REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CONSOLIDATED CRIMINAL APPEALS 220 & 221 OF 2011

FRED MACHOKA.....1ST .APPELLANT

COLLINS WEKESA SAITOTI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction in Criminal Case No. 758 of 2011 by A. Alego,

Senior Resident Magistrate, dated 9th November 2011]

JUDGMENT

1. The appellants were convicted for *robbery with violence* contrary to section 296 (2) of the Penal Code. They were sentenced to suffer *death*.

2. The particulars of the charge read as follows-

> *"On the 17th day of February 2011 at the Moi's Bridge Trading Centre, Moi's Bridge Location in Eldoret West District within the Rift Valley Province, jointly with others not before the court, while armed with offensive weapons, namely a metal rod, robbed Gilbert Wamalwa of a handbag containing 4 trousers, 5 shirts, 3 t-shirts, 4 pairs of socks; and cash Kshs 1,200 all valued at Kshs 6,000 and immediately at the time of such robbery threatened to use actual violence against the said Gilbert Wamalwa"*

3. The appellants are aggrieved by the conviction and sentence. The petitions of appeal were filed on 15th November 2011. The appeals were consolidated on 21st April 2016. On 1st October 2015, the 1st appellant had been granted leave to amend his grounds of appeal. On 21st April 2016, the 2nd appellant was also granted similar leave.

4. The *amended grounds* of appeal can be condensed into four. First, that the conviction was based on *unreliable* evidence of a *single* identifying witness; secondly, that the subsequent police identification parade was irregular; thirdly, that there was a variance between the substituted charge sheet and the evidence; and, fourthly, that the substance of the substituted charge was not explained to both appellants. In a synopsis, the appellants contend that their conviction was unsafe.

5. At the hearing of the consolidated appeals, the 2nd appellant relied entirely on his home-made submissions. They were filed on 1st December 2016. The core of the submissions is that the prosecution failed to prove the charge beyond reasonable doubt. The 1st appellant on the other hand submitted that there were glaring inconsistencies between the Occurrence Book; the substituted charge; and, the evidence. I was implored to allow the appeal.

6. The Republic contests the appeal. The position of the State is that all the ingredients of the offence were proved. The learned Prosecution Counsel, *Ms. B. Oduor*, submitted that PW2 knew the 1st appellant; and, that she positively identified him at the scene. It was early in the morning and there was sufficient light. Learned counsel submitted that the 2nd appellant was picked out by the complainant at the identification parade; and, that the parade was conducted in compliance with the law. She submitted that the complainant suffered injuries on the neck during the robbery. Lastly, she submitted that the corpus of evidence linked both appellants to the crime; and, that their defences were bogus.

7. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw independent conclusions. In doing so, I have been careful because I have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.

8. Early in the morning of 17th February 2011, at about 5:30 a.m., the complainant alighted from a public service vehicle at Moi's Bridge Trading Centre. He was carrying some luggage. All of a sudden three people approached him. He became suspicious. Another man joined them. He raised an alarm. The strangers attacked him. He fell down. They tried to strangle him. One of the attackers ripped off his jacket spilling out the complainant's wallets and documents.

9. A woman (PW2) witnessed the incident. She raised an alarm. The wallets contained, among other things, some money, identification documents, voters card and driving licence. The attackers took off with the complainant's documents and luggage. PW1 reported the matter to the police. As he made the report, two children told him that his bag (exhibit 1) had been recovered. The bag contained his clothes. Apparently, his assailants had also dropped the torn jacket (exhibit 3) along the way. The complainant also recovered the two wallets. The items were scattered but were all there. Even the sum of Kshs 1,200 was still intact. PW1 claimed that the 1st accused only returned the items after PW2 shouted: *"nemewajua; nimewajua". [I know you* or *I have identified you]*

10. Later, PW1 met PW2. She said she knew one of the attackers known as *Fred*. She said the other one was *Collins*. PW1 attended a police identification parade where he picked out the 2nd accused. He also identified him at the dock.

11. Upon cross examination, he conceded he did not know the accused persons before the incident. He said the incident occurred at about 6:00 a.m. He said the luggage was found near the house of PW2. He said it was PW2's children who returned the stolen luggage to him.

12. PW2 was delivering milk when she heard the cries of the complainant. She saw the complainant being attacked. She moved closer. She saw Fred (1st accused). She also identified him at the dock. At the scene, she shouted *"I know you Fred"*. The attackers ran away. She crossed the road. The complainant was confused. He told her that his bag had been snatched away. She advised him to report the matter to the police. When she returned home, she found her children with the recovered luggage.

13. PW3 conducted the parade. He said he informed the suspect the reasons for the parade. There were 8 persons in the parade. The 2nd accused chose a position between the 4th and 5th persons. He was identified by the complainant who touched his shoulders. He said the parade was conducted behind the police station. He said that the suspect was satisfied with the identification parade and signed the relevant form (exhibit 6).

14. PW4 recorded the complainant's statement. He looked for Fred Machoka (1st accused). He arrested him on 23rd February 2011. He found him asleep in his house. He later arrested the 2nd accused. He instructed the OCS to conduct an identification parade. He testified that the 2nd accused was positively identified. He produced exhibits 1 to 5.

