**No. 2803**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL APPEAL NO. 203 OF 2010**

**ERIC MOSIGISI MOMANYI.....1st APPELLANT**
**ANDREW MOMANYI NYAUMA.....2nd APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

***(Being an appeal from the Original Conviction and Sentence of the Principal Magistrate's Court at Nyamira Hon. L. Komingoi***

***in Criminal Case No. 158 of 2010 delivered on 2nd September, 2010)***

The two appellants whose respective appeals were consolidated by this court for ease of hearing rose from the same trial in the subordinate court. The two appellants were charged before the Principal Magistrate's Court at Nyamira with two counts of Robbery with violence contrary to section 296(2) of the **Penal Code**. In the first count, it was alleged that on 9th February, 2010 at Ikongo village in Nyamira North District within Nyanza Province Jointly with others not before court while armed with dangerous weapons namely knives robbed **Bernard Obiero** of cash kshs. 800/- and a motor bike engine number 88945 and chassis number MD2DDDM22SWH20722 make Bajaj valued at kshs. 78,000/= and immediately before such robbery used actual violence to the said **Bernard Obiero**. In the second count it was claimed that on the same day, place and similarly armed with the same dangerous weapons robbed **Dennis Miregwa** of cash kshs. 3,400/= a grey jacket, a black jumper and a mobile phone make Nokia 1110 all valued at kshs 11,900/= and at the time of such robbery used actual violence to the said **Davis Miregwa**. Both appellants entered a plea of not guilty to the charges and their case proceeded to trial.

Briefly the facts of the case were that, **Bernard Obiero** (PW2) was employed by to one, **Phares**

**Nyamongo** (PW3) to ride his motor bike for hire. On 9th February, 2010 at about 7.000p.m. he was at Nyankono area where he had just repaired a tyre puncture of the motor vehicle when **Davis Miregwa** (PW4) a fellow motor bike operator approached him and told him that he had an extra passenger he wanted him to ferry on his motorbike. That passenger was a person he knew very well as **Eric**. PW4 ferried the other two passengers he was left with. PW2 and PW4 were to take the three passengers to Sotik Highlands tea estate. However when they reached the junction to Sasini, the passengers suddenly claimed that they now wanted to go to Kerito Primary School. An argument and or altercation ensued over the change of destination between PW2, PW4 and the three passengers. PW2 suspected that these passengers were up to no good and harboured sinister plans. He wanted to abandon his passenger. However, as he tried to turn around the motor bike after asking his passenger to alight, the passenger, **Eric**, whom he identified in the trial court as the 1st appellant suddenly turned on him and hit him on the thigh with an iron bar and he let go the motor bike. He then pushed him to the ground, punched him repeatedly and stabbed him with a knife on the neck. In the process, the 1st appellant took his kshs. 800/= which was in his pocket. PW2 then abandoned the motor bike with the 1st appellant as he ran towards Nyankono whilst raising alarm.

As already stated, PW4 had carried two other passengers on his motor bike. One of them and whom he identified in the trial court, was the 2nd appellant. The two robberies were committed simultaneously. The 2nd appellant kicked and punched PW4. He also stabbed him on the left shoulder using a knife. PW4 raised the alarm as he ran into the nearby tea bushes. By then he had been robbed kshs. 3,400/= a jacket, a jumper and a mobile phone make Nokia 1110. PW2 and PW4 were thereafter treated at Ikerenyo health centre and later Nyamira District Hospital for the injuries sustained. The matter was thereafter reported at Nyamira Police Station.

At the police station, the report was received by **Sgt Anderson Zuma** (PW6) who also doubled as the investigating officer of the case. He issued P3 forms to both PW2 and PW4. Those forms were subsequently filled by **Sophia Kenaru** (PW1), a clinical officer, then attached to Nyamira District Hospital. In respect of PW2, she assessed the degree of injury as ***"maim"*** and probable type of weapons used, blunt and sharp. With regard to PW4, she assessed the degree of injury as ***"harm"***.

