NO. 2804

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NOS. 188 & 189 OF 2010

SAMWEL NGITI MWARA alias MOI .....1st APPELLANT

-VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Senior Resident Magistrate's Court at Kehancha Hon. J. R. Ndururi in Criminal Case No. 1672 of 2009, delivered on 30th August, 2010)

CHACHA MARWA JOSEPHAT alias CHACHA.....2nd APPELLANT

-VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal from the original conviction and sentence in the Senior Resident Magistrate's Court at Kehancha Hon. J. R. Ndururi in Criminal Case No. 1672 of 2009, delivered on 30th August, 2010)

These two appeals were with the consent of the parties concerned consolidated for ease of hearing and as they arose from the same trial in the subordinate court.

Samwel Ngiti Marwa alias **Moi** (the 1st appellant) and **Chacha Marwa Josephat** alias **Chacha** (the 2nd appellant) were jointly charged before the Senior Resident Magistrate's Court, Kehancha with two counts of robbery with violence contrary to section 296(2) of the **Penal Code**. The particulars as stated in the charge sheet in respect of count 1 were that on 22nd November, 2009 at Nyamagenge village of Maeta location in Kuria East District, the two while armed with dangerous weapons, namely simis and a toy pistol robbed **Samson Waisaku Marwa** of a mobile phone make Nokia 1200, a coat and cash kshs. 500/= and at immediately before or immediately after the time of such robbery used actual violence to the said **Samson Waisaku Marwa**. In respect of the 2nd count, the details were that on the same day and place and in similar fashion they robbed **Denis Mundia** of a mobile phone make Nokia 1202, one jeans jacket, credit card worth kshs. 50/= and cash kshs. 50/= and at or immediately before or immediately after the said robberies used actual violence to him. They both denied the charges and they were prosecuted.

The prosecution's case against the appellants was that PW1, Samson Waisaku Marwa, a local businessman at Maeta market and the complainant in count 1 on the material day closed, his business at about 7.15p.m and started walking home. On the way he met with **Denis Mundia**, the complainant in count II who was an administration police officer based at the nearby Maeta AP camp. He intended to buy some milk from PW1's home. Together they walked to PW1's home but found no milk. PW1 then escorted **Mundia** towards his brother's home hoping that he could get some milk thereat. About 30 meters from PW1's home, two persons whom they subsequently identified as the appellants approached them from the front whilst wielding pangas and ordered them to sit down. They duly complied and lay on the ground. One of the two persons whom PW1 subsequently came to know as the 2nd appellant stepped on his right side of the head and ordered him to hand over his mobile phone and money. At the same time, he heard the other person who turned out to be the 1st appellant order **Mundia** to hand over his mobile phone and money. PW1 recognized that voice as belonging to the 1st appellant. He knew the appellants very well as they were brothers and close neighbours. Infact he had even had lunch in his house on the same day with the 1st appellant. As PW1 was lying on the ground, he could see the 1st appellant's face from the moonlight, and also because the appellants were flashing their torch lights around. He also noticed that the 1st appellant was wearing a police jungle jacket and a black marvin cap.

Upon recognizing the 1st appellant, he turned his attention to the 2nd appellant who was assaulting him. He was able to recognize him. He was a brother to the 1st appellant and he knew him very well as a neighbour. Meanwhile, the appellants suspected that **Mundia** was a police officer and told him as much but **Mundia** denied, claiming that he was a teacher. PW1 persuaded them in Kuria Language that he was not a police officer, as he thought that if the appellants were to confirm that he was indeed a police officer, most likely they would kill him. As he knew the appellants to be the sons of **Marwa**, he asked them, ***"Marwa's children, why are you torturing me?"*** At that juncture, the 2nd appellant violently cut him on the right hand. He stood up and screamed. The 2nd appellant in the meantime again aimed a panga blow to his neck but he blocked it with his left hand, which sustained a fracture in the process. At this time he was facing the 2nd appellant face to face and could see his face clearly from the moonlight. He was wearing a jacket that looked similar to a police jungle uniform, a necklace and a cap. PW1 attempted to run away. As he did so the 1st appellant left **Mundia** and joined the 2nd appellant in pursuit of him. Unfortunately he fell down and the appellants caught up with him and cut him severally on his body, and then left. In the meantime **Mundia** had escaped to the house of **Rael Otaigo Masiaga** (PW4). She attended to his injuries and together they returned to the scene. On seeing the condition of PW1, **Rael** raised an alarm and neighbours came to the scene and took him to Kuria District Hospital for treatment, where he was admitted for eight days.

