REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(Coram: Ojwang & Azangalala, J J.)

CRIMINAL APPEAL NOs. 209 & 210 of 2008 (CONSOLIDATED)
- BETWEEN -

FELIX OCHIENG OMOLLO……..1ST APPELLANT
TOM OCHIENG WAYUMBA …….....2ND APPELLANT
- AND -
REPUBLIC…….…….RESPONDENT
(Being an appeal from the Judgment of Principal Magistrate** R. Kirui dated **21st July, 2008 in Criminal Case No. 1005 of 2006 at Mombasa Law Courts)

JUDGMENT

The appellants were charged with attempted robbery contrary to s.297 (2) of the Penal Code (Cap.63, Laws of Kenya): the allegation being that the two, jointly with others not before the Court and while armed with dangerous or offensive weapons, namely pistols, on the night of ***4th March, 2006*** at around 11.40p.m in Nyali Dolphine Estate, in Mombasa District of Coast Province, attempted to rob ***Moses Oduor Otiato*** of his motor vehicle Reg. No. KAS 515H, Subaru Impreza by make, valued at Kshs.850, 000/=.

The complainant gave evidence that on the material date, at 11.45 p.m., as he drove and came up to his gate in Nyali Estate, three people, among them the appellants herein, suddenly emerged from behind, two of them brandishing guns. Upon seeing the intruders, the complainant immediately switched on a Group 4 security alarm on his motor vehicle, Reg. No. KAS 515H, and his family also raised the alarm from the homestead. Upon hearing the alarm sirens, 1st appellant herein entered the complainant's motor vehicle, in the passenger section, and started conducting a search, while 2nd appellant herein stood guard behind. The complainant came out of the car armed with a metal bar which he had, and he hit 2nd appellant in the back. The three intruders began running away, but Group 4 security personnel arrived before they could escape, and a chase after the attackers began, in the direction of Kongowea. The pursuers reached these intruders some 500 metres away, and this forced the intruders to part company, one entering an estate next to Kongowea, two running in the reverse direction. With members of the public joining in the chase, the two attackers sought refuge in a bush, but they were then arrested; 1st appellant had tried to camouflage himself by means of tree branches; and 2nd appellant was also arrested while resorting to such camouflage. In the face of an irate mob that threatened to lynch the intruders, the Group 4 security personnel called the police who provided rescue. The police officers recovered a pistol-like object where 1st appellant had been hiding.

Irene Kalwenje Oduor (PW2) testified that her husband, the complainant, had arrived at the gate at 11.00pm on the material date, and she is the one who switched on the alarm. PW2 had followed the hot-pursuit team, and was able to perceive the appellants herein as the suspects who were arrested.

Corporal Zablon Mukhola (PW3) of Nyali Police Station testified that he was on duty at 11.45pm on the material night, when he received a call from the control room that certain robbery-suspects had been arrested by members of the public in the Dolphine area of Nyali Estate; and he proceeded there in the company of other police officers, and found the two appellants herein already arrested. PW3 and his

fellow officers rescued the appellants from an irate mob, and recovered from the two a toy pistol.
Both appellants herein, when put to their defence, gave unsworn evidence. The 1st appellant said he was coming from a shop known as Tumaini on the material night at 11.20pm when he was confronted by groups of unknown people, who assaulted him and took him, unconscious, to Nyali Police Station. The 2nd appellant said he was coming from a funeral gathering at 11.30pm on the material night, when a crowd of unknown persons pounced on him, arrested him, and battered him until he fell unconscious, until the following day at a Police Station.
From all the evidence, the trial Court addressed itself to the question whether or not the appellants herein, while armed with dangerous weapons, attempted to rob the complainant of his motor vehicle. The Court's assessment was as follows: the complainant gave evidence that he and others chased the appellants herein from the ***locus in quo*** up to their hide-out in the bush; PW2 gave confirming evidence, as she also witnessed the chase and arrest; PW1 said the chase was at close-range, and there was nothing intervening between the pursuers and the process of arrest.
The trial Court believed the prosecution evidence, and held that the complainant had no reason to tell an untrue tale about strangers; the Court held that the appellants herein were among the three people who confronted the complainant at his gate on the material night; and the Court found it to be established beyond any reasonable doubt that the appellants herein committed the offence charged. The appellants were convicted, treated as first offenders, and accorded an opportunity to make mitigation statements, whereupon each was sentenced to death, as provided for by law.
In the grounds of appeal, the appellants contended as follows:

