REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEALS 482 AND 483 OF 2009

WYCLIFFE AMALEMBA……..1ST APPELLANT

NDOLO NBAMBUKI…….2ND APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(AN APPEAL ARISING OUT OF THE CONVICTION AND SENTENCE OF K BIDALI PM IN CRIMINAL CASE NO. 2209 OF 2009 DELIVERED ON 6TH SEPTEMBER 2010 IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI)

JUDGMENT

The 1st and 2nd Appellants were charged with the offence of attempted robbery with violence contrary to section 297 (2) of the Penal Code. The particulars of the offence were that on the 25th day of November 2009 at Daisy Road in Runda area within Nairobi area province jointly being armed with a dangerous weapon namely a pistol, attempted to rob Gibert Omoga Owinga of his motor vehicle registration number KAV 324 W Honda CRV valued at Kshs 1,000,000/= and at the time of such attempted robbery threatened to use physical violence on the said Glbert Omoga Owinga.

The Appellants were arraigned in the trial court on 9th December 2009 and pleaded not guilty to all the charges against them. They were tried, convicted of the offence of attempted robbery with violence and sentenced to death. The Appellants being aggrieved by the judgment of the trial magistrate appealed both his conviction and sentence. The grounds of appeal for the 1st Appellant were that there was no evidence of his positive identification and that the trial magistrate relied on contradictory evidence and did not consider his alibi and mitigation. The 2nd Appellants grounds of appeal were that the trial magistrate erred by relying by not giving his points of determination contrary to section 169 of the Criminal Procedure Code, by basing his conviction on insufficient, inconsistent and circumstantial evidence by disregarding the Appellant's defence. They relied on written submissions availed to the court.

Ms Matiru for the State opposed the appeal and submitted that the two PW1 was driving to his home and as he approached his gate the 1st Appellant was waiting at the gate and the 2nd Appellant jumped on to the road and was knocked down by PWI. Pw2 was at the gate and there were security lights and was able to identify the 1st Appellant who used to work in the neighbourhood. The 2nd Appellant was identified by PW3 from the injuries he sustained after being knocked by PW1's car. Further, that the clothes they were wearing on the material day were recovered from their houses.

A brief summary of the evidence adduced before the magistrate's court is as follows. The prosecution

called six witnesses. PW1 was Gilbert Owinga who stated that he lives in Runda, and that on 25/11/2009 he was driving a motor vehicle registration number KAV 324W, a Honda, and as he approached his gate he called his employee called Mary to open the gate. PW1 said that 20 -30 metres from his gate he saw three men walking on the right hand side of the road and that he could see them as his car lights were on. He described one of the men as wearing a black suit, another a white cap and red track suit and the last one as wearing a blue track suit with white stripes.

PW1 further testified that one of the men jumped on to the road with a gun, and that he accelerated and hit him on the leg with the motor vehicle and drove past the gate. He called his employee to find out what was happening and also called his father who called the police. He stated that he did not see the faces of the men but was able to identify the clothes they wore which were produced in court.

PW2 was Mary Kisiku Kinyua, who testified that she is an employee of PW1 and that on 25/11/2009 PW1 called her to open the gate for him and as she was opening gate she saw the three men, one of whom jumped on to the road holding something that looked like a gun and was hit by PW1's car. She also described their dressing in similar terms as PW1, and stated that there were security lights at the gate and she could see the men clearly, who were 10 metres away. She further testified that the man who was hit by the car fell down, and that she was able to recognise the 1st Appellant who was in the blue track suit, as he used to work for a neighbour.

PW3 was Duncan Mukunzu who worked for PW1's neighbour and he testified that on 27/11/2009 when reporting to duty at 6.30 am, he met the 2nd Appellant who was limping, and who told him that he had been hit by a vehicle. PW3 stated that he had been told about the incident at PW1's gate by PW2, and that he then gave the information about the 2nd Appellant to PW1 and the police.

PW4 , PC Samwel Bornco testified that he was the arresting officer and was attached to Runad Police Station. Further that on 25/11/2009 at 8.00pm while on patrol with other police afficers they got a radio call of an attempted robbery at the PW1's house. They went to the house and were explained as to the incident by PW1 and PW2 who also described the clothes worn by the assailants. Further that PW2 said she was able to see the attackers and recognised one of them. PW4 testified that on 29/11/2009 they went to the house where PW2 stated the 1st Appellant worked and arrested him.

PW 5 was IP Nahum Muli, who was attached to the CID Gigiri, and he testified that he conducted an identification parade where PW2 identified the 1st Appellant. The last prosecution witness PW6, was Paul Abuto the investigating officer also attached to CID Gigiri, who testified that he was informed of three suspects who had been arrested with regard to the attempted robbery on 25/11/2009.

PW6 stated that he then organised for an identification parade, and that the 2nd Appellant informed him that he was involved in a road accident. He went to the 2nd Appellants' house and recovered a treatment card showing the 2nd Appellant had received treatment as Kiambu District Hospital on 26/11/2009. Further, that the 2nd Appellant explained that he had been knocked by a vehicle along Kiambu road, however that there was no report to that effect.

After the close of the prosecution case the trial magistrate found that a *prima facie* case had been established to warrant the Appellants to be placed on their defence, and explained section 211 of the Criminal Procedure Code to the Appellants. Both Appellant gave unsworn evidence and did not call any witnesses. The 1st Appellant testified that he was a caretaker in Runda Estate and that while at work on 29/11/2009 police came to his house and searched his house, took his trouser and jacket, and arrested him. He stated that he was then taken for an identification parade and PW2 who he claimed to be his girlfriend, identified him.

