REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO 78 & 80 BOTH OF 2010

(From original conviction and sentence in Criminal Case No. 2544 of 2009 of the Chief Magistrate's Court at Nakuru- D. K. MIKOYAN SRM)

SIMON NDIRANGU MAINA…….....……1ST APPELLANT
MICHAEL KIARIE GITAU.....2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

J U D G E M E N T

Simon Ndirangu Maina and Michael Kiarie Gitau were convicted by the Nakuru CMC No 2544/09 for two offences of robbery with violence contrary to **section 296(2) of the Penal Code (Cap 63 Laws of Kenya)** and were sentenced to death . The 1st appellant was also convicted on count IV of being in possession of public stores contrary to section 324 of the Penal Code. Being dissatisfied with the convictions and sentence, the appellants preferred Criminal Appeals 78 and 80 of 2010 which were consolidated at the hearing and proceeded as Criminal Appeals 78 of 2010. The 1st accused is the 1st Appellant whereas the 2nd accused is the 2nd appellant.

The grounds of appeal used by the appellants are summarized as follows :-

1. That the trial Magistrate erred in relying on evidence of identification by Pw1 and PW2 which was unsupported.
2. That the trial Court erred in relying on evidence in which the witnesses did not give a description of the appellants in making the initial report.
3. That the trial Court erred by shifting the burden of proof to the defence.
4. The Court erred in admitting the evidence of Pw6 and 7.
5. The court erred in failing to consider the defences of the appellant.
6. That the trial court erred by relying on evidence of a flawed identification parade.
7. That the trial court erred in convicting the appellants twice contrary to section 14 (3) (c) of CPC.

Mr Omutalema, the Principal State Counsel, opposed the Appeals. He submitted that the two complainants, Pw1 and Pw2 were able to identify the appellants at the scene and on an identification parade held two days later. The Inspectors who conducted the parade produced the said reports. He also submitted that the complainants had ample time with the appellants at close range

and also saw the appellants with the use of headlights from a motor vehicle . On sentence counsel urged the Court to exercise its discretion in light of the Court of Appeal's decision - ***GODFREY NGETHE VRS REPUBLIC CRCA 17/2008.***

On 31/11/09 at about 11.00pm,the two complainants Peter Mathenge Gatere (PW1) and John Maina Gatere (PW2) were waiting for Pw1's gate to be opened . This was at Naka Estate in Nakuru. They were in motor vehicle KAX 839S Nissan which was driven by Pw2.They were approached by three men, armed with a gun ,a panga and wore police uniforms . They took two Nokia phones and Ksh 30,000/= from Pw1 and drove off with them till Kivumbini area. The robbers called another vehicle which took them and they let the complaints to go. The complainants went back home at 2.00 am and at 3.00 am they were informed by the Police about arrests. At the Police Station, they found two blue shirts with badges (police uniform) a gun and pangas. Both complainants identified the 1st appellant on an identification parade while the 2nd complainant identified the 2nd appellant on another parade. They recalled that the 1st appellant as having sported a moustache. Pw2 also recalled seeing the robbers wearing blue shirts, one had a gun. He lost Ksh5,800/= a Nokia 1200, a pair of Safari boots and car tool box , ATM card for Equity Bank .

Pw3 APC Lemutho and Pw6 APC Franklin Yiengo were at section 58 on 1/5/2009, at midnight when they spotted three people , ordered them to stop but one run away while the two appellants were arrested. The 1st appellant had a polythene bag in which they found police uniforms , the 2nd appellant had a panga up his sleeve and a home made gun which he tried to drop but was seen and it was picked. Pw4 IP John Owouth and Pw5 IP Remson Ngambo conducted identification parades and Pw2 identified both appellants while Pw1 only identified the 1st appellant .

Both appellants denied committing the offences. The first appellant in his unsworn defence said that he is a changaa dealer and he was escorting a customer and when on his way back home, he met police officers and one person . He knew them. He denied having anything in a polythene bag and he was arrested for no reason. The 2nd appellant made a sworn defence where he claimed to be at a Bible school. He was from Nyeri and alighted at Kunste Hotel at about 1.00 P.M He met policemen who arrested him and took him to Central Police Station where his personal effects were taken.

This being the first appeal, this Court is required to evaluate and analyse the evidence afresh and make its own findings. We have reviewed the evidence of IP John Owuoth (Pw4) and IP Renson Ngambo (Pw5) who conducted the identification parades and we find that they did not comply with Force Standing Orders regarding conduct of parades. At section 6(IV) (K) of the Standing Orders it is required that , ***"when explaining the procedure to a witness, the officer conducting the parade will tell him that he will see a group of people which may or may not contain the person responsible . No witness should be told to pick out somebody or be influenced in any way whatsoever"***

Pw4 and 5 never warned the witnesses of this very crucial requirement. It seems that the witnesses were expected to find the robbers on the parades . We find the conduct of the parades by Pw4 and 5 to have been irregular and that evidence will be disregarded. All we have left is dock identification .

