REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL APPEAL NOS

404 & 405 & 2006

EVANS MAKUMI WANYUTU ……...…… 1ST APPELLANT

ROBERT MAKUMI WAWERU …… 2ND APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(From original conviction and sentencing in Criminal Case No. 1916 of 2005 of the Chief Magistrate's Court at Githunguri by L. Mutai, - Senior Resident Magistrate on 25th July 2006)

J U D G M E N T

These appeals are consolidated. The two appellants were charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. It was alleged in the particulars of the charge that on 29th October 2005 at Mbari yaigi village in Kiambu, Central Province jointly with another not before the court and armed with pangas and iron bars, they robbed one George Kamau Kibui of one mobile phone, make Motorola C200 valued at Ksh. 5500/- and at or immediately after the said robbery, they used actual violence to the said George Kamau Kibui.

Both denied the offence but after a full trial they were convicted of the offence of robbery contrary to Section 296 (1) of the Penal Code and sentenced to 10 years imprisonment each. Aggrieved by the said conviction and sentence they filed these appeals.

The record shows that at one point the appeals were heard by J.B. Ojwang J (as he then was) who declared that there was a mistrial and therefore the appeals should be heard by two judges. Going by the learned judge's judgement delivered on 8th October 2008, the mistrial was declared mainly on the basis that the learned trial magistrate misdirected herself on the nature of the prosecution case and failed to appreciate the terms of Section 296 (2) of the Penal Code and was in error of the assessment of evidence.

The learned judge also found that in the event the prosecution were to consider enhancement of sentence, then the appellants were entitled to prior notice so that they are not taken by surprise and also appreciate the possible consequences of proceeding with the appeal.

The appeal was then listed for hearing before another bench of Njagi and Warsame JJ who did not proceed with the appeal and thereafter before Khaminwa and Warsame JJ who noticed rather late that Ojwang J (as he then was) had declared a mistrial. Subsequently, we were seized of the appeals hence this judgment.

The record shows the Republic filed a notice of enhancement of sentence indicating that in the event the appeals were dismissed the sentence of 10 years imprisonment would be set aside and a death sentence sought. The two appellants filed written submissions respectively while the learned counsel for the Republic relied on the submissions made before Khaminwa and Warsame JJ earlier.

As the first appellate court, we are mandated to consider all the evidence on record, evaluate the same and arrive at independent conclusions. In perusing the record before us, we are constrained to observe the following. When the appeals were first argued before Ojwang J (as he then was), the record shows that the Republic was represented by one Mr. Makura. On 28th July 2008, Mr Makura informed the court that the Republic was conceding these appeals because the charge was not proved beyond any reasonable doubt.

The learned counsel for the Republic based his submissions on the fact that the conviction was based on the evidence of the complainant PW1 whose identification of the two appellants could not have been free from error. This is because the offence was committed at night and the witness could not tell at that time who his assailants were.

PW1 and PW3 could not give the exact time when the offence took place. Further the conviction was based on the evidence of a single identifying witness, yet the learned trial magistrate did not warn herself of the risks of relying on such evidence. On those grounds the conviction was said to be unsafe.

The foregoing notwithstanding, the learned judge went ahead to declare a mistrial which we have noted herein above. We mention this part of the record deliberately because subsequently the learned counsel for the Republic contradicted her colleague and opposed the appeals before us. We can only observe that where the learned counsel for the Republic concedes any appeal in the presence of the appellants, the appellants are entitled to entertain a legitimate expectation that their freedom is guaranteed.

That is not to say that the court is bound by the concession of the Republic. However, more often than not the courts agree with the position of the Republic because in any case it is the Republic that is the prosecutor.

Be that as it may, the complainant was on his way home when three people emerged from a coffee plantation and attacked him. This was near a shopping centre and it is alleged that there were lights nearby. The time was between 10 and 10.30 pm. According to PW1, these people ran towards him and attacked him. One had a panga and the other an iron bar. He was cut on the head and hit with an object at the back of the head causing him to fall down. A vehicle then appeared and these people ran away. The person driving this motor vehicle was one Ndirangu. It was his evidence that he identified the two people who attacked him as the first and the second appellants. He had known them before as they came from his village.

His cellphone mentioned in the charge sheet was in his pocket when it was stolen. It is his evidence that he reported to the police that the two had assaulted him. The two appellants were subsequently arrested and charged with this offence. There is evidence that the complainant was examined by a Dr. Muia from Ruiru private hospital who produced a P3 form in respect of his injuries.

In their defences, the two appellants denied the offence and each gave an alibi as to where they were on that day. The learned trial magistrate believed the evidence of the prosecution witnesses, dismissed the defences of the appellants and proceeded to convict them.

It is true that the only evidence that the learned trial magistrate relied upon was that of the complainant. The offence took place at night and although it was said to be near a shopping centre where electric lights

were on, the intensity of such lights was not given.

From the evidence of the complainant, the attack appeared to be sudden and unexpected. No description of the attackers was given by PW1, the complainant or any other person. One Mr Ndirangu who drove onto the scene soon after the complainant was said to have been attacked was never called to testify. There is evidence that the matter was first reported at Ngewa Police Post and then Kibichoi Police Station. At both police stations the complainant did not give the names of the two appellants notwithstanding that he said he knew and recognized them at the time of robbery. On several occasions the appellants requested to be supplied with the OB entries from Ngewa Police Post but these were not availed.

As the basic ground of these appeals is that of identification of the two appellants, we are constrained to observe that the conditions for positive identification were lacking in this case. We have also looked at the P3 form which however was discounted by the learned trial magistrate who rejected the doctor's evidence because of conflicting dates therein. We observe however that, the doctor noted in the P3 form the complainant was drunk and smelt of alcohol from the mouth. If that were the case, then his sense of appreciation, first of the scene and secondly of the identity of the attackers, was probably compromised.

Without going any further we are of the view that the evidence adduced by the prosecution witnesses and upon which the learned trial magistrate based the conviction of the appellants was inadequate and therefore the convictions were unsafe. The foregoing being the case, we have come to the conclusion that their convictions were unsafe and these appeals are hereby allowed, convictions quashed and sentence set aside. Both appellants shall be released forthwith unless otherwise lawfully held.

Orders accordingly.

SIGNED, DATED and DELIVERED in open Court this 29th day of October, 2013

A. MBOGHOLI MSAGHA **L. A. ACHODE**

JUDGE **JUDGE**