REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 59 & 60 OF 2015 (CONSOLIDATED)

(Being an appeal against conviction and sentence in Narok Criminal Case No. 554/2013 – T. A. SITATI SRM)

BENSON REREU KOILA…..……..1ST APPELLANT

JACKSON NAINGESHA…..…….2ND APPELLANT

-VERSUS-

REPUBLIC…….RESPONDENT

J U D G M E N T

1. The 1st Appellant **Benson Rereu Koila** and the 2nd Appellant **Jackson Naingesha** were jointly charged before the Chief Magistrate's court at Narok with two counts of Robbery with violence contrary to section 296(2) of the Penal Code. The particulars to the first charge state that on the 21st day of May 2013 at Total Estate in Narok North District within Narok County, jointly with others not before court while armed with dangerous weapons namely *rungus* and swords they robbed **Paul Omuchanya Miya** of an airtel mobile phone worth Ksh 2,000/= and cash Ksh 2,000/= and during the time of such robbery used actual violence on the said **Paul Omuchanya Miya**.

2. In the second count, the particulars are that on the 21st day of May 2013 at Total Estate in Narok North District within Narok County, jointly with others not before court, while armed with dangerous weapons namely *rungus* and swords they robbed **Samson Oluoch of** a Nokia mobile phone valued Ksh 2,000/=, Siemens Lap top valued at Ksh 38,000/=, National ID card, a KCB ATM card, 20 company cards and cash Ksh 900/= and immediately before and during the time of such robbery threatened to use actual violence on the said **Samson Oluoch.**

3. Following the trial in which the prosecution called 7 witnesses and the unsworn testimony of the Appellants, the court found the Appellants guilty and convicted them on both counts. They were sentenced to death on the first count while the sentence in respect of the second count was held in abeyance as required.

4. Through his advocate Mr. Kamwaro, the 1st Appellant has raised 26 grounds of appeal. Apart from grounds 5, 7, 22, 23 and 26 which raise different issues, the remainder of the grounds attack the evidence upon which the conviction was based. In ground 5 and 7, the 1st Appellant asserts that the judgment of the trial court lacked reason as required by the law and that the 1st Appellant's right to a fair trial was

violated through the failure by the prosecution to supply the 1st Appellant with witness statements before the trial.

5. It is also the 1st Appellant's contention in ground 23 that the court failed to follow the laid down procedure in accordance with the Criminal Procedure Code, which resulted in a mistrial. In ground 26 the 1st Appellant complains that the defence evidence was not given proper consideration. In ground 22 the 1st Appellant attacks his sentence as being harsh.

6. The second Appellant was acting in person. He filed amended grounds of appeal on the eve of the hearing. Grounds 1-3 attack the quality and adequacy of the prosecution evidence while in the 4th ground, the 2nd Appellant complains that his defence was unfairly dismissed.

7. In written submissions highlighted at the trial, Mr. Kamwaro argued the appeal under five heads. In my considered view, raising 26 grounds in the petition of appeal rendered the same unwieldy. For brevity and clarity, it is more practical to file summary grounds encapsulating different aspects, rather than a lengthy list of grounds.

8. Regarding identification, Mr. Kamwaro highlighted the failure by key witnesses **(PW1, 2 and 3)** to name the 1st Appellant to police in their report made within hours of the crime. He cited several authorities including **Maitanyi –Vs- Republic [1986] eKLR** and **Tekerali & Others –Vs- Republic [1952] Vol 19 EACA 25** for the proposition that such failure reduces the weight of the subsequent identification testimony.

9. Mr. Kamwaro submitted under the second head that the conditions in which the robbery occurred did not favor positive identification, and that the trial court should have considered closely the said circumstances, the nature of light available (in this case a lantern, broken in the course of the robbery and later, torches); the distance of the source of light relative to the suspects; and the period in which they were under observation by the witnesses. Once more, he relied on **Maitanyi's case** and **Joseph Ngumbao Nzaro –Vs- Republic [1991] 2 KLR 2012 in** asserting further the duty of the court to warn itself of the inherent dangers of relying on such identification evidence.

