**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Criminal Appeal 347 of 2008**

**BENSON RIKONO RIKAVO.....1ST APPELLANT**

**MARIL LITENA MANGALA .....2ND APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

**1.** The two Appellants **Benson Rikono Rikavo** and **Maril Litena Mangala** were charged in counts **I** and **II** with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. In the alternative count they were charged with handling stolen goods contrary to **Section 322 (2)** of the **Penal Code**.

**2.** The brief particulars in **count I** were that on 1st March 2008 at Karinde Trading Centre within Nairobi area whilst armed with metal bars they robbed Evans Gakio Wainaina of various items all worth Kshs. 5,220 and in the course of such robbery, they used violence against and inflicted injury upon the said Evans Gakio Wainaina. In **count II** the 1st and 2nd appellants were similarly charged of using violence against, and robbing one John Lengete Karaine of property valued at Kshs. 11,800.

**3.** In the alternative **count**, the particulars were that the 1st appellant on the 8th March 2008 at Karinde Trading Centre within Nairobi area Province, otherwise than in the course of stealing, dishonestly retained or received three spanners, one screw driver and one pliers all valued at Kshs. 1,700 the property of Evans Gikuo Wainaina knowing or having reasons to believe them to be stolen goods or unlawfully obtained.

**4.** At the end of the prosecution case, the 1st appellant was convicted on **counts I** and **II** for robbery with violence contrary to **Section 296(2)** of the **Penal Code** and sentenced to death on both counts. The 2nd appellant was convicted on **count I** and sentenced to death. He was acquitted on the second count under **Section 215** of the **Criminal Procedure Code**.

**5.** Being aggrieved by the decision of the court, the 1st and 2nd appellants filed an appeal against conviction and sentence. They advanced five grounds of appeal which were similar and have been summarised hereunder. They faulted the learned trial magistrate for failing to find that;

**(a)** ***There was no positive identification of either of them.***

**(b)** ***The evidence tendered was contradictory and could not sustain a conviction.***

**(c)** ***The prosecution did not prove their case beyond reasonable doubt due to lack of witnesses and exhibits;***

**(d)** ***The trial suffered irregularities which were fatal to the trial process.***

***(e) The Appellant's defence was adequate and plausible***

**6.** Learned state counsel Miss Mwanza, opposing the appeal on behalf of the state, submitted that there was sufficient evidence on record to support both conviction and sentence.

**7.** We have analysed and re-evaluated the evidence on record afresh bearing in mind the decision in **Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR.** In the said case the court of Appeal held that:

***"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".***

**8.** **PW1** Evans Gakio Wainaina, the complainant, testified that on 1st March 2008 at 8:30 p.m. while heading home from his place of work, and having passed by a bar and chemist at Karinde village, he was attacked by a group of 5 people. The men were armed with a heavy iron rod which they used to hit and inflict injury on his person. He was beaten to the point of losing consciousness. Members of the Public helped him and took him to a nearby dispensary. He reported the incident at Dagoretti Police post the following day after receiving treatment.

**9.** As a result of the attack, **PW1** sustained a fracture on his right arm. **PW7,** Dr. George Kungu Mwaura, examined him three months later on 7th June 2008 upon request by the Dagoretti police, and noted that he had suffered multiple wounds on his head, his front lower and upper teeth were missing, and that he had a fracture on both the right arm and hand. In his opinion the injuries were caused by a blunt object, and were about 3 months and 1 week old. **PW7** filled and signed a P3 form which he produced in court as exhibit No. 5, in this regard.

**10.** **PW2** John Lengete testified that on 4th March 2008 at 5.00 a.m he had opened his grocery store when the 1st appellant whom he knew well by name as Benson Rikovo came to buy a cigarette. As he was selling to him and chatting with him, the 1st appellant suddenly broke into the shop through the door together with another man using an iron rod. The two men attacked **PW2** with the iron rod. **PW2** shouted for help attracting neighbours to his rescue. His assailants ran away shouting, to destruct the neighbours, but not before they stole from him Safaricom cards worth Kshs. 5,500 and Kshs. 6,000 cash. The neighbours who came to his aid rushed him to Kikuyu Hospital for treatment.

**11.** **PW2** testified that during the attack the 1st appellant held him down as the other man hit him repeatedly with the iron rod,causing a fracture of his left arm.

**12.** **PW7** Dr. George Mwaura, who examined **PW2** on 7th March 2008, found a 3 inch long cut on the right side of his head, a fracture of the left arm and dislocation of left wrist. He assessed the injuries to be approximately 4 days old and estimated that they could have been inflicted on or about the 4th March 2008. **PW7** completed and signed a P3 form which he produced in evidence.

**ON IDENTIFICATION**

**13.** The appellants were notably convicted on the evidence of three Prosecution witnesses. We reminded ourselves of the Court of Appeal decision in **Karanja & Another vs. Republic [2004] 2 KLR**

**pg 140,** which held *inter alia* that:

***"1. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.***

***2. Whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification".***

We therefore bear in mind the said warning, as we re-evaluate the evidence on record.

