REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HCCRA NOS. 153 & 155 OF 2011

JOHN WESONGA JAOKO …..... 1ST APPELLANT

JARED OTIENO MUFWAYA …..... 2ND APPELLANT

VERSUS

REPUBLIC ….....…….....……RESPONDENT

(From the original conviction and sentence of E. S. Olwande SRM, at Butere PM'S Court, Criminal Case No. 98 of 2011)

JUDGEMENT

The appellants herein John Wesonga Jaoko and Jared Otieno Mufwaya were charged before the lower court with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. Particulars of the offence are that on the 2nd day of February 2011 at Bushieni Sub-Location in Butere District within Kakamega County, robbed Joseph Otieno Oduor of two speakers, car battery, amplifier and a mobile phone all valued at Ksh 26,000/= by cutting the said Joseph Otieno Oduor on the head.

The prosecution called 5 witnesses in this case. The 1st witness PW1 was the clinical officer who treated the complainant and filled his P3 form. He confirmed that complainant came to the clinic at Manyala bleeding. He had severe cuts on the head – 2 deep cuts reaching the skull and 4 others not so deep. He was 1st treated on 3.2.2011. He told the clinical officer that he was attacked by robbers who also cut him. He later filled the P3 form and he produced it in court as exhibit.

The complainant told court how he was attacked by robbers and cut. He said he didn't identify any of the robbers though but the appellants are known to him as they are his village mates and went to school with him. His property as per the charge sheet was stolen in the process.

PW3 – complainant's wife told court that on 2.2.2011 at 11 pm robbers attacked them as they slept. She heard her husband saying **"don't kill me".** She didn't hear her husband again. She was still in the bedroom. After a short while, 3 men entered her bedroom. One of them came where she was seated and picked up her baby. He asked her to give him money or they would kill the baby. The baby was 3 months old. The man had an orange torch and a knife and when he picked up the baby, he placed the 2 items on the bed. At that pint as he picked the baby, she saw his face and identified him. It was Songi – the 1st appellant. He was wearing a short trouser made from army prints and a black jacket. One of the robbers started picking items from the house and giving to those outside. She also saw this robber as he picked up the phone from her bed and the torch was still on. She noticed a small scar near his mouth and recognized him, as Chati, the 2nd appellant. She also identified the clothes he was wearing in court.

She told court that when the 1st appellant took the baby, she pleaded with him to spare the baby

and told him that they had no money.

After the thugs left, PW3 informed her brother in-law, Dan what she saw and also informed him that she identified 2 people -the appellants. She also later informed her husband the same.

PW4, Dan, told court that after the incident, PW3 told her he had identified 2 people who robbed them and who had assisted her built her house and are nicknamed Songi and Chati. They also recovered a blood stained phone at the scene which one man came to claim 2 days later. The complainant was convinced the man was involved in the robbery and on hearing this, the man ran away and is still at large to-date.

PW4, the officer who arrested the appellants and also charged them told court that he visited the scene of the offence and found things strewn all over and blood in the sitting room. He learnt from PW3 the wife of complainant that she had identified the appellants during the robbery. He was able to arrest the appellants and also recovered their torches, pangas and clothes identified by PW3 as the ones they wore during the robbery. The receipt of complaint's property stolen during the robbery were also recovered. He then charged the appellants accordingly.

Put on their defence, the 1st appellant said he was arrested on 14.2.2011 at 8 am. He says the complainant is like a brother to him and he had heard that complainant had been attacked by thugs but he didn't have time to see him. He visited later and also missed complainant. He denied that the jungle short and torch were his.

2nd appellant said that he learnt of the robbery meted on complainant on the night of 2.2.2011 and even visited complainant's home on 4.2.2011 but didn't see him. On 14.2.2011 he was arrested and arraigned in court for this offence which he denies. He denied that he went underground after this incident.

The trial court heard evidence presented to him and found that there were favourable circumstances under which PW3 recognized the two appellants and also with the subsequent recovery made of the clothes they wore and torches and pangas, he was convinced they were properly identified. Further that PW3 at the earliest incidence informed PW4 that she had identified the two. The trial magistrate found the appellants guilty of the charge and sentenced them to death.

They have now appealed before this court on both conviction and sentence on the grounds that:-

1. **The names PW3 gave as names of appellants are not included in the charge sheet.**
2. **Some recoveries made but no recovery forms were produced to prove what was recovered from each appellant.**
3. **That report was made by the assistant chief who did not testify and did not record a statement.**
4. **That no identification parade was done and that this was a case of mistaken identity.**

The State opposed this appeal. From these grounds of appeal, we note that it is true that no identification parade was conducted. However, this was not necessary given that the appellants were known to the witness PW3 who they built a house for. There was no need for the parade. She took some time with the appellants in her house as they took some properties outside and with the torch lighting, she was able to see and recognize them.

The appellants have admitted that they had no grudge with the complainant's family and even referred to his wife PW3 as sister in-law. There could be no motive to plant such a serious offence on the appellants.

The names the appellants were known were Songi and Chati respectively. It is however clear that these names were not included in the charge sheet which was a serious omission. Despite the fact that PW3 told court that he knew the two by there names and even villagers called them by the said names

omitting to use the said names on the charge sheet makes it difficult to link the appellants with the names given.

On issue of clothes worn by the appellants that night, it is also clear that clothes resemble. There is no proof that the clothes found were the same one worn by robbers that night.

The trial magistrate should have explored this area of doubt and given the benefit of doubt to the appellants. From our analysis of the evidence, we find that it was not safe to convict the appellants. We allow the appeal and set aside the conviction and sentence. We order the appellants set free unless otherwise lawfully held.

DATED THIS 11TH DAY OF DECEMBER 2013

SAID J. CHITEMBWE **HELLEN S. WASILWA**

JUDGE **JUDGE**