10. Under the 3rd head Mr. Kamwaro submitted that the trial court misdirected itself by advancing theories to fill glaring loopholes in the prosecution case; and particularly, failed to appreciate that the circumstances of the offence did not favour positive identification.

11. Under the fourth head Mr. Kamwaro stressed upon what he said were the contradictions in the prosecution evidence regarding the number of attackers (**per PW1, PW3, PW5 and PW7);** whether the robbers were armed with spotlights **(per PW1);** the nature of weapons carried by the robbers **(per PW1, PW3, PW5**); and their clothing (**per PW2, PW3);** place of arrest (**per PW1, PW5)** and words spoken in the course of robbery (**per PW1** vis-à-vis other persons present).

12. He cited the case of **Ndung'u Kimanyi –Vs- Republic [Criminal Application No. 20 of 1979]** as cited in **Harun Mwangi Kanene –Vs- Republic [2007] eKLR** regarding the minimum standard that a witness upon whose evidence it is proposed to rely should not do or say anything which creates in the mind of the court the impression that he is a person of doubtful integrity, hence unreliable, making it unsafe to accept his evidence.

13. The fifth head is really a reiteration of the submissions made concerning identification. Mr. Kamwaro underscored the fact that none of the items stolen in the robbery were recovered from any of the Appellants. Finally Mr. Kamwaro argued that the witness statements were not supplied in good time to the defence. It would seem therefore the grounds 19, 20 and 26 were abandoned.

14. The 2nd Appellant chose to rely on his home-made written submissions. He took issue with identification evidence led through **PW3**. He submitted that the trial magistrate failed to consider the conditions prevailing during the robbery in order to satisfy himself that the identification was free from

error.

15. In this regard he pointed out evidence by **PW3** that upon entering the house of **PW6**, the robbers smashed the lantern in the house. That **PW3** did not, following the robbery name the robber she claimed to have identified, in this case the 2nd Appellant. Thus he argues that the identification by a single witness in difficult circumstances rendered the evidence unsafe. Citing the evidence regarding his arrest by **PW7** the 2nd Appellant asserts that the arrest was based on mere suspicion due to his alleged relationship with the 1st Appellant.

16. On the final ground he submitted that he tendered a reasonable defence in the face of unsatisfactory and contradictory prosecution evidence.

17. Representing the Director of Public Prosecutions, Mr. Koima opposed the appeal. He asserted that the light from the lantern at the scene of robbery facilitated the identification of the robbers. That after it was smashed the robbers' spotlights illuminated the scene of the offence. He highlighted the fact that the Appellants visited **PW3** in search of **PW1** a day after the robbery. That on a repeat visit **PW3** gave the husband's **(PW1's)** telephone number to the Appellants.

18. He reiterated evidence that the 2nd Appellant was a neighbor to **PW3**. He stressed that the 1st Appellant was recognised by **PW3** and had been seen severally on previous occasions while wearing the same jacket worn during the robbery. That **PW1** in making a report to police named the 1st Appellant and that **PW2** identified the 2nd Appellant for arrest. He pointed out that the robbers were not only armed during the attack but also they visited violence on the witnesses **PW1 – 3** and that P3 forms were produced in this regard.

19. The duty of the first appellate court is to subject the trial evidence to a fresh and exhaustive evaluation and to draw its own conclusions, while bearing in mind that the trial court saw and heard firsthand the witnesses testify. The appellate court will also be slow to interfere with findings of fact made by the trial court based on the credibility of witnesses, unless such findings are clearly wrong and no tribunal properly directing itself would have arrived at them. (**See Ajode -Vs- Republic (1972) EA 32; Okeno-Vs- Republic (1973) EA 322)**.

20. The sum total of the prosecution case at the trial was as follows. Early on the night of 21st May 2013, the first Complainant **Paul Omuchanya Miya (PW1)** and his wife **Rose** C**hebet** (**PW3**) were visiting with their friends **Sera Wanjiku** (**PW5**) and her husband Pastor **Samson Otieno Oluoch** (**PW6).** Presently, **PW5** went out to get provisions to prepare refreshments for the guests.