**COUNT I**

**14.** On Count I **PW1** admitted under cross examination that he was unable to positively identify the 1st appellant as one of those who robbed him, but that during the robbery he could see as the time was about 5.30 a.m. and was not too dark.

**15.** **PW1** on the other hand was however categorical that the 2nd appellant was the one who called out his name and caused him to turn back, and that he had known the 2nd appellant well for a period of over 8 years. From the evidence on record, we note that during cross examination, **PW1** was able to describe what the 2nd appellant was wearing at the time of the incident; that is a blue T-shirt and jacket. He testified that he knew him as a neighbour. **PW1** also identified the 2nd appellant as the one whom he cut on the forehead with his pen knife in self-defence. The trial court did observe that indeed the 2nd appellant had a scar on his forehead.

**16.** **PW3,** Corporal Kennedy Kimotho who was the Arresting Officer, told the court that at the time he arrested the 2nd appellant on 4th March 2008 a few days after the incident, the 2nd appellant had a wound on his forehead. This evidence lent credence to the testimony of **PW1.**

**17.** We are therefore satisfied that there was clear and positive identification by **PW1,** of the 2nd appellant as one of the men who robbed him on the material day.

**COUNT II**

**18.** **PW2,** John Lengete Karaine testified that he was able to positively identify the 1st appellant as one of the men who robbed him. He knew him well by the name of Benson Rikovo and also as a herd's boy in the area who used to sell him milk. **PW2** told the court that he and the 1st appellant chatted briefly before the robbery occurred. During the robbery **PW2** asked him:

***"Benson mbona una fanya hivi'' that is, ("Benson why are you doing this?" )***

**PW2** stated that when he opened his shop at 5.00 a.m. he lit a lantern to enable him sell his wares and was thus able to see the 1st appellant well by the light of this lantern, which remained on throughout the time of the robbery.

**19.** We have examined the evidence on identification and do find that the evidence on record has proved beyond reasonable doubt, that the 1st and 2nd appellants' were at the scene and positively identified as being among the persons that violently robbed **PW1** and **PW2** of their properties on 1st and 4th March 2008 at Karinde Trading Centre respectively. Some of the stolen property was recovered in the 1st Appellant's possession on 9th March 2008.

**CONTRADICTORY EVIDENCE**

**20.** The second ground was on the contradictory evidence tendered and how it could not sustain the conviction.

**COUNT I**

**21.** The 1st Appellant submitted that the date in the Occurrence Book notably 4th March 2008 was at variance with the date of arrest that is 5th March 2008,further that the particulars of the charge were at variance with the testimony; that although the charge sheet indicated that a ½ kilo of meat and a loss of a total value of Kshs. 5,220 was suffered by **PW1**, he testified the contrary that, he was robbed of ¼ kilo of meat and suffered a loss of a total value of Kshs.5,000. We however find that these inconsistencies in the prosecution evidence are minor and immaterial and did not go to the core of the case.

**COUNT II**

**22.** The 2nd appellant submitted that the trial magistrate relied on contradictory testimonies to convict him. He pointed out that the record showed that the first Appellant was first arrested on 5th March 2008, where as **PW6** claimed he was arrested a day after the arrest of the 1st Appellant which was 6th March 2008. We however note the contrary from the record. **PW6** testified that he received the complaint of robbery on 4th March 2008, and that on the same date at 11.am, **PW2** identified one of the suspects at Karinde Police Post as one of those who had attacked him.

**23.** The 2nd appellant had been rescued by Administration Police Officers from an attack by a mob that beat him up badly. This record is therefore clear that the 2nd appellant was arrested on 4th March 2008 and not 5th March 2008 as he asserted and that the trial Magistrate was right in convicting him on this premise.

**24.** Further, although the 2nd Appellant faults **PW6** for testifying that he was arrested the following day after the arrest of the 1st Appellant and even repeats the same during cross examination by the 2nd Appelant, we note that during the said cross examination **PW6** denied knowing the exact date of arrest.

**25.** Although we are unable to establish from the record the exact date of arrest of the 2nd Appellant we agree with the sentiments of the trial Magistrate who in convicting the 2ndAppellant made the following remarks:-

***"In his defence Accused 2 merely denies the charge and states that he was arrested on 8-3-2008 for no reason by members of the public. Accused 2 gives no explanation or account to the court of where he was on 1-3-2008 at 8.00pm when this robbery occurred. In the court's view, the mere denial issued by Accused 2 cannot suffice as a defence. The totality of the evidence against Accused 2 is overwhelming and the court is satisfied beyond reasonable doubt that accused 2 was amongst the group of men who robbed the 2nd Appellant."***

**C. LACK OF WITNESSES AND EXHIBITS**
**COUNT 1**

**26.** The 1st Appellant faulted the Police for failing to open an inventory list of what they recovered from his house, or even making a certificate of search to be duly signed by the parties as is required under **Section 19** of the **Police Act**, and also for failing to record a statement from the lady they found in his house. Further, that **PW5** in evidence indicated that they had recovered 1 pliers, 1 screw driver star and 3 spanners yet **PW3** had testified of recovering six spanners.