On or about 10th February, 2010, PW4 as he was being discharged from Nyamira District Hospital for the same injuries he sustained during the robbery, saw the 2nd appellant outside the hospital gate. He informed fellow motor bike riders of his presence and they opted to confront him. On seeing them, the 2nd appellant ran towards the police station and he was arrested and placed in the cells. When interrogated he fingered the 1st appellant in the game plan. Through an informer, PW5 managed to arrest the 1st appellant at Tinga area. After the arrest, the 1st appellant led the police to where they had hidden the motor bike in Migori town. Apparently, the motor bike had been sold to one, **Awilo** by the 1st appellant. They went to his home but they did not find him. With the assistance of the local assistant chief however, they were able to recover the motor bike from a bush near the home. They took possession of the motor bike and ferried it to Nyamira C.I.D offices. The owner of the motor bike, **Phares Mosigisi Nyamongo** (PW3) who was present, positively identified the motor bike as his. At Nyamira C.I.D offices, scene of crime personnel led by **P.C Charles Kitur** (PW5) were summoned and took photographs of the motor bike. Thereafter the motor bike was released to the owner. Later PW6 preferred the charges against the appellants.

Put on his defence the 2nd appellant who was the 1st accused during the trial elected to give a sworn statement of defence. He testified that on 10th February, 2010 he was at his place of business near Nyamira District Hospital. A person who was supplying him with eggs went to him demanding his money. When he told him he had not sold the eggs yet, that person forcefully took two crates of the eggs. His wife held crate which unfortunately fell and the eggs broke. He then ran to Nyamira Police Station to make a report. At the station he was asked to wait for the supplier. He was then placed in the cells from that date to 22nd February, 2010 but the supplier never came. He was later arraigned in court

on 4th March, 2010. He denied having committed the offence.

The 1st appellant who was the 2nd accused in the trial also opted to give a sworn statement. He told the court that on 28th February, 2010 he was at Tinga Market. He had been contracted to ride a motor bike for somebody. While at the market, he was approached by a person who wanted him to ride a motor bike for him from Migori. He agreed to go with him when that person promised to pay him for the day. They proceeded to Migori where they spent the night. The following day they went up to a place called Uwethi where they recovered a motor bike make Bajaj black in colour. He then rode the bike back to Nyamira and on reaching Nyamira Police Station that person placed him in the cells.

The learned magistrate having considered and evaluated the evidence as presented by the prosecution as well as the defence was persuaded that the appellants were guilty as charged. Accordingly she convicted them and sentenced them to the mandatory death sentence. However, the sentence is not explicit as to whether it will be executed in respect of each count or only on one count. The learned magistrate ought to have clarified that aspect of the matter. However, since a man cannot be hanged twice over, we can only assume that the sentence could be carried out in respect of one count, preferably, the first count.

Be that as it may, the appellants were aggrieved by the conviction and sentence. They each separately lodged appeals to this court, which as we have already stated elsewhere in this judgment have since been consolidated.

Their grounds of appeal are similar. They complain that the prosecution did not prove their case to the standard required in criminal cases as essential witnesses were not called to testify, their defences were rejected though they created considerable doubt in the prosecution case, that the motor bike as an exhibit was not brought to court, there were glaring contradictions in the prosecution case and that they had been held in police custody for periods in excess of that permitted by the constitution.

When the appeal came before us for hearing on 31st March, 2011, the appellants elected to canvass the same through written submissions they tendered in court. We have carefully read and considered them.

On the part of the state, **Mr. Mutai**, learned senior state counsel opposed the appeals. He submitted that the evidence that convicted the appellants was sound and therefore the conviction was proper. The appellants were recognized by PW2 and PW3. There was violence visited upon the victims and later on the motor bike was stolen. It was subsequently recovered though. That evidence linked the appellants to the crime. On the issue of violation of the appellants' constitutional rights, counsel submitted that it is an issue which ought to have been raised in the trial court.