21. As she returned a group of men numbering more that 3 trailed her and entered her house behind her. They were armed with *pangas*, *rungus* and knives. They ordered the occupants of the house to lie down and assaulted **PW1** when he hesitated. They knocked off the lantern and proceeded to strip their victims of valuables. **PW1** lost a phone make Airtel and Shs 2,000/= while PW6 lost a laptop make Siemens, a phone make Nokia and cash.

22. A neighbour of the host couple **Margaret Ndeti** (**PW2)** was confronted by some of the robbers who stood outside her house. One of them forced his way into her house, and ransacked for valuables and finding none took away her spotlight while threatening **PW2**. The robbers eventually fled after **PW2** raised an alarm**. PW1, 2 and 3** said they had identified the 1st Appellant as one of the robbers.

23. When the robbers left the scene, a report was made to the police. On the next day the 1st Appellant in the company of the 2nd Appellant came to **PW1's** house demanding to know the whereabouts of **PW1**. They found **PW3** in the company of **PW5**. They went away returning after an hour. Police were notified. A trap was set up with **PW1** calling the 1st Appellant on a phone number he left with **PW3**, ostensibly for a meeting. The 1st Appellant showed up and was arrested by police.

24. The 2nd Appellant was arrested near Narok Law Courts after being identified. **PW1** and **PW2** were treated for minor injuries sustained in the robbery. P3 forms were completed by **Hillary Kiptoo** (**PW4)** on 22/5/13.

25. In his defence the 1st Appellant testified that he was in his house at 4.00pm on 22/5/2013 when he got a call from **PW1** whom he knew by the nickname *"waingo"*. He agreed to meet with **PW1** but at the rendezvous, he was accosted by **PW1** in the company of police offers who arrested him without giving reasons. He was eventually arraigned in court but denied the charges. He says the complainants were strangers to him.

26. The 2nd Appellant testified that on 23/5/2013 while attending to his own errands at the Narok Hospital he was arrested by CID Officers. He denied involvement in criminal activities. He too stated that the prosecution witnesses were strangers to him and did not identify him as a participant in the robbery.

27. Having considered the trial evidence in light of the submissions made at the hearing of the appeal, I take the view that this appeal stands or falls on the identification evidence. Other issues raised in the appeal appear peripheral where not related to the identification evidence. I will deal with some of the latter first before delving into the identification evidence.

28. Firstly, nothing turns on the question of the circumstances of the arrest of the 1st Appellant as this was explained by **PW1** and **PW7** and also confirmed by the said Appellant in his defence. Equally, the question of the number of robbers who struck at the home of **PW5** and **PW6** does not in any way detract from the evidence by **PW1, 2, 3, 5,** and **6** that there were several robbers. It is evident that while some robbers entered the house of the said couple, others stood guard outside. From the evidence of the witnesses **PW1, 2, 3, 5** and **6** there were at least 3 men who entered the house of **PW5** and **PW6**.

29. These witnesses testified that the robbers were armed with *rungus*, knives, *simis* or *rungus*. At the end of the robbery incident **PW1** and **PW2** had sustained injuries which are documented in their respective P3 forms that were completed by **PW6.** It is also true that the Appellants were not arrested while in possession of the stolen goods.

30. With regard to witness statements, the proceedings of 30/4/2014 show that the Appellants requested to be supplied with the statements of 4 remaining witnesses, implying that they had the statements of witnesses who had testified before that date. When the trial resumed on 26/6/2014 and 21/1/2015 the Appellants indicated readiness to proceed and did not further raise any issue concerning the statements. The complaint in this appeal that the Appellants were denied witness statements and therefore subjected to a mistrial has no substance.

31. All the remaining canvassed grounds can be summarized in a single three-pronged question that is whether the 1st and 2nd Appellant were properly identified by witnesses; whether the trial magistrate properly handled the identification evidence and whether the Appellants' defences were given due consideration.

