REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 83 & 84 OF 2009

GEOFREY SHIMONYO..……..……..……..……..……1ST APPELLANT

OSCAR INGOTSI…….2ND APPELLANT

VERSUS

REPUBLIC.....…….RESPONDENT

J U D G M E N T

1. The Appellants herein were charged with two Counts of the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code.**

2. On the first Count, it was alleged that on 22nd August 2008 at Rosterman Village, Shirere Sub-Location, Central Kakamega District within Western Province, jointly with another not before the Court, while armed with dangerous weapons, namely pangas and rungus, robbed Anjelina Muteshi of cash Kshs.1,300/- ten packets of supermatch cigarettes, four bedsheets, five dozen cups, three dozen plates, three sufurias and two radios valued at Kshs.10,300/- and at or immediately after the time of such robbery threatened to use actual violence on the said Angelina Muteshi.

3. On the Second Count, that on the same date and place and armed with the same weapons, robbed Patrick Embali of cash Kshs.600/- and mobile phone make Motorolla C113 and four kilogrammes of sugar all valued at Kshs.4,400/- and immediately before the time of such robbery threatened to use actual violence on the said Patrick Embali.

4. They denied the charges, were tried, convicted and sentence to death and in their consolidated Appeal, they have raised the following issues;

i) That their alleged recognition at the scene was not beyond reasonable doubt and that is why the Complainant did not mention their names to the Police while making the initial report.

ii) That the evidence was full of contradictions that should have been resolved in their favour.

iii) That their statements in defence were not considered at all.

5. The evidence in support of the charges was as follows;

6. PW1, Angeline Muteshi stated that on the night of 21st August 2008, she heard some people demanding that she should open her door. When she did so, she noted that they had torches and one of them had a police jungle jacket. They also had torches and one of them forced her back onto a bed and she was handcuffed to it. They then took away Kshs.8,000/- in cash and house utensils. Thereafter they left and she went back to bed and the next day she reported the robbery.

7. She stated that she recognized the Appellants from light emitted by their torches and that she was

relative of the 1st Appellant whom she also recognized by voice, and so she was well known to him.

8. She also stated that because she had recognized both Appellants, she named them when she recorded her statement with the Police and because she used to sell liquor to the 2nd Appellant, she was also very well known to him too.

9. PW4, Seraphin Busolo, a minor, stated that she was present during the robbery and that she also recognized the Appellants during the incident using the light emitted by the torches that they had.

10. PW3, Patrick Ihali on his part stated that on 21st August 2008 at about 1.00 a.m. he was asleep in his house when his door was banged and three men entered. He had put on the lights and he immediately recognized the two Appellants but he was unable to tell who the third man was. They had claimed to be Police officers and they commenced a search in the house and the 1st Appellant ordered him to sit down and hit him on the face before handcuffing him. They took Kshs.600/-, a mobile phone and 4 kilogrammes of sugar and left.

11. When he made his report to the Police, it was his evidence that he named the two Appellants and the two were later arrested.

12. PW5, Christine Mukwangu, wife of PW3 while corroborating her husband's evidence, added that she had known both Appellants' previously and that the 1st Appellant used to walk with Police officers in their Village and the 2nd Appellant was a seller of *'mandazi'* and so they were not strangers to her.

13. PW6, P.C. Benson Oluoch was the one who re-arrested the Appellants when they were taken to Kakamega Police Station by the Assistant Chief, Shirere Sub-Location and Administration Police officers from Rosterman. Later, he recorded statements from witnesses and charged the Appellants.

14. In his defence, the 1st Appellant denied the charges against him and stated that he had been arrested because of a grudge he had with his step-mother, PW1.

15. The 2nd Appellant on his part stated that he was arrested when he went to PW1's house to buy liquor. He paid Kshs.100/- and as he was going home, PW1 sent some people after him and he was beaten up and later charged. He denied knowledge of the incident leading to the charge.

16. In his judgment, the learned trial Magistrate found that the charge in respect of Count One had not been proved to the required standard but found the Appellants guilty in respect of Count Two and sentenced them to death.

17. On our part, the only issue that we deem fit to consider is whether the Appellants were properly identified at the scene of the alleged robbery. We say so because we have no reason to doubt that PW3 was hit in the face and that the robbers had initially posed as Police officers. Further, we have no doubt that the items listed in the charge sheet were indeed stolen during the robbery incident.

18. Contrary to the particulars in the charge sheet, we have seen no evidence that the robbers had any weapons save that they used handcuffs to restrain PW3 and the issue is whether the offence of robbery with violence could have been proved in the circumstances. In Shadrack Karanja vs. Republic [2006] eKLR, the Court of Appeal stated as follows;

"The same issue was raised in Moneni Ngumbao Mangi vs. Republic Criminal Appeal No.141/2005 (ur) and this court examined in detail the essential ingredients of the offence of robbery with violence under Section 296(2) of the penal Code as analysed in Johana Ndungu vs. Republic, Criminal App. No.116/1995 (ur). After noting that the charge sheet in that case stated, as it does in this case, that the Appellant "robbed" the Complainant, the Court continued:-

The word "robbed" is a term of art and connotes not simply a theft but a theft preceded, accompanied

or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property. The predecessor of this Court so held in Opoya vs. Uganda [1967] E.A. 752. …

As already stated there are three ingredients, any one of which is sufficient to constitute the offence or robbery with violence under Section 296(2) of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument that would be sufficient to constitute the offence. Secondly, if one is in company with one or more other person or persons that would constitute the offence too. And lastly 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 that would be yet another set to constitute the offence …"

18. We are duly guided and will hold that all the evidence points to an offence under **Section 296(2)** having been committed as the offenders were more than one and actually PW3 was hit on the face by one of them. But we must return to the issue of identification and/or recognition.

19. In Republic vs. Turnbull (1976) 3 All E.R. 549; it was stated as follows;

"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

20. In this case, PW3, and PW5 were categorical that both Appellants were known to them and that evidence was beyond reasonable doubt, in our view. What they did for a living was well known to them and there is absolutely no reason to doubt that fact.

21. As to the lighting available that night, we believe the evidence of the two witnesses that the robbers had torches and the light emitted was sufficient for them to recognize them.

22. In their defences, the appellants said nothing that would dilute the evidence against them and although they had nothing to prove, their defences were of no consequence when properly considered, as we have. They only defended themselves against the evidence tendered by PW1 and her witnesses. They said nothing of the evidence by PW3 and PW5 and so contrary to their assertion in the Appeal, there is nothing to be said of their defences.

23. In the end, we find no merit in all the grounds of Appeal and the Appeals as consolidated, are hereby dismissed.

24. Orders accordingly.

D. A. ONYANCHA **I. LENAOLA**
JUDGE **JUDGE**

DELIVERED, DATED AND COUNTER-SIGNED BY S. CHITEMBWE, JUDGE AT KAKAMEGA THIS 23RD DAY OF FEBRUARY, 2012

S. CHITEMBWE
JUDGE