As Judges of the first appellate court, we must perform the duty placed on us as set out in the case of **Okeno –vs- Republic, (1972) E.A 32** which is that we must reconsider the evidence, evaluate it ourselves and draw our own conclusions in deciding whether the judgment of the trial court should be upheld.

It is obvious from the judgment of the learned magistrate, that the conviction of the appellants turned more on evidence of recognition than the application of the doctrine of recent possession.

In the case of **Osiwa –vs- Republic (19890 KLR 469** the Court of Appeal when dealing with the issue of identification, observed thus ***"…where the only evidence against an accused is, as here, evidence of identification or recognition, a trial court must examine such evidence carefully to be satisfied that the circumstances of identification are favourable and free from the possibility of error before it can safely make it the basis of a conviction…".*** Thus it makes no difference whether the evidence be that of identification or recognition. It must be examined carefully before a conviction can be based on it. This need even in cases of recognition is necessary because much as recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another, the court still needs to warn itself that mistakes in recognition of close relatives and friends are sometimes and often made. See generally, **Anjononi –vs- Republic (1980) KLR 59** and **Cleophas Otieno Wamunga –vs- Republic, (1989) KLR 424.**

In this case, there is no doubt at all that both PW2 and PW4 knew the appellants very well. With to regard PW2, he knew the appellant as they were engaged in the same business in the same area. He also used to ferry passengers on motor bikes. When the 1st appellant cross-examined PW2 on the issue as to whether he knew him, this is how PW2 responded ***"… I know you as Erick … I know you very well … You also ride the motor bikes in that area … The first time I knew you were riding a motor bike …. I was your passenger in the early days you know how to ride a motor bike…".*** Again cross-examined by the 2nd appellant on the same issue, the witness responded thus: ***"…You are Andrea Ngunya …. Those are the names I know…".***

As for PW4, he stated this when asked by the 1st appellant regarding his knowledge of him: ***"… I know you as Erick … I know you by appearance…"***. With regard to the 2nd appellant he stated thus: ***"… I know you as Andrew … Your sister is married in our place … You always visited her … I had carried you as a passenger several times before … I do not know your home … I have taken you to your sister's home several times …".***

It is instructive that the above evidence was not challenged at all by the appellants in their defence; much as they were under no obligation to do so. However, we can see no reason(s) why these witnesses would have claimed to know the appellants when infact they did not. Indeed the 1st appellant does confirm in his defence that he does taxi business on a motor bike. Infact it was out of this knowledge, if we were to accept his defence that he was approached by a person at his place of business to go with him to Migori to retrieve a motor bike, which motor bike turned out to be that stolen from PW2 and which belonged to PW3.

From the evidence on record, the 2nd appellant first approached PW4 on 9th February at 7.30p.m with a request that he takes him to Sotik Highlands tea estate. He was in the company of another person. He agreed and the two boarded the motorbike. However on the way, they came across the 1st appellant who wanted also to ride on the same motor bike. PW4 reluctantly agreed. However on the way he met PW2 to whom he off loaded the 1st appellant. One may ask at about 7.30p.m how could these witnesses have identified or recognized the appellants? However, there is no evidence that at that time, it was so dark as to make it impossible for the appellants to be recognized. In any event these are people who were well known to the witnesses. There is the unchallenged evidence of how the 2nd appellant approached PW4 for the ride and how they negotiated the cost for the ride. That discussion could not have been held in the circumstances in which PW4 would not have recognized the 2nd appellant. Again the discussions were at the stage for the motor bikes. There were other motor bike riders at the stage. We doubt therefore in those circumstances whether again PW4 would not have recognized the 2nd appellant in whichever way. We are certain that the discussions must have been in close proximity and since PW4 knew the 2nd appellant very well, his recognition could not have been difficult.