Allan Munene (PW2) is a registered clinical officer at Kegonga District Hospital. He attended upon **Mundia** on the material date at about 8.30p.m and found him with a swollen right shoulder and a cut wound on the 2nd and 4th fingers of the right hand. He approximated the age of the injuries to be between 3 and 4 hours and assessed the degree of injuries as grevious harm.

Edwin Nyatera (PW3) also a registered clinical officer at Kuria District Hospital examined PW1 on 30th November, 2009, and found him with swellings on the head, a cut wound on the lower lumber region, trauma on the left hand at the wrist joint with plaster of paris, multiple cut wounds on the left hand and another cut wound on the left shoulder. He approximated the injuries to be seven days old and assessed the degree of injury to be grievous harm.

Soon after returning to her house from the scene, about 25 minutes later to be precise, the appellants suddenly came to PW4's house, each was armed with a panga. The 2nd appellant was also armed with a piece of sharpened iron rod. PW4 knew both appellants as they were her cousins and neighbours as well. She saw them clearly because her lamp was on. The 1st appellant placed his panga on a table and asked for drinking water. In the process, she noticed that the panga had blood stains. She also noticed that the 1st appellant was wearing clothes that looked similar to police jungle uniforms. She also noticed blood stains on his trousers. She asked them what they had done, and the 1st appellant asked her whether PW1's hand had been completely cut off. When PW4 pestered the appellants for details of what they were talking about, the appellants told her that they had ordered PW1 and his colleague to sit down but they had resisted and that is why they had cut them. The 1st appellant then threatened to beat her up if she persisted in her enquiries. She then asked them to leave, which they did.

Omari Robi Isanju PW5, also heard screams from the scene, but as he was feeling unwell, he did not respond. At about 3.00a.m, police officers came to his house, woke him up and arrested him. He was taken to Maeta AP camp, where he found seven other suspects including the appellants. The police informed them that some suspects had robbed two people of their mobile phones and a jacket. All were put in an open area, and he overheard the 2nd appellant tell the 1st appellant to return the mobile phones so that they would not be hurt. The 1st appellant kept quiet and the 2nd appellant repeated the request a second time. He then alerted police officers that the 1st and 2nd appellants were talking about some mobile phones.

PC Patrick Nyongesa (PW6) of the Kuria CID office investigated the case after receiving a report from **Mundia**. He visited the scene and also recorded statements from witnesses and then issued P3 forms to **Mundia** and PW1. He also received the appellants from AP officers from Kegonga, and he thereafter charged them with the offences. PW6 explained that after the incident, **Mundia** was involved in a road accident and had been in a coma and admitted at Armed Forces Memorial Hospital. In the premises he was unable to testify in the case.

CPL Johnes Morara PW7 of Maeta AP Camp testified that **Mundia** used to work with him in the same camp, and that on the material day at about 11.10p.m he informed him about the incident. As he knew the home of PW1, he went there and PW1's mother told him that the sons of **Marwa Marwa** were the ones who had attacked **Mundia** and PW1. He also went to the house of PW4 who confirmed to him that indeed the appellants had attacked **Mundia** and PW1. He was shown the homes of the appellants and he went there and arrested them. The appellants led PW7 and his colleagues to some other suspects who were said to have received the two mobile phones stolen from PW1 and **Mundia** but they were unable to recover them.

In their defence, the appellants gave unsworn testimony but the 2nd appellant called one witness, his wife **Esther Robi** (DW3).

The 1st appellant stated that at the time he was alleged to have committed the offences, he was asleep in his house, and was arrested by the police at about 3.00a.m and beaten up. He was thereafter taken to the police station and charged with offences he did not commit.