(i) the charge sheet was incurably defective;
(ii) the trial Court wrongly relied on the evidence of a single identifying witness;
(iii) the source of lighting at the material time was not ascertained;
(iv) some essential witness was not called to testify;
(v) PW2's evidence was mere hearsay;
(vi) the members of the public involved in the arrest were not called as witnesses;
(vii) the Group 4 security officers who helped with the arrest were not called as witnesses;
(viii) the investigations were "a shoddy fabrication" which could not lead to a conviction;
(ix) the appellants were held in custody for 16 days; and this "[contravened]section 72(3) (b) of the Constitution of Kenya";
(x) the trial Court erred in law and fact by rejecting the defences.

The appellants came to Court with pre-written submissions which were already filed, and they said they had nothing to add to the written texts; they confirmed this position after the respondent's counsel had made oral submissions.
Learned respondent's counsel, ***Mr. Muteti*** urged that the appellants herein had been properly identified as the suspects who attacked the complainant on the material night, and that they had been followed and arrested in a set of contemporaneous events which ruled out mistaken identity; and the attackers were armed with guns – which are dangerous or offensive weapons. Learned counsel submitted that it was clear from the evidence (especially of PW2) that the security lights at the gate were illuminating the entrance into the homestead, at the material time – and thus visibility in that area was good. Counsel urged too that the appellants' ruse of camouflaging themselves with tree branches, when they were being chased, corroborated the evidence that they were the suspects; and that there was still further corroboration in the shape of the toy pistol found at the hide-out.
Both appellants, in their written submissions, contended that the charge-sheet was defective, because it was not indicated if the complainant was robbed of anything.
This argument, obviously, cannot stand: because the charge as formulated was not robbery, but ***attempted*** robbery: and if the appellants entered the complainant's car without being invited into it, and if they did so while armed, it could only be for the purpose of robbing the complainant of something in the car, or the car itself, in circumstances of violence; hence the charge of attempted robbery was the proper one to bring.
Although the appellants contest the claim that they had been correctly identified, the evidence shows lights at the gate; shows that the complainant confronted the attackers at close range, and even battered one of them; shows that Group 4 security personnel came rapidly while the attackers were still in sight; shows an instantaneous chase of the three attackers, the disappearance of the third, and the pursuit and arrest of the two who are the appellants herein. We are in agreement with counsel that the chase-after-the-

suspects was so immediate, that there was sufficient contemporaneity in the arrest to corroborate other evidence of the identity of the appellants as the suspects.
Although the appellants partly based their case on the expeditious-trial provision of s.72(3)(b) of the former Constitution(of 1969), the case has not accommodated the exception provided for: that good cause ***can*** be shown for a longer period before the fourteen-day limit, before arraignment in Court, in respect of an offence such as the instant one. In principle an objection such as the one the appellants were raising, has to be brought at an early stage, so the prosecution can check the relevant information and produce it in Court. In the instant matter, an offence so serious, and involving firearms, had been committed, and this Court in its exercise of discretion, does not consider it right that it should reverse the finding and Judgment of the trial Court, unless an opportunity has been available for the respondent to explain the manner in which it acted.
We come to the conclusion that the charge was properly set out in the charge sheet, and the trial was properly conducted, leading to the conviction of the appellants. We dismiss the appeal; uphold the conviction; and affirm sentence.

Orders accordingly.

DATED and **DELIVERED** at **MOMBASA** this ***16th day of November, 2010.***

J. B. OJWANG
JUDGE

F. AZANGALALA
JUDGE