REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 71 OF 2010

CHARLES KIMWOLE ……..……. APPELLANT

VERSUS

REPUBLIC …….……. RESPONDENT

(Being Appeal against Sentence from Iten Senior Resident Magistrate's Court Criminal Case No. 574 of 2009 read on 15th May, 2010 by Hon. B.N. Mosiria – (Senior Resident Magistrate)

J U D G M E NT

The appellant, **Charles Kosgei Kimwole,** appeared before the Senior Resident Magistrate Iten charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that on the 29th June 2009 at Kapsowar Township Marakwet District, with others not before the court, while armed with dangerous weapons robbed Simon Kimaiyo Cheserek and Simion Maiyo Cheboi of their respective property which included money and mobile phones and at or immediately before or immediately after the time of such robbery used personal violence to the said persons.

After pleading not guilty to both counts, the appellant was tried and convicted on both counts. He was then sentenced to suffer death on each of the two counts. However, the sentence on count two ought to have been held in abeyance in view of the sentence on count one. A person does not die twice (see, **Boru & Another Vs. Republic (2005)KLR 649)**

Be that as it may, the appellant was aggrieved by the conviction and sentence and preferred this appeal on grounds contained in the petition of appeal filed herein on 19th May 2010. He relied on the same grounds at the hearing of the appeal in which he represented himself.
Basically, the appellant contends that his conviction was based on insufficient evidence by the prosecution and that his defence was disregarded by the learned trial magistrate. He therefore prays that the appeal be allowed and that the conviction be quashed and sentence set aside.

The respondent did not oppose the appeal. The learned Senior Principal Prosecution Counsel, **Mr. Oluoch,** submitted that although both PW1 and PW2 said that one of the robbers was short, they did not identify him as it was dark. Also, although PW1 said that he injured one of the robbers during the robbery he did not identify the area of injury.

The learned Prosecution Counsel went on to submit that PW5 said that there was a cotton wool piece with blood stains at the scene and that it belonged to the appellant. He (PW5) also said that the blood sample was examined and found to march that of the appellant's blood. However, PW1 was also injured but a

sample of his blood was not taken for analysis and comparison. The learned Prosecution Counsel contended that the only evidence against the appellant was his blood group "A" which according to PW6 is common to the extent that 26% of an area's population has similar group. Further, since there was no recovery, the appellant's conviction was unsafe.

For those reasons, the respondent conceded that appeal.

We have considered the grounds of appeal and the submissions by the learned prosecution counsel. However, our role is to reconsider the evidence and draw our own conclusion. In doing so, we bear in mind that the trial court had the advantage of seeing and hearing the witness.

In that regard, the prosecution case was briefly that on the material date at about 9.30 p.m. the two complainants (PW1 and PW2) were in a shop at Kapsowar when they were attacked by two people armed with a rungu and a firearm. One of the two people was short and the other tall. A gun shot was fired prompting the first complainant (PW1) to hide uner a desk from where he was flushed out by one of the intruders. He (PW1) put up resistance and struck one of those people with a torch on the face. He (PW1) was also injured when his little finger was bitten. He however continued to put up resistance until such time that he escaped from the scene into a neighbour's home.

The second complainant(PW2) was hit with a rungu on the chest and threatened with a gun. He managed to escape from the scene despite intense threats made against him by the tall robber. It was only when the tall robber went to the rescue of the short one that he (PW2) managed to escape, his mobile phone having been taken away.

Later on the 5th July 2009, the two complainants proceeded to a hospital after they were called from there. They found the appellant being treated for injuries on the face. He (appellant) told them that his tongue had been bitten.

The complainants called the police. **P.C. Asugo (PW4)** of Kapsowar Police Station proceeded to the hospital and arrested the appellant.

Thereafter, the appellant was handed over to **Cpl. Philip Mutisya (PW5)** who was investigating the case after receiving the necessary report at 9.00 a.m. on the 30th June, 2009.

In his investigations, Cpl. Mutisya confirmed that the second complainant was injured and issued him with a P3 form. He (PW5) went to the scene of the offence where he recovered a bullet and a spent cartridge. He also found a piece of cotton wool with blood stains as well as a rungu. He interrogated the appellant after his arrest. The appellant hold him that he had been bitten by a neighbour and went to Kapcheban health centre for treatment. Cpl. Mutisya noted that the appellant did not have treatment notes. He proceeded to the health centre and found no records respecting the appellant. He took the appellant's blood sample for comparison with the blood stains on the cotton wool.

After confirming that the appellant's blood sample marched the stains on the cotton wool, Cpl. Mutisya linked the appellant to the material offence and charged him accordingly.

A clinical officer at Kapsowar (PW3) examined the two complainants and confirmed that they suffered injuries during the robbery. He thereafter filled the appropriate P3 forms.

A Government Analyst(PW6) examined the blood samples and stains handed over to him for that purpose by Cpl. Mutisya. He found that the blood stains marched with the blood sample and compiled a report accordingly. Both the stains and sample were of blood group "A" which according to him (PW6) is a common blood group and is found in 26% of any given population.

The appellant was charged after completion of investigations. In his defence, he denied the offences and said that he woke up on the material date at 9.30 a.m. and went to demand a debt due to him from someone. He was paid the money. Thereafter, he passed through a liquor den where he drank alcohol upto

2.00 p.m. when he proceeded to another neighbour's house for more alcohol. He was there upto 4.30 p.m. but in the process he argued with and was injured on the tongue by one Edward Chemuto. He went to his home but on the following day went for treatment at Kapchebau dispensary. He was treated for several days but did not improve. Later, he proceeded to Kapsowar hospital where he was confronted and arrested by police officers. He was briefly held at a police station prior to being arraigned in court.

Joel Kiptoo DW3 and Richard Kimwole (DW2) both confirmed that the appellant fought with Edward Chemuto and was injured in the process.

All the foregoing facts were presented before the trial court which arrived at the conclusion that the appellant was one of the two people who attacked and robbed the complainants. He was therefore convicted by the trial magistrate who in so doing remarked;-

"The investigating officer was satisfied that accused was linked to this offence owing to investigations he did what he found out from government analyst. And also fact that injuries to accused were not reported anywhere and there was no documents to prove he was treated for injuries sustained. The only logical conclusion then left is that the injury was sustained when PW1 hit him with a torch and hence making him to have been properly identified by complainant. The accused attacked PW2 and then that same time PW1 and hence making him culprit who robbed and caused injuries to them".

Our evaluation of the evidence does not concur with the foregoing conclusion by the learned trial magistrate.

With respect, we are of the view that the trial magistrate's conclusion was incompatible and inconsistent with the evidence availed by the prosecution and that it clearly implied that the burden of proof was shifted to the appellant.

There was no evidence of direct identification of the appellant, neither was there cogent and credible circumstantial evidence to link the appellant with the offence.

The matching of the appellant's blood sample with the blood stains of the piece of cotton wool was not incapable of explanation upon any other reasonable hypothesis than that of guilt (see **Republic v.s. Kipbering Arap Koskei & Another 16EACA 135)** . The blood stains could have matched any other sample provided by anybody else including the first complainant and even the second complainant who were both injured during the offence.

The Government analyst (PW6) said that 26% of a given population have blood group "A".

In the end result, we think that the concession of the appeal by the respondent was well founded.

The appeal is therefore allowed.

The appellant's conviction on both counts is hereby quashed and the sentence set aside.

The appellant is now set at liberty unless otherwise lawfully held.

F. AZANGALALA
JUDGE

J.R. KARANJA
JUDGE

(Delivered and singed this 30th day of June 2011)