REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

(CORAM: AZANGALALA AND KARANJA JJ.)

CRIMINAL APPEALS NOS. 13 OF 2010 AND 14 OF 2010

(CONSOLIDATED)

BETWEEN

JACKSON YATICH KOTINI .....1ST APPELLANT

JOSEPH NGOLIANGA.....2ND RESPONDENT

AND

REPUBLIC.....RESPONDENT

[Being an appeal from the Judgment of the Principal Magistrate – H.M. Nyaga dated 19/01/2010 at Kabarnet in CRC. No. 39 of 2008]

JUDGMENT

The appellants, **Jackson Yatich Kotini** and **Joseph Ngolianga** were charged in Court with the offence of robbery with violence contrary to section 296(2) of the Penal Code (Cap 63, Laws of Kenya). It was alleged that the appellants, while armed with a dangerous weapon, namely A G 3 rifle, on the 21st January, 2008, in Marigat town in Baringo District, within the Rift Valley Province, robbed **John Ngetuny** of a cash sum of Kshs 14,000/= and a Nokia- 2300 mobile phone valued at Kshs 8,000/= and at or immediately before or immediately after the time of such robbery wounded the said **John Ngetuny** (hereinafter "the complainant).

In a second count, the pair were charged with the offence of being in possession of a firearm contrary to section 89 (1) of the Penal Code. The allegation being that the appellants in the same place, same date, jointly, without reasonable excuse, carried a G 3 rifle S. No. 392285, loaded with 20 rounds of ammunition, in circumstances which raised a reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order.

In a third count, the appellants were charged with personating a police officer contrary to section 105 (6) of the Penal Code. It was alleged, in the said count, that the pair in the same place and same date, falsely presented themselves to persons employed in the public service namely police officers and assumed to

arrest the said complainant.

The learned trial Magistrate did not find proof to the required standard in respect of count 2 and accorded the appellants the benefit of doubt and acquitted them on the count. With respect to the other counts, the learned trial magistrate found that the prosecution had discharged its burden as required and convicted the appellants of the same.

After regarding the appellants' mitigation, the learned trial Magistrate pronounced the death sentence against the appellants in respect of the 1st count and imposed a prison sentence of 2 years upon the appellants on count 3.

The appellants were not satisfied with their convictions and sentences and have appealed before us on a number of grounds which in the main raise the following issues:- Unsatisfactory identification, insufficiency of the prosecution evidence and failure to consider or adequately consider the appellants' defences.

During the hearing of the appeals, the appellants appeared in person and relied upon pre-written submissions. On the other hand, **Mr. Oluoch,** the leaned Senior Deputy Prosecution Counsel, appeared for the Republic and orally submitted that the appellants were positively identified and were convicted on sound evidence.

As the first appellate court, it is our duty to analyze, re-examine and re-evaluate the evidence upon which the appellants were convicted and arrive at our own independent conclusion bearing in mind that we had no advantage of seeing and hearing the witnesses testify and should give allowance for that. (See **Okeno –vrs- Republic [1972] E.a 32 and Ngui –vrs – Republic [1984] 729).**

The prosecution case was that the complainant (P.W.1) was enjoying himself at a canteen in Marigat town when, at about 1.00 a.m., he was joined by the appellants. The 1st appellant was armed with a gun and was in police uniform, while the 2nd appellant was in civilian clothes and was unarmed. The appellants demanded a drink from the complainant who declined. The appellants then informed him that he was under arrest and started escorting him. The complainant telephoned his cousin, **Festus Biwott** (P.W.2) and informed him of the purported arrest. As he was being escorted, he attempted to escape but fell down when a shot was fired. He was then placed in a saloon vehicle which was driven past the police station and back to town to Laboss Bar where he was hand-cuffed. He was then driven to Kamco hotel where the entire team alighted and the car was driven away. There, the complainant was assaulted by the appellants and his hand-cuffs removed. The 1st appellant then removed Kshs 14,000/= from the complainant and when the 1st appellant wanted to further assault him, he escaped to a nearby school where he hid behind a cactus bush until the next morning.

That morning, the complainant reported the attack to Marigat Police Station where he was issued with a P.3 form which was subsequently completed and signed by **Anderson Chelugo** (P.W.6) who was then a Clinical Officer at Marigat. P.W.6 classified the injury the complainant had sustained as harm.

