REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 481 & 483 of 2005 (Consolidated)

WYCLIFF KHATECHI ..... 1ST APPELLANT

ALFRED KIMATA KIHONGA ..... 2ND APPELLANT

- AND -

REPUBLIC ……..……RESPONDENT

(An appeal from the judgment of Senior Resident Magistrate Ms. Muchira dated 30th

September, 2005 in Criminal Case No. 9782 of 2004 at Kibera Law Courts)

JUDGMENT

The appellants herein were charged with robbery with violence contrary to s. 296 (2) of the Penal code (Cap. 63, Laws of Kenya). The particulars were that the appellants acting jointly with others not before the Court, and while armed with a knife, on *7th December, 2004* at Jamhuri Road, robbed ***Karanja Omari*** of a bicycle and one cellphone, Motorola by make ? all valued at Kshs.6,499/= ? and at or immediately before or immediately after the time of such robbery, used personal violence upon the said ***Karanja Omari.***

The complainant, ***Karanja Omari*** (PW1) said that on 7th December, 2004 (the material date) at 6.45 a.m. he was riding his bicycle across an open field to his home at Jamhuri, and as he got to the centre of the field, he saw four men jogging; two of them passed him, while two remained behind. The "joggers" who remained behind tugged the complainant's bicycle from behind; and the other two "joggers" closed in on him; then two of the "joggers" drew a sword, and struck the complainant with it. The "joggers" robbed the complainant of his cellphone, then they grabbed his bicycle, and walked away.

The complainant, who is a supervisor with BM Security and is based at headquarters along Jamhuri Road, dashed to his office in search of aid. He secured a sniffer-dog with its handler; and in only three minutes, he and the dog-handler and the dog were chasing the robbers towards a forest. Members of the public joined in ? and two of the "joggers" (the appellants herein) were arrested. As these attackers attempted to escape, being chased, they abandoned the bicycle which they had stolen. The complainant identified the appellants herein as the ones who struck him with a sword and also took his cellphone; he identified them from their clothing, and from their facial appearances; and he also identified his bicycle which had been stolen.

Evan Makoli Kimau (PW2), the dog-handler, had immediately set out, upon hearing PW1's screams; and he and others gave chase after the four suspects, his dog biting at the suspect with a machete and the one with the bicycle. PW2 and his dog caught up with 1st appellant herein, while members of the public arrested 2nd appellant herein. Later, Police officers came and re-arrested both suspects.

Police Constable Rephinus Omondi (PW3) who was the investigating officer went to BM Security offices, and found the appellants herein already arrested; and he later charged the two suspects.

Both appellants made unsworn statements, 1st appellant saying he was walking to his place of work, when BM Security guards arrested him; he said he knew nothing about the offence in question. The 2nd appellant said he was walking near

BM Security offices, when he met two men who attacked him and battered him; but he knew nothing about the offence charged.

The learned Magistrate conducted her analysis as follows:

"The issues for determination are whether it is the [appellants herein] who, while armed with a knife, robbed PW1 and [struck] him with [a] sword as charged. Has the prosecution proved its case beyond reasonable doubt? PW1 said [it was] ... at 6.45 a.m. [when the incident took place]. He was walking across the open field when he was attacked by the four gangsters. He was robbed and [ran] away screaming for help. PW2 hears and goes after the four men with his sniffer-dog. [The appellants herein] are caught.... I find PW2 corroborates PW1's testimony; for PW2 recovers PW1's bicycle from one of the robbers and his accomplice armed with the [machete]. PW3 is called to [the BM Security offices] and [re-arrests] the two accused persons. [The 1st and 2nd accused] do not [escape] ... from the scene. The two say each was walking home when [he] was ... arrested for no reason. I find it hard to believe either of them. Hardly will an innocent man be arrested by members of [the] public in [such] circumstances.... I find [that] the two [were] caught red-handed after the robbery on PW1. I find [that] the prosecution has proved its case beyond reasonable doubt. I find both guilty as charged, and convict them accordingly."

The learned Magistrate treated the appellants herein as first offenders, and took into account their statements in mitigation, but imposed on each the death penalty as provided by law.

In the petition of appeal, the appellants contended that they had not been positively identified at the *locus in quo*; that nothing incriminating was found in their possession at the time of arrest; that their defences had been rejected without a basis.

On the occasion of hearing the appeal, the appellants turned up with written submissions, to which were attached documents headed "Amended Grounds". In these new grounds, they further contested their identification at the *locus in quo*, because there had been only a single identifying witness; they contended that proof of the prosecution case beyond reasonable doubt had not been achieved.

In the oral submissions, 1st appellant said he would add nothing to his written submissions; but 2nd appellant submitted that the material time being early morning, at 6.45 a.m., a positive identification of him at the *locus in quo* was not made. He also contended that the members of the public who gave chase after him should have been called as witnesses.

Learned counsel ***Ms. Gateru*** supported both conviction and sentence, and urged that the appeals be dismissed. She submitted that the prosecution had adduced cogent evidence, and had proved the case against the appellants to the required standard.

Counsel urged that the complainant had made a positive identification of the suspects on the material morning; he had been clear that the appellants herein, of the four morning robbers, had been left behind to guard him after the robbery; and he had clearly seen 2nd appellant strike him with a machete, and 1st appellant grab his cellphone and pass it on to another member of the gang. The complainant had testified that the robbers had not concealed their faces; and when he screamed in alarm, members of the public had come out, given chase, and arrested the appellants; PW2 with his sniffer-dog had also joined in the chase; and in these circumstances of instantaneous chase and arrest, there was no scope for mistaken identification.

Learned counsel contested certain technicalities sought to be relied on by the appellants: the charge-sheet was not defective, as it described in detail the nature of the charge, and its mode of formulation caused no prejudice to the appellants. Counsel urged that if any contradictions would be found in the prosecution evidence, these would be very minor and not capable of compromising the case.

Of the defences, counsel urged that these had been duly considered, but found to be devoid of merits.

We have carefully considered all the evidence, and addressed ourselves to the manner in which the learned Magistrate addressed the same. We are not in agreement with the appellants that any defects marked the proceedings, or the weight of the prosecution case-such as should call for a reversal of the findings of the learned Magistrate. We found no defect of form, such as would prejudice the defence case; and we believe the trial Court paid all due regard to the defence case.

That leaves only the merits of the case, as the sphere that must determine the outcome in these proceedings; and on the merits, the time of day, we would take judicial notice, was well-lit from natural source; the robbery incident took place in the open field; the robbers had not disguised themselves in any manner; we must conclude that the complainant saw them well.

Identification was greatly enhanced by the instantaneous process of chase-after-the-thieves; with PW2 and his sniffer-dog being involved; with members of the public joining in ? this chase process ended with the arrest of two persons who were, in our opinion, not mistakenly identified; these persons were the appellants herein.

The recovery of the complainant's bicycle which the robbers had grabbed, is still further corroborative evidence. We hold that there was no mistake in the identification of two of the robbers of the material morning; they were the appellants herein.

We dismiss the two appeals; we uphold conviction in both cases; we affirm the sentences imposed by the trial Court.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 11th day of February, 2009.

J. B. OJWANG **G. A. DULU**

JUDGE **JUDGE**

Coram: Ojwang & Dulu, JJ.

Court clerk: Huka & Erick

For the Respondent: Ms. Gateru

Appellants in person