The 2nd appellant stated that he was asleep in his house with DW3 at the time he was alleged to have committed the offences. Police officers came to his house and handcuffed him and thereafter searched his house. He was thereafter taken to Maeta AP camp thence to Kehancha Police Station. On 3rd December, 2009, he was brought to court and that is when he saw the 1st appellant for the first time.

DW3 testified that at that material time, the 2nd appellant was at home asleep. Essentially she corroborated what the 2nd appellant had testified in court.

The learned magistrate having carefully considered all the evidence on record concluded thus:

"…After careful evaluation of all the evidence on record, I find that the prosecution had proved beyond all reasonable doubts that it is the two accused persons who robbed PW1 and Mundia of the items mentioned above, and in the said robberies they were armed with dangerous or offensive weapons and that at the said robberies they wounded both PW1 and Mundia. They committed two offences of robbery with violence. I therefore find each of the accused person guilty as charged on both counts. I convict them accordingly under section 215 of het Criminal Procedure Code…".

Having convicted the appellants as aforesaid, the learned magistrate sentenced them to the mandatory death sentence. Aggrieved by the conviction and sentence aforesaid, the appellants mounted in this court, separate appeals, which as we have already stated have since been consolidated.

The appellants advanced similar grounds of appeal, to wit that the case was one of witchunt to fix them, that the evidence adduced was insufficient to find a conviction, the trial court relied on hearsay evidence to convict them and that their defences were not given due consideration.

When the appeals came before us for plenary hearing on 30th March, 2011, the appellants elected to canvass them by way of written submissions. We have duly read and considered them.

The state through **Mr. Mutuku**, learned Senior Principal State Counsel, supported the conviction and sentence of the appellants in respect of the 1st count as the complainant did testify. However, he did not support the conviction of the appellants on the 2nd count since **Mundia**, the complainant did not testify. He submitted that the appellants were recognized by PW1 as they were neighbours. Although it was dark, he still recognized them by voice, there was also moonlight and the appellants too had torches which they occasionally directed at each other. Then there was the testimony of PW4 who saw the appellants on the same day in her house. They were armed with pangas and sharpened iron rod. She noticed that the pangas were blood stained and the clothes of the 1st appellant soiled with blood. This evidence gave credence to PW1's evidence as to those who attacked him. The appellants were arrested on the same night. PW1 had told PW4 that they had been attacked by the appellants who were **Marwa's** children. Their names were given to the police in their first report.

These appeals being first appeals to this court, it is the duty of the court to re-examine and re-evaluate the recorded evidence and reach its own conclusions on that evidence on whether it (the court) thinks the convictions were right or otherwise. In doing so the court has to bear in mind that it neither saw nor heard the witnesses and the appellant's testify; that privilege is reserved for the trial court and on appeal, the court must give due allowance to that factor.

From the judgment of the learned magistrate it is clear that the conviction of the appellants turned on the evidence of recognition by PW1 and the corroboration thereof by PW4. It has been stated time on end that the correctness or otherwise of identification and or recognition of a suspect which he disputes, entails the examination of such evidence critically. The guidelines on the matters to be considered when dealing with such situation were succinctly set out in the well known case of **Republic –vs- Turnbull (1976) ALL ER 549**, an English decision in which it was stated as follows:

"…First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of accused which the defence alleges to be mistaken the judge should warn the jury of special need for caution before convicting in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reasons for the need for such warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the Judge need not use any particular form of records.

Secondly, the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have this accused under observation? At what distance? In what light? Was the observation impeded in any way as for example by passing traffic or press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused. How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the prescription (sic) of the accused given to the police and the witness when first seen by them and his actual appearance…".

The Court of Appeal has in several decisions adopted the above principles. In the case of **Paul Etole and Another –vs- Republic, Criminal Appeal No. 24 of 2000 (UR)**, the Court of appeal after referring to the above principles considered situations of identification by recognition; similar to what is before us. It stated:

"…Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made …".

In this case again, the alleged recognition of the appellants at the scene of crime was by a single witness. It is not that a fact cannot be proved by the testimony of a single witness. It can. However, such evidence must be tested with greatest care especially when it is known that the conditions favouring a correct recognition were difficult as in this case. See **Abdalla Bin Wendo & Another –vs- Republic (1953) 20 EACA 166 and Roria –vs- Republic (1967) E.A 583**.

