REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Criminal Appeal 91 of 2006

DENNIS SAINA NDIEMA ……..…… 1ST APPELLANT

JOSEPH BARASA SERUT …… 2ND APPELLANT

VRS

REPUBLIC ……..……. RESPONDENT

JUDGMENT

The Appellants, Dennis Saina Ndiema and Joseph Barasa Serut were convicted by Bungoma Principal Magistrate of the offence of robbery with violence contrary to section 296 (2) of the Criminal Procedure Code and sentenced to death. The appeal before this court is grounded on lack of proper identification, insufficient and contradictory evidence.

The first Appellant has an additional ground that the proceedings in the lower court were conducted in Kiswahili and English language which he did not understand.

The Senior Principal State Counsel opposed the appeal on grounds that the Appellants were properly identified by the complainant. The incident took place at mid – day in broad day light. It is the complainant who led the police to arrest the Appellants after spotting them in Kapsokwony town four (4) days later. The first Appellant was found in possession of the battery of complainant's mobile phone which had been stolen during the incident. The two Appellants were arrested at a shop where the first Appellant had gone to charge the battery. There was no possibility of mistaken identity.

The complainant in this case was the first prosecution witness (PW1). He said that on the material day, he went to buy maize at Chebuyuk for his business and carried it on a donkey cart. On his way to Kapkatony, he met the two Appellants and another whom he did not know before the incident. They stopped him and asked him a number of questions which he answered. The Appellants ordered him to sit down on the ground which he did. They continued talking to PW1 and threatening to slaughter him if he did not pay Ksh.20,000/= to save his life. The 2nd Appellant told him to give something for the "*old men*" meaning themselves. The 1st accused searched complaint's pocket and removed cash Ksh.1500/= and a mobile phone. Another man who had masked his face came with a gun and dared him to go and report the incident to the police. PW1 was then kicked and roughed up and told to leave the scene which he obliged. He reported the matter to police the same day. It was one week later that PW1 spotted the first Appellant in a barber shop at Kapsokwony. He called police who arrested him and also the 2nd accused who was within the same vicinity. 2nd accused had taken a battery to be charged which PW1

identified as his.

On the ground of lack of identification, PW1 was the only witness who identified the Appellants as they robbed him. They were in the company of another person and later joined by a man with a gun who had masked his face. 1st accused had a knife while the 2nd accused had a stick. The incident took place at broad day light at 12.00 noon. The Appellants engaged the complainant in a question and answer session and threats to harm him for about one hour. He was ordered to sit down at some stage as the three men talked to him and issued threats demanding money.

It was daytime and the intensity of light was good for identification. The length of time, one (1) hour and the conversation that took place between the parties was conducive for identification. PW1 had no doubt who robbed him when he called police a week later to arrest the first Appellant. He was arrested at 3.00 p.m at day time again. PW1 described what each of the Appellants did to him and what weapons each was armed with. We are satisfied that the conditions for identification were conducive and that there was no possibility of error on the part of PW1.

PW1 identified the battery of his mobile phone which had a tear and some ink. PW2 the owner of the barber shop confirmed that the complainant who had followed the first Appellant closely as he went to the shop, entered after the Appellant had walked out. He asked PW1 what Appellant had come to do at the shop. He was shown the mobile phone battery which the Appellant had come to charge which he positively identified. He then called police who laid an ambush and arrested the two Appellants. PW2 corroborated the evidence of PW1 on arrest. He also identified the battery by the marks on it. PW3, the police officer who arrested the Appellants, corroborated PW1 and PW2's evidence on arrest and about the battery in regard to the first Appellant. In his defence, the first Appellant says he was arrested on a road at Kapkatony market. He said he did not know why the police officer arrested him.

The 2nd Appellant was with the first Appellant as he came to collect the battery at the shop. He stood outside as his accomplice entered the shop. He said he was arrested as he went to buy medicine for his sick father.

PW1, PW2 and PW3 did not know the Appellants before the incident. There was no possibility of any malice on their part in order to frame a case against any of the appellants. The magistrate had an advantage of seeing the witnesses and assessing their demeanor. We have no doubt she correctly found them credible.

There was no need of holding an identification parade in this case since it is the complainant who led police to arrest the suspects. PW1 was very honest in cross-examination by the first Appellant when he said he did not know the names of the Appellants. He only knew them by physical appearance and it is the Appellants who gave their names to the police after arrest.

We are satisfied that identification of the two Appellants by the complainant was satisfactory.

The first Appellant was found in possession of the battery of Complainant's mobile phone stolen during the incident only seven (7) days after the robbery. The doctrine of recent possession applies in this case and the lower court correctly applied it. This evidence of recovery corroborates the evidence of identification which is in its entirety overwhelming.

The two Appellants' defences were mere denials and were rightly rejected by the lower court in its judgment.

On the issue of language raised by the first Appellant, we find that the proceedings in the lower court were conducted in Kiswahili language from the beginning to the end. During plea, the appellants said they understood Kiswahili and the court proceeded in that language. Although the first Appellant said he understands Sabot language and not Kiswahili, he still conducted his appeal in Kiswahili language which in our assessment he understood well. In the lower court, he cross-examined all the witnesses which support the fact that, he followed the proceedings well.

It is our finding that the appeal has no merit and must fail. We hereby so declare and decree.

F. N. MUCHEMI **SAID CHITEMBWE**

JUDGE **JUDGE**

Dated, Delivered and Signed at Bungoma

This 17th day of June 2009 in the presence of the appellants and the state counsel Mr. Onderi