REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 173 & 174 OF 2009

(as consolidated on 16/2/2011)

VINCENT INDECHE SHIOYI……..……..……1ST APPELLANT

NELSON TSALWA MASABA…….……..……..2ND APPELLANT

VERSUS

REPUBLIC.....…….RESPONDENT

J U D G M E N T

1. The Appellants herein, Vincent Indeche Shioyi and Nelson Salwa Masaba were both charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. It was alleged that on 25th December 2007 at Shianda Village, Butere District, within Western Province jointly with others before the Court, while armed with dangerous weapons namely rungus and pangas robbed Joseph Bulinga Keya of cash Kshs.36,000/- and one mobile phone make Nokia all valued at Kshs.52,000/- and at, or immediately after the time of such robbery, used personal violence against Joseph Bulinga Keya.

2. They also faced the charge of malicious damage to property contrary to **Section 339(1)** of the **Penal Code**. In that regard, it was alleged that on 25th December 2007 they, jointly with others not before the Court, willfully and unlawfully damaged the rear windscreen and right side mirror of motor vehicle registration number KAV 318W Toyota Corolla all valued at Kshs.6,600/- the property of Joseph Keya.

3. The Appellants denied all the charges and upon trial, were convicted and sentenced to death. In the Appeal, the Appellants have faulted the totality of the evidence against them and faulted their conviction as not warranted in the circumstances.

4. In evidence before the trial Court, the case for the Prosecution was that on 25th December 2007 at 11.00 p.m., PW1, Joseph Bulinga Keya, PW3, Francis Bukachi and PW4, Francis Keya together with one Shadrack Ambani and Jeremiah Olumola were all travelling in motor-vehicle registration number KAV 318W when they saw a young man and woman staggering drunkenly on the road. According to PW1, he recognized the young man as one Vincent, the 1st Appellant and that when he asked him why he was walking around drunk, the 1st Appellant suddenly hit the vehicle's windbreaker and as he did so, a group of people allegedly emerged from a sugarcane plantation nearby and attacked PW1 who had opened the car door when it was first hit.

5. The three witnesses said that both PW1 and Shadrack Ambani were injured during the incident and that PW1 lost his Nokia phone and Ksh.36, 000/- in cash. All purported to have recognized the two Appellants using light from the car's headlights and when they reported the matter at Butere Police Station the same night, they returned to the scene and PW2, Wycliffe Tobosso Ochula pointed them to the homes of the Appellants where they were both apprehended and taken to the Butere Police Station.

6. PW2, aforesaid turned out to be a hostile witness and his evidence was thus rendered valueless.

7. PW5, Oliver Maheso, a Clinical Officer examined PW1 and noted that his occipital region had tenderness as did his thorax and left first finger. The degree of injury was diagnosed as harm and a P3 form to that effect was produced.

8. In cross-examination, learned Counsel for the Appellants questioned certain alterations on the P3 forms and they included the fact that the date of the incident was initially recorded as 25th February 2007. The other alteration was also on a date but with regard to the date of arrest of the Appellants.

9. PW6, Cpl. Christopher Mulunge visited the scene together with PW1 on the same night the incident happened and upon interrogating PW2, he pointed him to the homes of the Appellants and they were arrested. Later, the witness recorded statements from other witnesses and charged the Appellants with the present offence.

10. PW7, C.I.P. Lacton Mbeyi, a Scenes of Crime Officer photographed motor-vehicle KAV 318W and noted that its rear windscreen was broken, as was the windbreaker on the driver's side. He produced the photographs as exhibits.

11. When asked to defend himself, the 1st Appellant stated that on Christmas Day in 2007, he went to Butere Market to celebrate the day and at 8.00 p.m. he left for his home with his girlfriend, one Lilia Udada. On their way, a familiar motor-vehicle passed them and then stopped. The occupants came out and asked them what they were doing at the time and that they were asking the questions because they were Police officers. He recognized PW1 as a person he had previously seen in the area. He added that PW1 without provocation started whipping the 1st Appellant who refused to run away because his girlfriend was new to the area and knew no one in that village. She too was whipped and the 1st Appellant raised an alarm whereupon PW2 came and intervened and PW1 stopped whipping the duo. That PW1 then asked for his phone and one of the occupants of the car told him that it was on the dashboard and they left the scene.

12. According to the 1st Appellant, after the incident, although he was injured, he went home and at 3.30 a.m. he was woken up by Police officers and he was arrested and later charged. Nothing was recovered from the scene, he stated.

13. The 2nd Appellant on his part stated that he was arrested on the morning of 26th December 2007, handcuffed and taken to Butere Police Station where he was charged with the offence of robbery with violence but he denied the offence.

14. We have read the trial magistrate's judgment and we have taken into account the submissions by Mr. Namatsi for the Appellants and Mr. Limo for the Republic. Our opinion is as follows;

15. Firstly, we should dispose of the case against the 2nd Appellant because we have read the record and we are unconvinced that he was properly convicted. We say so because although PW1, PW2 and PW3 purported to recognize him at the scene, their evidence in that regard was completely wanting. All through their evidence, it was clear that the 1st Appellant and his girlfriend were the ones who triggered the late night incident. They were at the scene at the time of the incident and it is unclear how the 2nd Appellant was embroiled in it. If he was part of the group that allegedly appeared from the sugarcane plantation, then there is no evidence as to how he was identified out of the ten or so people mentioned. The light of motor-vehicle cannot be said to have been used to do so as none of the witnesses said so and in any event, it was focused on the front and not the sides of the car, where the group of people allegedly emerged from.

16. Further, it was the 1st Appellant who allegedly pointed out to PW1 and PW6 that the 2nd Appellant was also at the scene. Accomplice evidence can never be used to convict and so that evidence without any

other evidence to corroborate it is worthless – see M'Inanga vs. Republic [1985] KLR 294.

17. For the above reasons, we must allow the Appeal in favour of the 2nd Appellant and will make the necessary orders at the end of this judgment.

18. Turning to the case against the 1st Appellant, because he has admitted being at the scene, we must turn to the issue whether he committed the offence as alleged. **Section 296(2)** of the **Penal Code** provides that the offence of robbery with violence is proved and punishable in the following circumstances;

"(1) …

(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 robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentence to death."

19. In the present case, we are unable to say that the above offence was proved beyond reasonable doubt. We hold that view because if one looks at the totality of the evidence, what emerges is that PW1 decided to discipline the 1st Appellant for walking on the road while drunk. An altercation occurred which led to PW2 and others intervening and there is no doubt that PW1's vehicle was damaged as a result thereof. He may also have sustained minor injuries and may have lost some money and his phone during the incident. ***But where is the evidence that the 1st Appellant was a robber?*** We are unable tobelieve the theory that he and his girlfriend pretended to be drunk only to attack PW1. We are more inclined to the other theory which was forcefully brought out during cross-examination of PW1, PW2 and PW3 that it was PW1 with his whip who initiated the whole incident. That theory was reinforced in the 1st Appellant's defence which we find to have been consistent throughout the case and which was hardly challenged.

20. On the whole, we find that the case against the Appellants was weak and the benefit of doubt should have been given to them.

21. We hereby allow the Appeal as consolidated and will quash the Appellants' conviction, set aside their sentences and order that they should be set free unless they are otherwise lawfully held.

22. Orders accordingly.

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

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

S. CHITEMBWE
JUDGE