15. When the accused were placed on their defence, they protested their innocence. The 1st accused stated as follows-

> *"On 18.2.2011, I was at home with my parents. After four days, on 22.2.2011, police officers came home and were looking for me. I adhered [sic] to go with them up to the police station. They alleged I had insulted my neighbour back at home. I was lost for words. I asked that I see the complainant but I did not till when I was brought to court and charged as herein. I do not know anything to do with these allegations. I am innocent of the charges leveled against me. I have never committed any such offence in my life".*

16. On his part, the 2nd accused said the following-

> *"On 6.3.2011, I was asleep at home. I heard a knock at the door at 5:00 a.m. I asked who it was. They said they were police officers. I opened the door. They told me that they wanted me to take them to some place. They took me to the station. I was later paraded for identification parade. I was then brought to court. I am still pleading my innocence to date. I pray for the court's mercy"*

17. A number of matters arise from that evidence. The first relates to identification. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal had this to say-

> *"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."*

18. In *Obwana & Others v Uganda* [2009] 2 EA 333, the Court of Appeal of Uganda stated as follows at page 337;

> *"It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. The rationale for this is that a witness may be honest and prepared to tell the truth, but he might as well be mistaken. This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence"*

19. In *Maitanyi v Republic* [1986] KLR 198 at 201, the Court of Appeal delivered itself as follows-

> "*It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, State counsel and defence counsel. In the absence of all these safeguards, it now*

becomes the great burden of senior magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the "greatest care" the evidence of a single witness?"

20. When I juxtapose those authorities against the evidence, I find as follows. The appellants and the *complainant* were not complete *strangers*. The robbery took place between 5:30 p.m. and 6:00 a.m. The complainant said the attack was *sudden*. There were *four* attackers. He did not give their description to PW2 or the police. When PW2 spoke to the complainant immediately after the attack, she said he looked *confused*. I thus find that the complainant did *not* positively identify his attackers at the *time* of the robbery.

21. The more relevant evidence of identification was that of PW2. PW2 was delivering milk when she heard the hollers of the complainant. She saw the complainant being attacked. She moved closer. She saw *Fred* (1st accused). She also identified him at the dock. At the scene, she shouted *"I know you Fred"*. The assailants ran away.

22. She did not identify the 2nd appellant. But she *knew* the 1st appellant. The conditions under which the identification of the 1st appellant took place were *favourable*. It was between 5:30 a.m. and 6:00 a.m. PW2 witnessed the attack from just across the road. She mentioned the *name* of the 1st appellant in the course of the robbery. I am thus satisfied that she positively identified the 1st appellant. It is telling that the stolen items were returned; and, more specifically dropped outside the house of PW2.

23. PW2 was only identified at the police identification parade. It was conducted *behind* Moi's Bridge Police Station on 7th March 2011. That was over *two weeks* after the incident. The complainant was accommodated at the crime office. PW3 said the complainant could not see the suspect before the parade. PW3 said that he informed the suspect the reasons for the parade. There were at least *eight* persons in the parade as required by the Standing Orders. Under Rule 6(v), the parade should be conducted in private and out of the view of the public. In this case, the parade was *behind* the police station. The complainant should not have been informed that the suspect was one of the people in the parade. PW3 was silent on the matter. But even assuming that all the rules of conducting a parade were followed, it was still *pointless*: the complainant neither identified the 2nd appellant nor gave his description to the police immediately after the incident. It remains doubtful that he could positively identify the 2nd appellant over two weeks later.

24. The dock identification was equally worthless. In *Maitanyi v Republic* [1986] KLR 198 it was held that even where the dock identification is preceded by a properly conducted identification parade the evidence of a single identifying witness must be tested with the greatest care before a conviction is entered. I am in the end *not* satisfied that the identification of the 2nd appellant, Collins Wekesa, was positive.

25. The next key question is whether *all* the ingredients for the offence of *robbery with violence* were established. Section 296(2) of the Penal Code provides-

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death".

26. There is no doubt that the complainant was attacked by *more* than *one* person. However, I find there was a variance between the substituted charge and the evidence. While the charge stated that the attackers were *armed* with a *metal rod*, there was *no* such evidence from the complainant or PW2. I am thus not satisfied that the assailants were armed with any offensive weapon. All that the complainant said is that the *"attackers held his throat"*.

27. No medical evidence was led to show the nature of injuries, if at all to the complainant. The

complainant said the "*attackers held his throat"*. The facts presented in this case do *not* disclose the offence of *robbery with violence*. See *James Leshoo v Republic*, Kisii, High Court Criminal Appeal 120 of 2008 [2011] eKLR. The legal burden to establish all the elements of the offence rested with the prosecution. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332. I find that vital *ingredients* of the offence were *not* proved beyond reasonable doubt. In addition, the identification of the 2nd appellant was cast into serious doubt.

28. The *conviction* of both appellants was *unsafe*. The appeal is allowed. I *quash* the conviction and sentence. Both appellants shall be set free *forthwith* unless held for some other lawful cause.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 13th day of December 2016

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellants (in person).

No appearance by counsel for the Republic.

Mr. J. Kemboi, Court Clerk.