32. The evidence of **PW1** was that when the robbers entered his host's house, they ordered the victims to lie down even while smashing the lantern and demanding for money and valuables. He was slapped for hesitating. He claimed to have recognised the 1st Appellant following a prior robbery whose details were not provided. That the 1st Appellant had a spot light and other robbers also had spotlights which illuminated the room enabling the witness to see the faces of the 4 robbers and their assortment of weapons.

33. During cross-examination, the witness said that the 1st Appellant and 3 others engaged the victims in the host's house, while the robbers outside stood guard at the door which they had locked. He also clarified that only the 1st Appellant had a torch and not his companions. He said that the 1st Appellant wore a "maroon coloured sweater." It would seem that the raid at **PW2's** house occurred after the robbery on **PW1 and PW6**. **PW2** put the time of the raid at 8.30pm while **PW1** said the robbers burst

into his host's house at 8.00pm.

34. Whatever the case, **PW2** said that the man who forced his way into her house and stole a spotlight had his face covered. Her lantern was burning and she said she identified him by the jacket he wore having seen him in it severally in the area. **PW2** said the 1st Appellant "was the jacket man" whom she knew before as a tenant in the same plot, and as a frequent visitor after he moved away. She did not know the 2nd accused and neither did **PW1** mention him in reference to the robbery at the pastor's house.

35. In cross-examination, **PW2** said that on the material night, the 1st Appellant wore an orange jacket he regularly wore, but his face was covered with a black band but that she recognised his voice. The wife to **PW1, Rose Chebet (PW3)** also put the attack at 8.00pm. She said, like **PW1**, that on entering the home of **PW5** the gangsters smashed the lantern but that she identified the 1st and 2nd Appellants.

36. A third man then joined them as the victims were ordered to lie down and surrender cash and valuables. **PW3** further told the court that the robbers shone spot lights after smashing the lantern which went off. She too stated that she recognised the 1st Appellant who was a neighbor and who wore an orange jacket that he frequently wore. That the 1st Appellant wore a covering on his face but she "instantly recognised him from his jacket."

37. In cross-examination, PW3 said that the 1st Appellant ordered her to lie down but she refused and looked directly at the Appellant, calling out his name but he ran out at the mention of his name. That is when, according to **PW3,** the 1st Appellant went to rob **PW2. PW3** stated further that the 2nd Appellant came in with the robbers.

38. The hosts to **PW1** and **3** and also neighbours to **PW2** were the **Pastor Samson Otieno Oluoch (PW6)** and his wife **Sera Wanjiku (PW5). PW5** described the robbery incident in their home but stated that the robbers turned off the wicker lamp and lantern hence she did not identify any of them. She too stated that she had had an incident on the previous night when the 1st Appellant threatened to slash her as she walked to her home.

39. In cross-examination, **PW5** said that the 1st Appellant during the said previous incident was posing as a member of the local vigilante**. PW6** gave a similar description of the robbery but stated that **PW1** and 3 recognised one of the robbers before they smashed the lanterns and turned off the wicker lamp.

40. During cross-examination, **PW6** said that he did not recognize the 1st Appellant during the robbery. There is also evidence by the witnesses **PW1– 3, 5** and **6** that on the morning after the robbery the two Appellants went to the house of **PW1** and **PW3** demanding to see **PW1**. They were armed and had dogs.

41. While all the witnesses to the robbery in **PW5's** house confirm that the robbers smashed the lantern and put off the wicker lamp, only **PW1, 2, 3** refer to the subsequent use of a torch or spot light by the robbers to illuminate the house. **PW5** and **PW6** in whose house the robbery occurred, did not identify any of the robbers even though it appears that they too were familiar with the two Appellants prior to the robbery. That in my view is surprising when considered in light of the evidence by **PW1** and **3** that they had opportunity to recognize the 1st Appellant and identified the second Appellant before the lamp was turned off and by voice (**per PW3).**

42. The four witnesses above were in the same room and circumstances although neither **PW5** nor **PW6** referred to any spotlights being used by the robbers. The dimensions of the room were not given, nor the proximity of the witnesses to the robbers moments before the lantern was put off. PW3 came closest to doing so but even then did not describe how close she came to the 1st Appellant in order to look at him "directly".

