REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Criminal Appeal 157 of 2007

PIUS ISAYA MANJERO ..... 1st APPELLANT

MICHAEL OMUSAL AYUB.....2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in Criminal Case number 1916 of 2006 of the Senior Resident Magistrate's Court at Maseno)

Coram

Karanja, Aroni – JJ

Gumo for state

Court clerk George /Laban

Appellants in person

JUDGMENT

The two appellants, **Pius Isaya Nanjero** and **Michael Omusala Ayub** were convicted and sentenced to death by the Senior Resident Magistrate at Maseno for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars of the charge were that on the 15th December 2006 at Mwibona Market, West Bunyore location Western Province, jointly with others not before court robbed **Hudson Ato** of T. V. make Sony, a DVD player, a tape recorder make Sony, a generator make Honda, a radio – cassette, five mobile phones, an amplifier and assorted shop goods inclusive of Kshs. 35,000/= cash all valued at Kshs. 103,000/= and at or

immediately before or immediately after the time of such robbery used actual violence to the said Hudson Ato.

The appellants pleaded not guilty to the charge and after trial, were convicted and sentenced accordingly.

Being dissatisfied with the conviction and sentence they preferred separate appeals which were herein consolidated and heard together. The grounds of appeal are more or less similar and are contained in the respective petition of appeal filed on the 15th October 2007. They are essentially an attack on the prosecution evidence of identification and the failure by the prosecution to call vital witnesses. There is also a complaint that the appellants' defence was not given proper consideration by the learned trial magistrate.

The appellants appeared in person at the hearing of the appeal and orally addressed us in response to the address by the respondent through the learned Assistant Deputy Public Prosecutor, **Mr. Gumo**.

In opposing the appeals, the learned State Counsel submitted that the appellants were identified by recognition as being part of those who committed the offence of robbery with violence against the complainant. That, PW1, PW2 and PW3 testified that there was electric light at the time of the robbery thereby enabling them to recognize the appellants. Therefore, there was no mistaken identification of the appellants.

The learned State Counsel further submitted that there was sufficient evidence against the appellants and in any event, a fact may even be proved by a single witness and that although the learned trial Magistrate may not have complied with Section 169 of the Criminal Procedure Code, this court being a first appellate court is bound to revisit the evidence and arrive at its own conclusions.

In response to the foregoing, the first appellant **(Pius)** submitted that although PW1, PW2 and PW3 said that they saw the robbers with the help of security lights and recognized them they did not mention the names of the suspects in the first report to the police. That, PW1 only

mentioned names when he recorded his statement.
Further, PW1 did not state the position of the security lights in relation to the robbers and the distance separating him and the attackers and that there was contradiction in the evidence of PW1, PW2 and PW3 regarding the clothes that he (first appellant) was wearing and how he was arrested.
The first appellant contended that the police officers who arrested him were not called to testify nor did the investigating officer and that nothing was recovered from him.
In his submissions, the second appellant **(Michael)** said that PW1 did not identify any of the robbers as he did not mention the names of the suspects in his first report to the police and only did so after a period of twelve days when he recorded his statement. Further, PW1 said that it was his first time to see the robbers and that the police officers who arrived at the scene did not say what they were told by PW2 and also that PW1 and PW2 contradicted themselves with regard to the weapons used.
The second appellant contended that he was not found in possession of any stolen property and that the investigating officer did not testify and say how he was arrested and for what reason.

We have carefully considered the foregoing arguments by both sides and in the fulfillment of our duty to reconsider the evidence and arrive at our own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses, we now proceed to summarily review the evidence availed before the trial court and draw our conclusions.
The prosecution case was that on the material date at about 1:00 a.m the complainant **Hudson Ato (PW1)** was at his house with his family consisting of his wife **Rose Mokeira (PW2)** and children **Ato Oliver (PW3)** and **William Ato (PW4)** when a group of about fifty people invaded them. These people were armed with pangas and iron-bars but met resistance from the complainant who was cut on the neck and hand

in the process. He managed to escape and proceed to Luanda Police Station where he reported the incident and was escorted back to his home by police officers. On arrival, they found that the attackers had already left having stolen electronic items and other things.
The complainant said that the security lights in his compound were on at the time of the robbery. He therefore saw and recognized the two appellants as having been part of the gang of robbers. He had previously known them and that the first appellant had undertaken studies with him. He said that the first appellant had covered his head with a hat but not the second appellant. He also said that he mentioned the names of the appellants when he recorded his statement and not at the time of lodging his report.

The complainant's wife (PW2) heard commotion and noises outside their house after her husband had stepped outside into the compound. As she stood by the door, a group of people outside the house ordered her to sit down. She went inside the house after locking the door. She did not know what was going on but a few minutes four people broke into her bedroom, assaulted and ordered her to produce a key to a cupboard and surrender money. They removed Kshs. 5,000/= and demanded more. They then ordered her to open the nearby shop for them.
They broke into the shop and she switched on the electric lights and gave them some coins in the drawer. They continued assaulting and demanding money from her and took about thirty minutes to ransack and steal property before the police arrived at the scene with her husband. She saw and recognized the first appellant commonly known as "**Nyayo"** and a cyclist in the area. He is the person who slapped her with a panga and was wearing a red jacket and putting on a black cap. She also recognized the second appellant as the person who was very polite. She again saw the first appellant on 16th December 2006 at about 11:00 a.m. passing near her shop and pretending to be drunk. He was arrested after she called police officers from the Railways Police

Station. Also, on the 17th December 2006 at about 9:00 a.m. she spotted the second appellant and alerted the Railway Police. He was also arrested.