It is common ground that PW1 knew the appellants very well. This fact has not been disputed by the appellants. Indeed even the 1st appellant had lunch on the material day with PW1. This fact too was not

discounted by the 1st appellant. This goes to show that apart from being neighbours, they were also perhaps friends. How friends can suddenly turn into foes beats our logic. However on the evidence on record we are satisfied just like the learned magistrate was that the appellants were well known to PW1, and were positively identified by him.

The incident occurred at night, at 7.30p.m to be precise. It may or may not have been dark. No evidence was led on that aspect of the matter. However since, PW1 talked of the moonlight and torches, it is safe to assume that indeed it was dark. This being the case it is important to consider whether PW1 could have recognized the appellants. Indeed the learned magistrate appreciated this concern when he stated ***"… According to DW1, the two robberies occurred at 7.15p.m. It is usually dark at this time. It is therefore very important to look at the prevailing circumstances, to be able to decide whether or not it was possible for PW1 to identify the two accused persons…".***

What are the circumstances? First and foremost, PW1 knew the appellants both by appearance and names. Indeed they were neighbours. There was moonlight. Although the intensity of the light emitted by the moon is not disclosed it must have been bright for besides PW1 recognizing the appellants' faces he was able also to see the clothes they were wearing which included police jungle jacket and a black muffin for the 1st appellant. As for the 2nd appellant he was wearing a necklace, brown cap and a jacket that resembled those of police officers. The appellants too had their torches on. Occasionally and perhaps accidentally they would direct the same on each other. For instance and according to PW1, the 2nd appellant at some point flashed his torch towards the 1st appellant. Though by then PW1was lying on the ground, his eyes were not covered. In that state he was able to see the face of the 1st appellant when the torchlight was flashed at him by the 2nd appellant. Although PW1 found himself in a difficult position, as he had been ordered to lie down by the appellants, hit with a panga on the back, we still think that he had presence of mind to look at and recognize the appellants. Afterall they were close neighbours. Just before he launched his unsuccessful bid to escape, he stood up and started screaming and, the 2nd appellant attempted to cut his neck which he blocked with his left hand. The hand was seriously injured. At that time he was face to face with the 2nd appellant. In that position, we are convinced that he could easily have recognized the 2nd appellant, a neighbour.

Prior to recognizing the appellants visually, PW1 had already recognized them by their voices. Of course evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused persons voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. See **Choge –vs- Republic (1985) KLR 1**. In the instant case, it has been established that the appellants were neighbours of PW1. Infact their homes are 100 metres from that of PW1. They are brothers. Indeed during the day, the 1st appellant had had lunch with PW1. The appellants talked to the witness when they ordered PW1 and **Mundia** to lie down, when they asked the two to give them money and their mobile phones, when they were asked to remove their jackets, when PW1 tried to placate them in Kikuria Language that **Mundia** was not a police officer but a teacher so that they could not kill him since they suspected that he was one. PW1 knew the appellants very well. We do not think that he would have mistaken the voices of the appellants and in particular that of the 1st appellant with whom he had just had lunch in his house. We have already established that the conditions obtaining at the time were such that there was no mistake of recognizing the appellant's voices.

It is instructive that once the appellants realized that they had been recognized by PW1 they became

extremely violent towards him. As confirmation that PW1 had recognized the appellants he said ***"Children of Marwa why are you torturing me"***. On hearing this, the 2nd appellant went for jagular, his neck with a panga. Luckily, PW1 blocked the blow with his left hand which was cut and fractured. When he ran for his dear life, the 1st appellant left **Mundia** and joined the chase for PW1 with the 2nd appellant. Unfortunately PW1 fell on the ground. They pounced on him and cut him repeatedly on the back and the abdomen. This accelerated violence on PW1 after he exposed the appellants for who they were points to one irresistible conclusion, they knew that they had been recognized and wanted to finish PW1 so that he could not live to tell.