**27.** **PW1** also testified that the Police had recovered about six of his stolen spanners, yet he only identified three spanners in court one of which had been marked ***"N".***This clearly left questions begging since only 3 spanners were produced as exhibits in court, which the trial court did not address. We agree

with the 1st Appellant that from the court record, indeed no inventory of the recovered items was prepared by the police, who testified as much. We also agree that there was no explanation as to the whereabouts of the other three spanners that were recovered from the 1st Appellant's house. In regard to the lady found in the 1st Appellants house, we note that she was not an eye witness to the offence and so her evidence was not vital in any way.

**28.** **Section 19** of the **Police Act** regarding a search warrant referred to by the 1st Appellant in our view is discretionary. It provides thus:-

***"A police officer may lay any lawful complaint before a magistrate and may apply for a summons; warrant, search warrant or such other legal process as may lawfully be issued against any person."***

However, we also have looked at section 20 of the Police Act which provides for the exceptional circumstances under which the Police may search without a warrant, as follows:-

*20. (1) When an officer in charge of a police station, or a police officer investigating an alleged offence, has reasonable grounds to believe that something necessary for the purposes of such investigation is likely to be found in any place and that the delay occasioned by obtaining a search warrant under section 118 of the Criminal Procedure Code will in his opinion substantially prejudice such investigation, he may,* ***after recording in writing the grounds of his belief and such description as is available to him of the thing for which search is to be made,*** *without such warrant as aforesaid enter any premises in or on which he expects the thing to be and there search or cause search to be made for, and take possession of, such thing:*

**29.** We have also looked at the trial court record and note that **PW1** told the court that he had inscribed the handles of the spanners with the letter ***"N"*** for Njenga which was his name. The trial court did examine these exhibits 1, 2 and 3 and observed the letter ***'N'*** as described by **PW1**. The 1st Appellant in his defence was unable to give any explanation as to how these items came to be in his house.

**COUNT 2**

**30.** The 2nd Appellant also faulted the Prosecution for failing to summon vital witnesses to testify in the case. These were the neighbours who came to the rescue of **PWI** and the members of the Public who arrested the 2nd appellant. This according to him was in derogation of **Section 150** of the **Criminal Procedure Code**. However it is our considered view that the prosecution called the witnesses whom they deemed to be necessary for their case. There is no evidence that the 2nd appellant requested the court to avail the neighbours or members of the Public who effected his arrest, if he wished to examine them.

**31.** Furthermore the members of the public who arrested the 2nd appellant handed him over to the police and who testified and they themselves were not eye witnesses so that their evidence would be deemed to be vital. Ground 3 of the appeal therefore fails to this extent.

**D. THE TRIAL SUFFERED FATAL IRREGULARITIES**

**32.** The 1st Appellant called the attention of the court to technical irregularities on the trial record which he deemed fatal to the trial process. He submitted that the Coram on 3rd April 2008 was irregular, since the trial Magistrate signed and listened to the cross examination of **PW1** by the Appellants, and proceeded to take the evidence of **PW2** and **PW3**. We however note that on the said date of 3rd April 2008, there is no record of the trial court sitting. On the 30th April 2008 the trial court did record coram and record the evidence of **PW1, PW2** and **PW3**. No irregularity is discernible from the record.

**E. THE APPELLANT'S DEFENCE WAS ADEQUATE AND PLAUSIBLE**

**33.** This being a criminal case the appellants were under no obligation to defend themselves or to prove

their innocence.

The 1st Appellant in his defence told the court that he was apprehended by a crowd on 4th March 2008 at 1.00 a.m. He gave no explanation as to his whereabouts on that day at 5.00 a.m. the time the robbery occurred. His defence is a mere denial to the charge, which the trial court found unconvincing. The 2nd Appellant also gave an unsworn defence in which he told the court how he was apprehended on 8th March 2008 on his way to work on charges he was unaware of. We note that his defence was a mere denial to the charges and do not find it plausible at all.

**33.** We have re-evaluated the evidence which the 1st and 2nd Appellants adduced in their defence and we are in agreement with the trial Magistrate that the said defences were mere denials and did not dent the otherwise strong prosecution case against them. There was overwhelming evidence which proved the prosecution case against the appellants on the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.

**34.** Having given careful consideration to all the circumstances, we are satisfied that the learned Chief Magistrate properly convicted the 1st and 2nd appellants. The appeal is therefore dismissed. The conviction and the sentence imposed on the appellants by the trial Magistrate are hereby confirmed.

**SIGNED DATED** and **DELIVERED** in open court this **26th** day of **February 2013.**

**F. A. OCHIENG** **L. A. ACHODE**

**JUDGE** **JUDGE**