43. In addition to the fact that the room was immediately plunged into darkness once the lantern went off, there is evidence by **PW 2** and **3** that the 1st Appellant wore a facial covering, a black band. Indeed

according to the evidence of **PW1, PW2** and **PW 3** it seems that they based their identification of the 1st Appellant on the familiar jacket he wore on the material date, variously described as orange or maroon in colour, and which they said they had seen him wear previously. Secondly, **PW1** and **PW6** claimed that the 1st Appellant had previously attempted offences against them, apparently at night. The circumstances enabling identification in the previous incidents were not stated.

44. Taken in totality, the identification evidence by **PW1 – 3** discloses that the circumstances prevailing during the robbery were difficult and did not favor identification of the 1st Appellant whom they claimed to know before. There is a long line of authorities supporting the proposition that evidence of visual identification must be treated with great care and caution. The court of appeal summarized the applicable principles in **Joseph Muchangi Nyaga & Another -Vs- Republic (2013) eKLR** as follows:-

> **"Evidence of visual identification should always be approached with great care and caution (See Waithaka Chege versus Republic (1979) (KLR 217). Greater care should be exercised where the conditions for favourable identification are poor. (Gikonyo Karume and Another Versus Republic (1980) KLR 23) ……before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of and the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him……"**

45. In dealing with the identification evidence by **PW1 – 3** and **PW5** and **6,** the trial court did not consider the fact that the 1st Appellant wore a facial covering and whether indeed the witnesses **PW1 - 3** had an opportunity to see the robbers before the lantern went off. Had the learned magistrate applied his mind to these matters and the admitted inability by **PW5** and **6** to identify the robbers in the same room, he would have come to a different conclusion.

46. Additionally, an aspect not given due consideration was the reliance on the Appellant's alleged jacket by **PW1 – 3** to identify him. If indeed this jacket was notorious enough as to be synonymous, in the area, with the 1st Appellant, **PW5** and **6** also ought to have identified the 1st Appellant.

47. The other misdirection was the court's conclusion, with regard to the visit at **PW1's** house by the 1st and 2nd Appellant on the morning after the robbery that they had gone there with the aim of "eliminating **Paul (PW1)** as a potential witness." There was evidence that the 1st Appellant may have belonged to a vigilante group whether legal or illegal. Without firm evidence, there was no basis for the conclusion that the said morning visit exclusively pointed to an intention to do harm to **PW1** in relation to the robbery.

48. It does seem that the 1st Appellant had a record of sorts in the area, following alleged incidents with **PW1** and **PW5.** The circumstances of his identification in those previous particular incidents with **PW1** and **PW5** are not clear, but it would seem that due to the incidents he was a prime suspect of the robbery.

49. From the defence given by the 1st Appellant, he knew **PW1** and agreed to meet him, as **PW1** also stated, on the 22/5/13 when he was arrested. The conduct of the 1st and 2nd Appellants, of visiting **PW1's** home severally on the morning after the robbery and the 1st Appellant agreeing to meet **PW1** on the same evening does not seem consistent with his involvement with the offence. More so if it is believed that **PW3** called out the 1st Appellant by name during the material robbery thereby forcing him to run to **PW2's** house to carry out a robbery attempt there.

50. With particular regard to the evidence by **PW2** that's he identified the 1st Appellant by voice, a stringent test ought to have been applied. As the Court of Appeal stated in **Choge -Vs- Republic (1955) 1KLR:-**

> **"Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In**

> **receiving such evidence, care would be necessary to ensure it was the accused's voice, that the witness was familiar with it and recognised it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it."**

51. **PW2** did not in her evidence indicate how she became familiar with the 1st Appellant's voice. That he was her neighbor for 3 years was insufficient; it is not unusual for neighbours to barely greet each other. As observed earlier, the conditions obtaining were difficult, even in the house of **PW2** because the robber wore a facial covering. The incident at **PW2's** appears to have been brief and fast.

