REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CONSOLIDATED CRIMINAL APPEALS NOS. 69 & 70 OF 2010

(Appeals arising from the conviction and sentence of the judgment of [MRS. M.I.G. MORANGA, SRM]

dated 17th November 2009 in the Chief Magistrate's Court Kakamega in Criminal Case No. 3241 of 2007)

GEOFFREY NAKHAMI WESONGA.....1ST APPELLANT
MICHAEL ODHIAMBO AJUOGA.....2ND APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

Geoffrey Nakhami Wesonga (the 1st appellant) and Michael Odhiambo Ajuoga (the 2nd appellant) were charged , together with another person who was however acquitted, with six counts under the **Penal Code**. They were charged with two counts of **robbery with violence** contrary to **Section 296(2).** The particulars of the first count were that on 7th December 2004 at Bungoma Township in Bungoma District, while armed with dangerous weapons, namely two pistols (make Tokalev Serial No.34912(1944) and Ceska Serial No.114521) robbed Rasiklal Kantilal Haria of KShs.30,000/=, Motorola mobile phone, a golden necklace and two (2) golden finger rings all valued at KShs.74,000/= and at or immediately before or immediately after the time of such robbery, used violence to the said Rasiklal Kantilal Haria. In the second count, the particulars of the offence were that on the same day and in the same place, the appellants, jointly with others not before the court, while armed with dangerous weapons namely two pistols (make Tokalev Serial No.34912 (1944) and Ceska Serial No. 114521) robbed Jotham Mukhaisi Masibai of motor vehicle registration No. KAG 613 Z make Toyota Corolla Saloon and at or immediately before or immediately after the time of such robbery, the appellants used violence against the said Jotham Mukaisi Masibai. The appellants were charged with four (4) other counts under the **Firearms Act** but were however acquitted of the charges. The issues relating to the said charges under the **Firearms Act** are not live and are therefore not subject to this appeal. When the appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, the appellants were convicted as charged on the first count of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. They were sentenced to death as is mandatorily provided by the law. The 1st appellant was convicted, in the second count, of the lesser charge of **robbery with violence** contrary to **Section 296(1)** of the **Penal Code**. In light of the sentence imposed on the first count, the trial court declined to sentence the 1st appellant in respect of the second count. The appellants were aggrieved by their conviction and sentence

in respect of the first count and they duly filed an appeal to this court.
In their petition of appeal, the appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the basis of the evidence of identification that was not established to the required standard of proof beyond any reasonable doubt. They faulted the trial magistrate for relying on extraneous matters in convicting them. In their view, this constituted miscarriage of justice. They took issue with the fact that the trial magistrate had relied on inconsistent, contradictory, uncorroborated, scanty and incredible evidence by the prosecution's witnesses to convict them. They faulted the trial magistrate for convicting them on the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** yet all the ingredients to establish such charge had not been proved to the required standard of proof. The appellants were aggrieved that the trial magistrate had relied on unsatisfactory evidence of the prosecution witnesses to convict them. They were aggrieved that the trial magistrate had failed to take into account the totality of the evidence adduced before arriving at the said decision convicting them. The appellant faulted the trial magistrate for failing to take into account their respective defences which had exonerated them from the crime before arriving at the said decision to convict them. Finally, the appellants took issue with the judgment which was written by the trial magistrate which in their view did not accord with **Section 169** of the **Criminal Procedure Code**. For the above reasons, the appellants urged the court to allow their appeals, quash their convictions, and set aside the death sentence that was imposed upon them.

At the hearing of the appeal, the two separate appeals that were filed by the appellants were consolidated and heard together as one. This judgment is therefore in respect of both appeals. This court heard oral submissions made by Mr. Atulo on behalf of the appellants. He essentially reiterated the contents of the petition of appeal urging this court to find that the prosecution had not established its case on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. In particular, Mr. Atulo took issue with the quality of the evidence that the prosecution offered in respect of the identification of the appellants at the scene of crime. He was of the view that, taking into account the entire circumstances of the case, it was unlikely that the identifying witnesses would have been in a position to positively identify the appellants as being among the gang of robbers who attacked the complainants. On his part, Mr. Orinda for the State was emphatic that the prosecution has established its case, on the basis of the evidence of identification, to the required standard of proof beyond any reasonable doubt. He urged the court to dismiss the appeal filed by the appellants as the same lacked merit.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent determination whether or not to uphold the conviction of the appellants. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified (see **Okeno v Republic [1972] EA 32**). In this appeal, we are required to re-evaluate the evidence adduced before the trial court, in light of the submissions made during the hearing of this appeal, and thereafter render our decision whether or not to uphold the conviction of the appellants.