Again all along the ride, they were engaged in discussion until when the robbery occurred. The ride was not a short one. The same goes for PW2 in so far as the 1st appellant is concerned. They were even recognized by their voices. This cannot be doubted considering that they were people they were familiar with as they were engaged in the same trade. Further it has not been suggested that these witnesses framed the appellants with the case. There is no evidence of any prevailing grudge that would have acted as a catalyst for these witnesses to frame the appellants or any one of them. The totality of the foregoing is that the circumstances obtaining were favourable for positive recognition of the appellants by these two witnesses. We were satisfied further, that the appellants could not have been victims of mistaken recognition.

We are reinforced in this conclusion by the fact that when these witnesses reported the incident to the police, they fingered the appellants as the suspects in the crime. They gave their names to Nyamira Police

Station and as fate will have it, when PW4 was being discharged from Nyamira District Hospital the following day, he saw the 2nd appellant at the hospital gate and alerted his fellow riders. When they approached him, he ran to the Police Station. We doubt very much that the 2nd appellant's dashing to the police station on seeing fellow riders approach him was an innocent act contrary to what he stated in his defence. Our view is that his defence was correctly dismissed as pure lies by the learned magistrate. He must have known that PW4 had recognized him during the robbery and alerted his co-riders and that is why on seeing them he ran for his dear life. If at all he was that innocent, he would have reasoned out with the other said riders. Afterall he was one of them.

Once arrested and subjected to interrogation 2nd appellant mentioned the 1st appellant. Through an informer, the 1st appellant was arrested and led the police to the recovery of the stolen motor bike. Can it be a mere coincidence that this appellant is mentioned as a suspect and when arrested, he leads the police to the recovery of the motor bike which is positively identified by the owner as the one which was stolen from PW2? We do not think so. Is it also a mere coincidence that this appellant in his defence talks of a person approaching and requesting him to go with him to Migori to retrieve a motor bike which motor bike turns out to be the one stolen from PW2 and by none other than the said appellant and his cohorts? We do not think so either.

Finally, from the P3 forms of these two witnesses, it is apparent that they all stated that they were assaulted and robbed by three men two or one of whom were known to them.

In view of the foregoing we cannot fault the learned magistrate in her holding ***"… The evidence against the accused is overwhelming they have been identified positively. The (sic) led to the recovery of the bike failed (sic) to call the person who had brought the motor bike does not weaken the prosecution's case…".*** As stated already, we do not think that the conviction of the appellants turned on the doctrine of recent possession. Had that been the case, then perhaps the evidence of the person who purchased the motor bike would have been important to demonstrate whether the appellants, despite having disposed off the motor bike were still in physical or constructive possession of the same. This is also the essential witness the appellants allege was not called to testify. What we have said above sufficiently answers the complaint.

The appellants also claim that the prosecution case was riddled with glaring contradictions and inconsistencies. We do not discern such contradictions. Even if there were, they were minor and did not go to the root of the prosecution case.

With regard to the alleged violation of their constitutional rights we think that what the appellants are saying is that upon arrest each one of them was detained in police custody for more than the time permitted by section 72(3) of the now repealed constitution which had required that a person charged with a capital offence be brought to court within fourteen days from the date of arrest. This requirement was not complied with in the circumstances of this case. As correctly submitted though by **Mr. Mutai**, this issue was never raised before the trial court. It is being raised in this court for the very first time knowing that the prosecution would have no chance to give any explanation. See **James Githui Wathiaka & Another –vs- Republic, Criminal Appeal NO. 115 of 2007 (UR)**.

In our view, the appellants were rightly convicted and sentenced. We see no reason to interfere with the findings of the trial court. We therefore dismiss both appeals.

**Judgment dated, signed** and **delivered** at Kisii this 20th day of May, 2011.

**ASIKE-MAKHANDIA** **RUTH NEKOYE SITATI**

**JUDGE** **JUDGE**