52. **PW2** told the court that she "recognised him (1st Appellant) from the jacket he was wearing." She mentioned this aspect twice in her evidence-in-chief and only during cross-examination spoke about identification by voice, however not stating what the 1st Appellant said. Her evidence suggested strongly that the key feature by which PW2 identified the 1st Appellant was the familiar jacket he wore, itself a very weak form of identification. Evidently the said jacket was not tendered at the trial for identification by witnesses.

53. Regarding particular evidence against the 2nd Appellant, only **PW3** mentioned that the second Appellant was in the company of the robbers at **PW5's** house. Neither **PW1** nor **PW5** and (or **PW6)** mentioned the 2nd Appellant in relation to the robbery incident. If indeed conditions favoured the identification in **PW3's** case, the recognition of the 2nd Appellant, described as **PW3's** neighbour, it is surprising that **PW5** and **6,** also neighbours to **PW3** did not recognize the 2nd Appellant. And the fact that he accompanied the 1st Appellant to **PW1's** house on the morning after the robbery did not prove he participated in the night's robbery. Thus as regards the 2nd Appellant the identification evidence was by a single witness in difficult circumstances.

54. In the case of **Abdalla Bin Wendo & Another –Vs- Republic [1953] 20 EACA166,** the Court of Appeal for Eastern Africa observed regarding such evidence that;

> **"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness *but his 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 testimony of a single witness, can safely be accepted as free from possibility of error." (Emphasis added).**

55. The second Appellant was said to have been identified for arrest by **PC Collins Okoth (PW7)** by an unnamed complainant near the court precincts at Narok. His defence as regards reasons for being at the place he was arrested may not be believable but there was no credible evidence to connect him with the robbery. Possibly, he was arrested because he accompanied the 1st Appellant to the house of **PW1** on the morning after the offence.

56. The trial court after summarizing the trial evidence found correctly, that there was no dispute regarding the fact of robbery against **PW1** and **PW6** on the material night. And the court also correctly identified the sole issue for determination as the identification of the robbers.

57. In analyzing the evidence, however, the trial court fell into error by failing to give due consideration to the circumstances and manner of identification of the Appellants as stated by **PW1-3** and **PW5** and **PW6.** While the 1st Appellant has argued that the complainants did not name their attackers in the first report the said report was not made an issue during the trial, nor was it tendered in evidence.

58. Mr. Kamwaro in citing the decision in **Tekerali & Others -Vs- Republic (Supra)** stated the correct

position of the law. However, there is no requirement for the trial court to demand that the first report be availed absent a request to the court by the defence. This ground therefore has no substance for purposes of this appeal and especially in light of the evidence by the prosecution regarding the arrest of the suspects. It seems therefrom that definite suspects (the Appellants herein) were named to the police by the complainants.

59. I however agree with the Appellants that the whole question of the Appellant's actual identification presented a serious challenge, in the circumstances described by the victims of the robbery and called for a more indepth and careful analysis than the trial court's judgment reveals.

60. On my part, upon evaluating the prosecution evidence at the trial, I am not satisfied that the identification of the Appellants was water tight. The failure by the trial court to subject that evidence to proper tests resulted in a conviction that, in my considered view, is unsafe, the Appellants' rather flaky defences notwithstanding. Grounds 4, 6, 9-15, 21, 24 of the 1st Appellant's petition of appeal do have merit in so far as they challenge the identification evidence by prosecution witnesses.

61. Grounds 1-3 of the 2nd Appellant's amended grounds of appeal are justified. As earlier stated, the practice of filing an overly long list of grounds of appeal is neither practical nor useful in the prosecution of an appeal, and should be avoided. That notwithstanding, based on my own findings on the identification evidence at the trial, I must quash the convictions recorded against both Appellants in the two counts of Robbery contrary to Section 296 (2) of the Penal Code. The two Appellants are to be set at liberty forthwith, unless otherwise lawfully held.

Delivered and signed at Naivasha on this **23rd** day of **June**, **2016.**

In the presence of :-

For the 1st Appellant : Mr. Kamwaro

For the DPP : Mr. Koima

Appellants : present

Court clerk : Barasa

C. MEOLI

JUDGE