What are the facts of this appeal? On 7th December 2004 at about 2.00 pm., PW1 Rasiklal Kantilal Haria (the complainant) was relaxing in his residential house within Bungoma Municipality. He was with his wife and child. He was also with his two house-helps, PW5 Eunice Nekesa and PW6 Faustine Nanjala Nyongesa. According to the complainant, at that time, robbers gained entry into his house. The robbers, who were armed with pistols, ordered the complainant and members of his family to lie on the floor. The robbers, who were four in number, ordered him to give them money. The complainant testified that he complied with the order and gave them KShs.40,000/= (cash); golden rings, golden necklaces and other jewellery worth KShs.75,000/=. The complainant's Motorola mobile phone was also robbed from him. The golden necklace which was robbed from the complainant's house was later recover recovered by the police. It was marked for identification in court, but the police officer who recovered it did not testify in court. The complainant testified that during the course of the robbery, he was able to positively identify the 1st and 2nd appellants. In his testimony in the trial court, the complainant explained in detail the role each of the two appellants played during the course of the robbery. PW5 and PW6 too told the court how the robbery was executed and how they were able to be in close contact with the appellants which enabled them to be positive of their identification upon their arrest. PW5 and PW6 told the court how they were tied up, threatened with pistols, and told to lie down. They corroborated the evidence

adduced by the complainant regarding the circumstances of the robbery. In particular, PW5 narrated how the 2nd appellant hit her on the head when she hesitated to follow his instructions that she should lie down. After the robbers had left the complainant's house, the complainant, PW5 and PW6 were able to untie themselves and thereafter made a report to the police. The complainant, PW5 and PW6 were positive that they had not met with the appellants prior to the robbery incident.

Meanwhile, on the same day, at about 1.00 p.m. while PW2 Jotham Mukaisi was at Bungoma bus-stage waiting for a fare, he was approached by two men who inquired from him if they could hire him to ferry a patient to Kanduyi Hospital. PW2 at the time operated a taxi, a Toyota corolla saloon registration number KAG 613Z. After negotiating the fare with the two men, PW2 accepted to ferry the two men to a place where, ostensibly, they would find the sick patient to be taken to the hospital. PW2 recalled that when they reached a residential house in the outskirts of Bungoma town, he was directed to enter a certain house. Upon entering the house, he was confronted with a scene whereby the complainant and members of his family were lying on the floor. PW2 testified that he too was ordered to lie on the floor. This was after a pistol had been pointed at him. PW2 narrated how his pockets were frisked and KShs.1000/= robbed from him. PW2 testified that he identified the 1st and 2nd appellants as being members of the gang who robbed the complainant. PW2 explained in detail the role that was played by the 1st and 2nd appellants during the course of the robbery. PW2 recalled that the 1st appellant ordered him to surrender the keys of his taxi. He complied. After the robbery, PW2 discovered that the robbers had escaped with his taxi. PW2 informed the owner of the motor vehicle PW4 George Musambai Wafula of the robbery. PW4 informed the police. Meanwhile, the complainant had also given the report of the robbery to the police.

On the same day i.e. 7th December 2004, PW8 P.C. Festo Wamwai received a report from PW4 of the theft of his motor vehicle. PW8 at the time worked at the Criminal Investigation Department's office at Bungoma. PW8 testified that the police mobilized and sought to pursue the robbers. He narrated how they received tips on the direction the stolen motor vehicle was being driven by among others, a boda boda cyclist. The police were able to pursue the motor vehicle upto a place called Sertanyi. The stolen motor vehicle was recovered by the police. PW3 P.C. Molongo Tali, a Scenes of Crime officer arrived at the scene and dusted the motor vehicle for finger prints. No usable finger prints were recovered. PW8 testified that on arrival at the scene, he was informed that five men had dashed from the motor vehicle. PW8 saw them. He sought to stop them. They ran away. PW8 ran in hot pursuit of them. As he was running after them, he shot in the air. One of them dropped something as he was running. PW8 managed to collect the item. It was one of the pistols which was produced in evidence by the prosecution. PW8 managed arrest the 1st appellant. The pistol did not have any ammunition. The 1st appellant was arrested by PW8. He was escorted to Bungoma Police Station where he was interrogated by the police. Later on the same day he led the police, including PW8, to the house of the 2nd appellant at Lurambi estate in Kakamega Municipality. The 2nd appellant was arrested. His house was searched and a golden necklace recovered. This necklace was however not produced in evidence as the police officer who recovered the same was not called to testify. However, the said golden necklace was positively identified by the complainant (PW1) as the particular one which was robbed from him.