The complainant's children (PW3 and PW4) both secondary school students narrated more or less what was stated by their father and mother.

Ato (PW3) estimated that the attack took a duration of thirty minutes and said that there were security lights outside the house. He saw and recognized the two appellants as having been part of the gang of robbers who slightly injured him in the process.

William (PW4) did not identify and/or recognize any of the robbers.

Dr. Philip Athero (PW4), examined the complainant after the offence and confirmed that he had been assaulted and occasioned bodily harm.

The foregoing evidence by the prosecution was considered by the learned trial magistrate who ruled that a **"prima –facie**" had been established to warrant that the appellants be placed on their defence.

The appellants denied the offence. The first appellant (Pius) stated that he was a seedlings vendor at Luanda and was arrested on 17th December 2006 and taken to the Kenya Railways Police Station and then Luanda Police Station. None of the stolen property was found in his possession.

The second appellant (Michael) stated that he was a "**boda –boda"** (bicycle taxi) operator and was at work on 15th December 2006 when he was arrested and taken to his house which was searched and nothing recovered. He was later charged in court.

The totality of the evidence adduced before the learned trial magistrate indicated that the basic issue that arose for determination was whether the offence of robbery with violence under Section 296 (2) of the penal code was committed and if so, whether the appellants were positively identified as having been part of the offenders.

After being satisfied that the offence was established and that the appellants were identified by recognition, the learned trial magistrate

entered a verdict of guilty against the appellants and convicted them accordingly.

On our part, we are satisfied that the offence was duly established. It was proved that a big gang of robbers attacked the complainant and his family and got away with the family's property. The gang was armed with crude weapons and in the process assaulted the victims.

We are however not satisfied that the identification of the appellants whether by recognition or otherwise was watertight and reliable.

Even where there is identification by recognition there must exist favourable conditions and adequate opportunity for identification especially if the offence occurred in the hours of darkness.

Herein the evidence showed that the gang of robbers numbered about fifty (50). This is such a big number that it would be difficult for a victim to make a proper and reliable identification of any of the robbers notwithstanding the presence of security lights. The evidence showed that the security lights were within the compound but not inside the house. However, the complainant's wife (PW2) stated that when she was forced into their shop she switched on the electric light. She did not say whether at the time she had an opportunity to look at the robbers inside the shop and identify any one of them.

Indeed, none of the prosecution witnesses stated that they took a good glance at any of the robbers to be able to identify them. The situation must have been very confusing, distressful and chaotic considering that the scene was full of people moving all round in an effort to accomplish their illegal transaction. These people must have put a lot of scare and shock into their victims for them (Victims) to make a proper and reliable identification of any one of them (robbers). Indeed, one of the victims (PW4) was not able to identify any of the robbers although he was all along together with the others (PW1, 2 & 3).

The complainant (PW1) attempted to resist the robbery but could only do so for five minutes before he escaped from the scene to rush to the nearby police station. He could not possibly have had adequate

opportunity to see and positively identify any of the robbers.

For all the foregoing reasons we find that the appellants were not positively identified as having been part of the gang of people who attacked and robbed complainant of his property. Their conviction by the learned trial magistrate was unsafe not only on the basis of the identification evidence but also on the basis that the prosecution failed to call vital witnesses to establish the formal arrest of the appellant and their arraignment in court after the prerequisite investigations. Neither the arresting officer nor the investigation officer was called to testify. This meant that the appellants may have been arrested without a formal complaint being made against them and were charged in court without formal investigations.

We do not think it was prudent for the learned trial magistrate to put the appellants on their defence in the absence of the evidence of the arresting or investigations officer. They should have been acquitted under Section 210 of the Criminal Procedure Code without much ado. The failure to call the investigations and/or arresting officer was in the circumstances fatal to the prosecution case. Such failure was addressed by the then Chief Justice of Uganda, **Sir Udo Udoma**, in the case of **Bwaneka =vs= Uganda [1967] EA 768** when he stated:-

> **"The prevailing practice of not calling police officers during trials in magistrate's courts to testify as to the part they played in deciding ultimately to arrest and charge an accused person is most unsatisfactory. It gives the impression that the police do not seem to realize that it is their duty to control and conduct all prosecution in the magistrates' courts in criminal cases. Generally speaking criminal prosecutions are matters of great concern to the state and such trials must be completely within the control of the police and the Director of Public prosecutions. It is the duty of the prosecutors to make certain that police officers who had investigated and charged an accused**

person do appear in court as witnesses to testify as to the part they played and the circumstances under which they had decided to arrest and charge an accused person . Criminal prosecutions should not be treated as if they were contests between two private individvals".

We have nothing useful to add to the foregoing statement but we would herein ask the Learned Assistant Deputy Public Prosecutor to take serious note and enlighten the police prosecution department accordingly.

Otherwise, these appeals are allowed. The conviction of the appellants is hereby quashed and the sentence set aside. They are set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kisumu this 18th day of May 2010.

J. R. KARANJA
JUDGE

ALI-ARONI
JUDGE