The robbery was committed about 11.00pm and having disregarded the evidence of the identification parades all we have left is dock identification. In our view the circumstances under which the complainants were robbed were difficult for anybody to identify the robbers . Pw1 recalled that the robbers jumped from the flowers outside his gate , they were sandwiched between the robbers, then he was pushed to the rear. He was then ordered to lie face down. However, he claimed to have seen the robbers using the lights from vehicles that were passing by. How could he see

them when he was lying facing down ? Pw1 also claimed to have seen the 1st appellant using headlights from their vehicle but he did not explain how. Pw1 did not explain clearly how he managed to see that the 1st appellant had a moustache, although in court, he was clean shaven . In court Pw1 also claimed to have recognized the 1st appellant's voice but he did not tell the court what was unique about that voice, that enabled him recognize it.

Pw2 recalled that when the robbers attacked them, entered into their car, and they were made to lie down facing down . He also said that the robbers did not give him a chance to see them and there were no lights in the vehicle. He admitted to having only raised his head after the robbers had left to go to the car they had called for and later he saw them by use of headlights from their vehicle. The court was not told how far the robbers were from the complainants vehicle, whether Pw2 saw them from the rear or the front. Pw2 also said he recognized the 1st appellants voice but he did not point to any unique feature in the 1st appellants voice that made him know it. We are of the view that the complainants were not in a position to positively identify the robbers under the circumstances analyzed above.

The only evidence that seems to connect the appellants with the offence is that they were arrested on the same night of the robbery and were in possession of police uniform, (shirts) which Pw1and 2 said the robbers wore.

Pw3 and 6 stopped and arrested the appellants between Free Area and Kunste, near Naka Estate. According to Pw1 and 2 the appellants parted ways with them at Kivumbini . It was not disclosed whether Kivumbini is near Naka Estate. Besides, the robbers were driven off in another vehicle and the question is whether they are the same people who were found near Free Area by the police. In our considered view, though the appellants were arrested while in possession of police uniforms, (shirts) gun and panga, which raises suspicion that they could have been involved in committing of some offence, it can not be said with certainty that they are the same people who robbed Pw1 and 2.

All the above factors considered , we find that the evidence on identification of the appellants was wanting and weak. There are glaring doubts in the prosecution case as to whether the appellants were properly identified as the robbers and those doubts should have been resolved in favour of the Appellants . Mere suspicion cannot be a basis for conviction for such a serious an offence.

In its judgement, the trial Court observed that the **"defence raised did not rebut the incriminating evidence against each accused person"** In criminal cases the burden always lies with the prosecution to prove its case beyond any reasonable doubt. It is not for the appellants to rebut the prosecution case. The appellants were only expected to give a reasonable explanation in order to shake or raise doubt in the prosecution case. The trial Court erred in shifting the burden of proof on the appellants by expecting them to rebut the prosecution case. We find that the offence of robbery with violence was not proved beyond any reasonable doubt and the conviction on counts 2 and 3 was unsafe and is hereby quashed and sentence set aside.

We have considered the defences raised by the appellants . They are mere denials in light of the evidence of Pw3 and 6 regarding the appellants' arrest. On the evidence of Pw3 and 6, we find that the appellants were arrested at midnight, armed with offensive weapons i.e, an immitation of a firearm, a panga and Police uniform. Another person who was with them ran on being stopped. We are satisfied that the appellants were at that place with an ill intention, that is to commit an offence. By virture of section 179 (1) of the CPC, We find the appellants guilty of the offence of preparation to commit a felony contrary to section 308(1) of the Penal Code.

As regards count 4, Pw3 and 6 arrested the 1st appellant while carrying a polythene bag with police

uniform inside. Both witnesses are police officers. The investigation officer also confirmed that the shirts are police uniform. There was no explanation offered by the 1st appellant for possession of police uniform and yet he is not a police officer. We find that the conviction for that offence is sound and we find no reason to disturb that it. Having found as above, we hereby sentence the Appellants as follows;

Both appellants are convicted and sentenced to 7 years imprisonment for the offence of preparation to commit a felony contrary to section 308 (1) of the Penal Code.

The 1st appellant is also sentenced to serve 6 months imprisonment on count 4 and the sentences will run concurrently . The sentences will take effect from the date of conviction on 9/8/2010.

Orders accordingly .

DATED AND DELIVERED THIS 20TH DAY OF MAY 2011

R.P.V WENDOH
JUDGE

M J ANYARA EMUKULE
JUDGE

PRESENT
Mr Omwega for state
Appellants in person
Court Clerk : Kennedy Ogumo