PW8 told the court that after the arrest of the appellants, they were detained at Bungoma police station. On 8th December 2004, PW9 Chief Inspector Johnstone Libese conducted an identification parade. In the identification parade PW1 (the complainant) PW2, PW5 and PW6 identified the 1st and 2nd appellants as being among persons who participated in the robbery. According to the prosecution, this identification by the witnesses at the identification parade, confirmed the earlier identification by the particular witnesses. PW7 Acting Superintendent of Police Lawrence Ndhiwa examined the two pistols recovered in the course of investigation of the robbery and established that they were firearms within the meaning of the **Firearm Act**.

When the appellants were put on their defence, they both denied participating in the robbery. The 1st appellant testified that he was a victim of mistaken identity. He told the court that he had attended an interview for teaching job on the particular day he was arrested. He stated he was relaxing with his friends in a Busaa den after the interview when he saw people running helter-skelter. He took off on his heels. It

was while running away that he was arrested by the police. He testified that while in the police custody, he was tortured to confess to the crime. He disputed his identification by the identifying witnesses. He reiterated that the identifying witnesses were exposed to him prior to the identification parade that was conducted by the police. On his part, the 2nd appellant, while explaining the circumstances of his arrest, denied involvement in the robbery. He gave an alibi defence regarding where he was on the day of the robbery. He told the court that he was at his place of business with his wife when the robbery took place. It was his case that he could not therefore have participated in the robbery.

Having considered the submissions made before us on this appeal, and having re-evaluated the evidence adduced before the trial magistrate's court, it was clear to the court that the prosecution secured the conviction of the appellants on the basis of the evidence of identification. According to PW1, PW2, PW5 and PW6, they identified the appellants during the course of the robbery. The robbery took place at 2.00 p.m. It was in broad daylight. The robbers made no attempt to conceal their identity. PW1, PW2, PW5 and PW6 explained in detail the roles each appellant played in the robbery. On analysis of the said evidence, it was clear to the court that the evidence of the said witnesses regarding how they identified the two appellants was consistent in material respect. Further, upon the arrest of the appellants, an identification parade was conducted by PW9. The above identifying witnesses, without hesitation, identified the two appellants. Although the appellant claimed that was exposed to the said witnesses prior to the identification parade, having evaluated the evidence, it was clear that no such thing happened. If there was such reservation, the 1st appellant should have so indicated in the identification parade form.

This court is aware of the injunction that when considering the sole evidence of identification as a basis of conviction, it should warn itself of the danger of convicting such accused on such evidence of identification. We have duly warned ourselves. It is apparent from the evidence adduced by the PW1, PW2, PW5 and PW6 that the circumstances favouring positive identification were present when the identification was made. The time the robbery took place was sufficient to enable a positive identification to be made. (see **Maitanyi v Republic [1986] KLR 198).** We have taken into account that in the hectic circumstances of the robbery, the witnesses may have been shocked or confused, especially when it is considered that pistols were being waved at the victims of the robbery. We have however discounted this as a factor because of the positive nature in which the said witnesses were able, without hesitation, to point out the appellants in the police identification parade which conducted hardly twenty four (24) hours after the robbery incident. We are satisfied that the trial magistrate properly evaluated the evidence of identification that was placed before her and thereby reached the correct determination that it was the appellants who committed the crime. In the case of the 1st appellant, the circumstances of his arrest further pointed to his guilt. PW8 testified how he pursued the 1st appellant, while firing in the air, until his arrest. Just before his arrest, the appellant threw on the ground an item which PW8 later confirmed to be a pistol. In his narration of the events leading to the arrest of the 1st appellant, it was evident that PW8 did not at any time lose sight of the 1st appellant in the hot pursuit. The claim by the 1st appellant that he was a victim of mistaken identity does not therefore hold any water.

The upshot of the above is that the two appeals filed by the appellants herein lack merit. All the ingredients to establish the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** were proved to the required standard of proof beyond any reasonable doubt. The two appellants were armed with dangerous weapons, namely pistols, when they robbed the complainant (PW1). They robbed him of valuables, which included cash. They were more than one when they committed the robbery. Their appeals are hereby dismissed. The conviction of the appellants by the trial magistrate on the first count of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** is hereby confirmed. The death sentences imposed upon the appellants are similarly confirmed.

It is so ordered.

DATED at KAKAMEGA this 7th day of December 2011

L. KIMARU

J U D G E

B. THURANIRA JADEN

J U D G E