From the description of the events by PW1, it is clear that the incident took abit of time to be accomplished. Indeed he stated that infact it took 10 or so minutes. This is a considerable period of time and we are satisfied just like the learned magistrate that, PW1 had more than enough time to observe the appellants sufficiently to be able to recognize them both visually and by voice.

PW1 testified that he had no grudge against the appellants. The appellants in their defences did not allude to any such grudge. This goes to show that PW1 had no reason or basis to falsely accuse the appellants and bear false testimony against them. To our mind therefore, what PW1 testified to must be true.

Still on the question of recognition, PW1 told the first person he came in contact with (PW4) that ***"It is Marwa's sons who attacked him being Ngiti and Chacha".*** He passed over the same information to **PC Patrick Nyongesa** of C.I.D Kuria District. So that in their first reports both PW1 and **Mundia** fingered the appellants as the culprits. Infact it was on the basis of these reports that the appellants were immediately arrested. This lends credence to the positive recognition of the appellants by PW1.

There was then the testimony of PW4. She is a relative of the appellants. They are her cousins. Hardly or is it 25 minutes after she had come from the scene of crime, the appellants walked into her house. They were both armed with pangas just as PW1 testified. They also had a sharpened iron rod. She had put on the lamp and saw the appellants clearly. The 1st appellant placed his panga on the table. They asked for water and as she was pouring the same, she noticed that the 1st appellant's panga had blood stains. The 1st appellant was wearing clothes that looked like police uniform just like PW1 had described. She noticed blood on his trousers. Out of the blues they asked her whether PW1's hand had been chopped off. When she asked them how they knew, they told her to leave the matter or else they would beat her up. They then left. This evidence lends credence to PW1's evidence as to who attacked them. It cannot be a mere coincidence that PW1 mentions to PW4 that he was attacked by the appellants and then shortly thereafter the appellants walk into her house. From their appearance, they looked suspicious. They are armed with pangas. The 1st appellant is wearing clothes similar to police jungle uniform just like PW1 had testified. They start asking questions about the condition of PW1 and **Mundia**. How could they have known about the condition of PW1 and **Mundia** without having been involved in or at least being told about the attack? There is no evidence that they had any misunderstanding with PW4 that would have forced her to bear false testimony against them. She was even a relative.

The totality of all the foregoing is that the conviction of the appellants on the first count was safe. The appellants raised alibi defences. Of course an alibi is an allegation by an accused person that at the time of commission of the alleged offence, he was at another place other than at the scene of crime. See **Karanja –vs- Republic (1983) KLR 501**. Once the defence has been raised, the proponent does not assume the responsibility of proving it. It is up to the prosecution to poke holes into it and disapprove it. However such defence must be set up at an early stage, so that it can be tested by those responsible for investigations and prevent any suggestion that the defence was an afterthought. The learned magistrate correctly observed that during the hearing and indeed in the cross-examination of crucial witnesses the appellants never suggested that they would rely on that defence. The defence was raised too late in the day when they gave their unsworn statements of defence thereby according the prosecution little or no

time at all to counter it. It was unfortunate however for the learned magistrate to have commented that ***"The 1st accused person did not call any other evidence to corroborate his alibi"***. As already stated a person who sets up an alibi defence need not to prove it. This notwithstanding, on the overwhelming evidence on record against the appellants, the alibi defences were unsustainable and were clearly afterthoughts as correctly observed by the learned magistrate.

As regards count II, the complainant in this count did not testify. Apparently before the trial, the complainant in this count, **Denis Mundia** was involved in a serious road traffic accident and was bedridden. The prosecution therefore closed its case without calling him as a witness. However, the learned magistrate decided albeit in error to treat the evidence in support of count 1 as supporting as well count II. That was wrong. Thus the learned senior principal state counsel was right in conceding the appeal in respect of this count.

On the overall we dismiss the appeal in respect of count I. However the appeal in respect of count II is allowed, conviction quashed and sentence imposed set aside. In view of the fact that the appeal in count I has been dismissed, the appellants will serve the sentence imposed on it.

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

ASIKE-MAKHANDIA **RUTH NEKOYE SITATI**

JUDGE **JUDGE**