REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Criminal Appeal 87 & 88 of 2005

JOHN LUMWACHI alias MOI …… 1ST APPELLANT

BENEDICT KWARUSA INGOSI …… 2ND APPELLANT

V E R S U S

REPUBLIC …….....…… RESPONDENT

J U D G E M E N T

The appellants JOHN LUMWACHI alias MOI and BENEDICT KWARULA INGOSI together with one JOSEPH CHUMBA AMUKANGA (now deceased) were charged with the offence of Robbery with Violence contrary to *section 296 (2)* of the Penal Code. The particulars of the charge were that the accused on 9th November, 2004 at Mukangu village, Lukusi sub-location, Vihiga Location, Kakamega District in Western Province, jointly with others not before court, while armed with dangerous weapons namely pangas and an axe robbed manage Washira of KShs.8000/= cash, one bicycle make Avon and assorted shop goods all valued at KShs.16,000/= and at or immediately before or immediately after the robbery wounded the said Manase Wachira.

The appellants were convicted and sentenced to death. The appellants preferred the current Appeal. The 1st Appellant, John Lumwachi alias Moi filed Criminal Appeal No.87/2005 while the 2nd Appellant Benedict Kwarula Ingosi filed Criminal Appeal No.88 of 2005. The Appellants' co-accused Joseph Chumba had filed Criminal Appeal No.86 of 2005 but the appeal abated after the death of the said accused.

During the hearing, the two appeals were consolidated and the appellants agreed to the consolidation. The 1st appellant relied on his four grounds of Appeal which can be summarized as follows:-

i) The learned trial magistrate erred in law and fact by relying on identification by recognition whereas the incident took place at night and there was no enough light.

ii) The complainant did not know the appellant by name prior to the incident and therefore his evidence could not be relied on.

iii) The circumstances under which the bicycle was recovered did not irresistibly show that the

appellant had exclusive possession.

iv) The ingredients of robbery were not proved by corroborating evidence of other witnesses.

The first appellant also made written submissions which are to the effect that his rights under *section 77 (2)* of the Constitution were violated as witnesses testified in English which he did not understand. The second appellant, Benedict Kwarula relied on his grounds of Appeal and his written submission. These grounds can be summarized as follows:-

i) Evidence of PW2 was not corroborated.

ii) There was no enough light for positive identification.

iii) Burden of proof was shifted to the appellant

iv) Nothing was recovered from the appellant

Similarly, the 2nd appellant in his written submissions allege that the trial was conducted in English which he did not understand.

Mr. Karuri, learned State Counsel opposed the Appeal. He submitted that the lower court record showed that the proceedings were conducted in Kiswahili and the appellants did cross examine the witnesses.

On identification, the State Counsel submitted that PW2 identified the appellants using moonlight. PW2 recognized the appellants and knew them. PW2 testified that he knew the 1st appellant as a charcoal seller and the 2nd appellant as someone who used to fill potholes on the road. The lost bicycle was recovered after 1st appellant led police to where it had been hidden at a sugar plantation. The complainant gave the names of the appellants to the police when they recorded his statement at Hospital.

The prosecution case was that on 9-11-2004 at about 7.30 p.m., the complainant, PW2, Manase Wachira was heading home from his hawking duties in a bicycles when he was attacked near a river at a place called Mukungo. He was pushing his bicycle uphill when four people came from the other side of the road and surrounded him. They asked for money and attacked him. He was robbed of a bicycle, KShs.8000/= cash and assorted shop-goods. The complainant was seriously wounded and was admitted at Kakamega Provincial Hospital for one month and thereafter transferred to Kapsabet Hospital for another two months.

PW2 testified that he identified the attackers as he knew them. He identified the 1st Appellant as he used to sell charcoal and as a Boda Boda operator and gave police his names as John Lumwachi alias Moi. Similarly, he identified the 2nd appellant as someone who used to fill potholes on the road awaiting payment. He identified both appellants as there was moonlight. A vehicle passed by at the scene and the attackers left only to come back later to finish the complainant alleging that the victim had recognized them. The complainant was cut severely all over the body.

The following morning PW3, Reuben Shivachi, saw 1st appellant with a bicycle which 1st appellant claimed to have picked at the bridge. This evidence was corroborated by that of PW5, Esther Shivachi, who is the wife of PW3. She testified that the 1st appellant went to their home on 10/11/2004 in the morning and told PW3 that he had recovered a bicycle at the river. The 1st appellant was going to PW3 and PW5 home to plough their land.

PW6, corporal George Mwanje was given the names of the appellants by the complainant on 13th November, 2004, he went to their homes and arrested the two appellants. The first appellant led them to a sugar cane shamba owned by the1st appellant's grand father where they recovered the bicycle.

The main issue is whether the appellants did violently rob the complainant and whether they were properly identified. PW2, the complainant, testified that he knew his attackers. He gave their names to PW6 and PW7, two police officers. Similarly he gave the names of his attackers to his brother Francis Salim Thuo, PW4. He testified that there was moonlight and it was about 7.30 p.m. He also saw them by the assistance of a vehicle headlight that passed at the scene. It is our finding that PW2 positively identified the appellants. There was moonlight as well as vehicle headlights that assisted the complainant to identify the appellants. This coupled with the fact that the 1st appellant was seen with the bicycle that had been robbed that morning proves that the 1st appellant was involved in the robbery. Both appellants were known to the complainant and he recognized them.

The 1st appellant was advised by PW3 to take the bicycle to the village elder or Assistant Chief but he instead hid it in the sugar cane shamba. Such conduct is not consistent with that of an innocent person who had just found the bicycle at the river as purported by the first appellant. We are satisfied that the trial court arrived at the correct decision. The identification by the complainant, although being one of a single witness, cannot be held to be erroneous, mistaken or doubtful. It is indeed the complainant's identification that led to the arrest of the 1st appellant and the recovery of the bicycle.

The appellants were put on their respective defence and denied having committed the offence. The 1st appellant testified on how he was arrested and stated that he saw the stolen bicycle for the first time in court. Similarly the 2nd appellant testified on how he was arrested. The trial court considered the appellants' defences and the submissions that the burden of proof was shifted to the appellants cannot succeed.

On the issue of the language used in the trial, the record shows that PW1 and PW7 testified in English. PW1 was a Clinical Officer who produced the P3 form. He was cross-examined by the 2nd appellant. Similarly, PW7, P.C. James Kiogore testified in English. The record shows that the witness was extensively cross-examined by all the accused persons. It is therefore our conclusion that the appellants constitutional rights were not violated. They fully participated in the trial.

Consequently, we find that this Appeal has no merit and the same is dismissed.

Dated, Delivered and Signed at Kakamega this 30th day of June .2009 in the presence of the Appellants, and the Learned State Counsel.

FLORENCE N. MUCHEMI **SAID J. CHITEMBWE**

J U D G E **J U D G E**