Festus Biwott, (P.W. 2) confirmed receiving the complainant's call informing him of his alleged arrest. The next morning, he accompanied police officers to the house of one Sally who was said to be a girl friend of the suspects. Various items were recovered from that house including a police uniform and belt, and a black bag. The said **Sally** then led the team to a bush where a G.3 rifle was recovered. The team included A.P. Cpl **Rioba Nyakundi** (P.W.4) who was then stationed at Marigat D.O.'s office and **P.C. Koech Musa** , then stationed at Marigat Police Station.
The appellants were later arrested and charged as already stated. The appellants gave sworn statements. The 1st appellant put forward an alibi defence that at the time of the alleged attack, he was at Kijabe Mission Hospital attending to his niece who had been involved in an accident and had been operated upon. On his return to Marigat, he was arrested by some youths who took him to Marigat Police Station where he was beaten and subsequently taken to Kabarnet Police Station where he was charged with an offence he knew nothing about.
The 2nd appellant in his statement narrated how he was arrested, beaten and forced to admit the robbery

and knowledge of the 1st appellant.
At the conclusion of the trial, the learned Principal Magistrate found that the complainant had had ample time to recognize the appellants and positively identified them.

On our own independent re-examination and re-evaluation of the evidence which was placed before the learned trial magistrate, we have made the following pertinent observations. The prosecution case turned upon the testimony of the complainant who was the only identifying witness. On his own admission, he commenced drinking at 6.00 p.m. By the time the alleged attack occurred, at about 1.00 a.m., the complainant had been drinking for 6 hours. We cannot in the premises rule out the possibility that the drinking had, by the time of the attack, had a toll on him. The possibility that his faculties were impaired by the drinking cannot be ruled out all together. He was not drinking water or soft drinks. He was enjoying himself. In his own words:-

"I was drinking and did not want to risk losing the money."

That answer given in cross-examination suggests that the complaint was imbibing alcohol and he did so for six (6) hours prior to the attack. In our view, in the complainant's state, mistaken identification was likely.

In his entire testimony, the complainant did not allege that he gave a description of his assailants to any one, prior to the arrest of the appellants. In his own words:-

"After about 2 weeks, I was called by my cousin Festus who told me that the 2 suspect had been arrested. After the 2nd one was arrested, I came to Kabarnet Police Station. I saw, them and identified them …"

It is significant that the appellants were not arrested on the description of the complainant. Even when he eventually purported to identify them, he did not state how he did so. He had been attacked by two people one of whom was in police uniform and another in civilian clothes. The record does not indicate whether, at the time of their arrest, the appellants were dressed in the same fashion as the thugs who had attacked the complainant for him to identify them.

We are also puzzled that, the prosecution did not find it prudent to call Sally who was alleged to be a girl friend of the attackers. Yet, it is Sally who allegedly led the police in the recovery of the items which seemed to link the attackers to the robbery. If Sally had been called as a witness and testified that the items indeed belonged to the appellants, her testimony would have supported the complainant's identification of the appellants. But she was not. In our view, she was an essential witness and we draw the inference that if she had been called, her testimony would have been adverse to the prosecution's case.

In view of what we have said about the identification of the appellants, our conclusion is that the same was not positive. We appreciate that the learned trial Magistrate warned himself of the danger of convicting on the testimony of a single witness. In the circumstances of this case however, we think it was not safe to convict.

Our consideration of the issue of identification has covered the other complaints made by the appellants. We cannot in the premises uphold their conviction on the basis of the evidence adduced. We allow the appeals, quash the conviction of the appellants for both robbery with violence and personating a police officer and set aside the sentences of death imposed upon them and that of imprisonment for 2 years. The appellants are accordingly set free unless they are otherwise lawfully held.

Before concluding this judgment, we observe that the learned trial Magistrate ordered the appellants to suffer death for robbery with violence and also serve 2 years imprisonment for personating a police officer. He did not state how both sentences were to be served. If we had upheld the conviction and the sentences, we would have ordered the sentence of imprisonment to be held in abeyance since it would not

be served if the death sentence were to be executed. That is however academic since we have allowed the appeals.

DATED AND DELIVERED AT ELDORET THIS 14TH DAY OF APRIL, 2011.

F. AZANGALALA

JDUGE

J. R. KARANJA

JUDGE

Read in the presence of:

J.R. KARANJA

JUDGE