not charged with the alternative court. The trial magistrate complied with **Section 214 (1) (ii)** of the *Criminal Procedure Code* and allowed the deceased to recall witnesses. Two witnesses were recalled and cross-examined by the deceased after which he intimated that he did not want any witnesses to be recalled. Furthermore, the appellant did not demand that any more witness be re-called.

From the foregoing, there is no basis for interfering with the concurrent findings of the two courts below which findings were founded on credible and overwhelming evidence. We are satisfied that the

appellants were properly convicted and the appeal is dismissed.

Dated and delivered at Nairobi this 10th day of December, 2010.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR