IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 216 & 212 OF 2009 (CONSOLIDATED)

(From original conviction and sentence in Criminal Case No. 1720 of 2007 of the Principal Magistrate's court

at Naivasha – NDUKU NJUKI, SRM)

BENJAMIN GATHIRU KAMAU.....1ST APPELLANT

JOSEPH NDUNGU GITAU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Benjamin Gathiru Kamau and Joseph Ndungu Gitau were convicted of the offence of robbery with violence contrary to **Section 269(2)** of the **Penal Code** and sentenced to the only prescribed sentence, of death. The appellants were aggrieved by the said decision. Benjamin Gathiru filed Criminal Appeal No. 216 of 2009 while Joseph Ndungu filed Criminal Appeal No. 212 of 2009. At the hearing, the appeals were consolidated and proceeded as Criminal Appeal No. 216 of 2009. The appellants filed submissions in support of their grounds of appeal. The appellant contended that the court erred in basing its conviction on the evidence of a single identifying witness which was not corroborated and that their defences were not taken into account by the trial court.

Mr. Omutelema, who represented the State, conceded the appeal, for reasons that the conviction was unsafe having been based on a single identifying witness and that the magistrate failed to warn himself of the danger of basing a conviction on a single identifying witness. Secondly, counsel urged that the first appellant, should have been given the benefit of doubt having explained that PW1 gave him the telephone as security for money and that the issue of fake money was consistent throughout the case. Counsel added that 2nd appellant was only mentioned and there was no evidence against him.

Briefly, the facts as we understand them are that John Gachoya Maina, the complainant herein (PW1) had been at Moonlight Bar at Longonot from on 17/8/07, 8.00 p.m. taking beer. He recalled that at 10.00 p.m. appellant, Benjamin Gathiru, who owned a butchery next door, called him to go and eat meat which he had cooked. PW1 went to eat meat, gave the 1st appellant a Kshs.200/- note but 1st appellant rejected the note saying it was torn. PW1 gave him Kshs.1,000/- note and 1st appellant gave him change of

Kshs.900/-. He continued to drink till midnight when the bar was closed. He left for his home in company of appellant 2 and his son Guchu. They had been drinking at the same bar. On the way, 2nd appellant and the son ran ahead of him, and 30 metres ahead, they attacked him. They were joined by appellant 1 and Tony Munguti beat PW1 up and robbed him of Kshs.2,300/- and a mobile phone. When he tried to scream, Tony Munguti put soil in his mouth. After they left him, he managed to get up and go home and reported the matter to the Police station on the next day. He was able to identify the assailants because it was not very dark on that night and he could recognise their voices as they spoke robbery. He said that his phone which he was robbed of was recovered from appellant 1. PW2 who got a report of the robbery from PW1visited the scene with PW1 and found a shoe at the scene but the owner was unknown. PW1 denied that he had given his mobile as security, in lieu of payment, for the meat he ate. PW2 was merely informed of the robbery by PW1.

PC Joshua Githinji (PW3) who received a robbery report visited appellant 1's house on 20/7/07 and recovered the complainant's mobile phone from 1st appellant's ceiling, and a blood stained knife under his mattress. He also testified that a shoe recovered at the scene was found to belong to appellant 1 as the other shoe was recovered in his house.

1st Appellant in his sown statement admitted having been at work at the butchery on 18/8/07 where he served PW1 with meat at about 9.00 p.m. He said appellant 1 gave him Kshs.200/- which was found to be fake. PW1 had no money to pay for the meat he ate and he gave appellant 1 his phone as security. Appellant 1 identified the phone as that produced in court. He denied that the shoe produced in court was his. He denied ever attacking or injuring PW1.

Appellant 2 also gave a sworn statement and denied having been with PW1 or robbing him.

DW1, Samuel Njoroge, testified to having been with PW1 at appellant 1's butchery where he ate meat, paid with fake money and after an argument, he agreed to give his mobile as security.

After reviewing the evidence on record the court finds as a fact that PW1 sustained injuries on the night of 17th and 18th August 2007. Appellant 1 and DW2 do admit having been with PW1 at the butchery on that night. When at the butchery, PW1 was not injured but on the next day 1st appellant noted that PW1 had injuries.

PW1 was alone when he was attacked. The circumstances under which PW1 was attacked were not conducive to identification. It was at night, after midnight. There were no lights at the scene. PW1 testified that he was able to identify his assailants because it was not 'pitch dark'. What does 'pitch dark' mean? It means that it was dark on that night but he did not tell the court whether there was full moon, half moon or ¼ moon or any other source of light at the scene. It is not sufficient to say it was not pitch dark. Besides, it is worth noting that PW1 had been drinking beer from 8.00 p.m. till the bar closed at midnight. Even if he was not drunk, his vision or judgment may have been impaired to some extent due to the alcohol. It is therefore questionable whether he was able to identify his assailants under such circumstances. The trial court should have warned itself of the danger of relying on the uncorroborated evidence of a single identifying witness under such difficult circumstances. What the court recorded was not a warning.

The complainant also testified that he was able to recognize the assailants' voices because they conversed as they assaulted and robbed him. The complainant did not specify to what each of the 4 assailants said that enabled him to recognize their voices. He only said that he recognised their voices but did not explain how he did that, save that the 2nd appellant said **"sasa amekufa tumuache."** That was not conversation between 4 people but a statement by only one person.

Though the Police claimed to have recovered a shoe at the scene which paired with appellant 1's shoe, they denied collecting the shoe from appellant 1's house. Only one shoe was produced as belonging to appellant 1. Appellant 1 denied that it was his shoe. If indeed a similar shoe was seen at appellant 1's house, there is no explanation given why the Police failed to take it as an exhibit. That leaves a gap in the

prosecution evidence.

PW3 said they received a blood stained knife from appellant 1's house. 1st Appellant said it was his knife. It seems the said knife was never taken to the Government analyst to confirm if the blood on it belonged to PW1 or if at all there was any.

During the hearing of the case, 1st appellant, maintained that PW1 ate meat at his butchery, attempted to pay for the meat with fake money and when it was discovered, he was forced to leave his phone as security to avoid being arrested. This was confirmed in the sworn defence. We find that the explanation given by 1st appellant is plausible and it did raise a doubt in the prosecution evidence.

In summary, we find that the prosecution evidence on identification of the assailants was not supported by independent evidence and there is a real likelihood of PW1 having made a mistake taking into account the difficult circumstances under which PW1 was allegedly robbed and assaulted. We have also found many gaps in the prosecution case which should have been reconciled before a conviction could be founded. In the circumstances, we do find that the conviction was unsafe. We hereby quash the conviction and set aside the sentence. The appellants are hereby set free forthwith, unless otherwise lawfully held.

DATED and DELIVERED this 3rd day of December, 2010.

R.P.V. WENDOH

JUDGE

M. J. ANYARA EMUKULE

JUDGE

PRESENT:

.....for the appellants.
.....for the State.
Kennedy – Court Clerk.