The 2nd Appellant testified that he lived in Runda estate and that on 25/11/2009 he went to work at Muthaiga North and returned home, and that on the next day 26/11/2009 while on his way to work he was hit by a Matatu registration number KAR 607R, and that the driver of the motor vehicle took him to

Kiambu District Hospital and gave him Kshs 1,000/=. He stated that he did not report the accident to the police as he was not badly injured. He also stated that on 27/11/2009 he was arrested and denied committing any offence.

We have considered the arguments made by the Appellant and the State. Our duty as the first appellate court is to re-evaluate the evidence and draw independent conclusion as held in **Okeno v Republic (1972) E.A. 32**. However we are alive to the fact that we do not have the advantages enjoyed by the trial court of seeing and hearing the witnesses as observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

We accordingly find that the issues for determination in this appeal are whether there was positive identification of the 1st Appellant, whether there was sufficient evidence to convict the Appellants, and whether there was non-compliance with section 169 of the Criminal Procedure Act.

On the issue raised of the positive identification of the 1st Appellant, it was submitted by the said Appellant that if PW2 recognised the 1st Appellant there was no need to attend an identification parade, and that there were no special marks on the clothing recovered from him to prove that they were the clothes worn during the commission of the robbery.

We have reminded ourselves of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, inter alia,that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

In addition it has been stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

In the present appeal the robbery took place at night, and PW2 stated that he was able to see the 1st Appellant from security lights that were on at the gate, and the 1st Appellant himself admitted to the fact that he was known to PW2 when he testified that PW2 was his girlfriend. We therefore find that there was no mistake in his recognition and identification.

On the issue of whether there was sufficient evidence to convict the Appellants for the offence of attempted robbery with violence, the 1st Appellant argued that the evidence of PW1 and PW2 was not sufficient to warrant a conviction and that they contradicted themselves in their evidence. The 2nd Appellant argued that PW1 and PW2 did not identify or recognise him and that there was no evidence that any cloths were recovered in the 2nd Appellant's house.(confirm from the handwritten proceedings and page 17-18 of the typed proceedings) Further that no evidence was brought of the similarity of his injuries to those suffered by the assailant who was hit by PW1's car.

Section 297 (2) of the Penal Code provides the ingredients of the offence of attempted robbery with violence as follows:

> **(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.**
>
> **(2) 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 assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

We are guided by the decision in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** which sets out what constitutes robbery with violence under section 296(2) of the Penal Code as follows:

1. **If the offender is armed with any dangerous or offensive weapon or instrument, or**
2. **If he is in the company with one or more other person or persons, or**
3. **If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.**

We are also alive to the requirement that proof of any one of the above ingredients of robbery with violence is enough to base a conviction on under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**. It is our view that this position in law also applies to the offence of attempted robbery with violence under section 297(2), the only difference being that there is no need to prove that there were goods or items that were stolen in the offence of attempted robbery with violence.

With respect to the 1st Appellant we have already found that he was recognised as the scene of the crime. PW1 and PW2 also testified that he was in the company of two other men and one of the assailants had a gun who jumped in front of PW1's car and the only intention could have been to cause PW1 to stop and to steal his car or belongings. It is thus our finding that the ingredients of the offence of attempted robbery with violence were proved with respect to the 1st Appellant.

With respect to the 2nd Appellant the only evidence adduced linking him to the commissions of the offence was his injuries, which were similar to those that were suffered by one of the assailants upon being hit by PW1's car, and the evidence that he was treated for his injury on 26/11/2009, the day after the attempted robbery. The 2nd Appellant gave an explanation as to how he got injured, as having been hit be a matatu on Kiambu Road bearing a registration number KAR 607R.

We are in this respect guided by the decision in **Sawe vs Republic (2003) KLR 364** that in order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses other than that of his guilt, and only if there are no other existing circumstances weakening the chain of circumstances relied on. The court of Appeal also held that the burden of proving facts which justify the drawing the inference of guilt to the exclusion of any other reasonable hypothesis is always on the prosecution.

In the present appeal we find that a reasonable hypothesis was provided by the 2nd Appellant which was not disproved by the prosecution either by showing that the motor vehicle he stated hit him, a matatu registration number KAR 607R, did not exist, and if it did that there was no such accident as claimed. In addition upon re-evaluation of the evidence we find that there is no record of clothing found in the 2nd Appellant's possession similar to those won by one of the assailants that was produced in evidence as stated by the trial magistrate in his judgment. We therefore find that the evidence used to convict the appellant did not satisfy the legal requirements of circumstantial evidence to warrant the conviction of the 2nd Appellant.

The last issue for determination is whether section 169 of the Criminal Procedure Code was complied with by the trial magistrate. It was argued by the 2nd Appellant in this respect that the trail magistrate failed to give his reasons for convicting the 2nd Appellant based on the evidence of PW1 and PW2. The provisions of section 169 are as follows:

"(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the

reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."

We have examined the trial magistrate's judgment, and particularly pages of the said judgment, and we find that it clearly sets out the issues he found necessary to determine, the evidence adduced on those issue, and his decision on each issue including the reasons thereof. We note that an argument that the reasons given by a trial magistrate are incorrect or illegal cannot be raised as one of compliance with section 169, and only as one of error of law or fact. We therefore find that there was compliance with section 169 of the Criminal Procedure Code in this respect.

We accordingly uphold the conviction of the 1st Appellant for the charge of attempted robbery with violence contrary to Section 297(2) of the Penal Code, and the sentence for this conviction is found to be legal. We however quash the conviction of the 2nd Appellant for the charge of attempted robbery with violence contrary to Section 297(2) of the Penal Code and set aside the sentence imposed upon him for this convictions. We also order that the 2nd Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AT NAIROBI THIS 14TH DAY OF NOVEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE