MARTIN ODUOR WADENYA alias RASTA …… 1st APPELLANT

DENIS OTIENO OGINGA alias ALLAN ……2nd APPELLANT

VERSUS

REPUBLIC ……...……..…. RESPONDENT

[From original conviction and sentence in Criminal Case number 70 of 2008 of the Principal Magistrate's Court at Siaya]

CORAM

Mwera, Karanja J. J.

Musau for State

Court Clerk – George/Laban

Appellant in person

JUDGMENT

The first appellant, **Martin Oduor Wadenya alias Rasta**, and the second appellant, **Dennis Otieno Oginga alias Allan**, were charged with another for robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the 14th January 2008, at Kombewa Siaya District Nyanza Province jointly with others not before the court while armed with dangerous weapons namely pistols robbed **Benjamin Omondi Ndege** of a motor cycle make Hommy, cash Kshs. 500/= and a pair of shoes together with a mobile phone make Motoralla F3 all valued at Kshs. 85,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Benjamin Omondi Ndege.

After trial, before the learned Principal Magistrate at Siaya, the appellants were convicted and sentenced to death as by law established. Their co-accused was acquitted.

The second appellant was the first accused while the first appellant was the third accused.

Following the conviction and sentence, the appellants preferred separate appeals which were consolidated and heard together. The grounds of appeal are contained in their respective petitions of appeal filed herein on the 10th June 2008 and are basically an attack on the evidence of identification relied upon by

the trial magistrate to convict, the inadequacy of the prosecution evidence and the failure by the trial magistrate to give regard to the treatment of PW2 and PW3 as hostile witnesses. And also failure to give regard to their respective defence.

At the hearing of the appeals, the appellants presented "**written submissions**" and orally addressed us essentially on the issue of identification.

The Learned Senior Principal State Counsel, Mr. D. Musau, opposed the appeals. He contended that the appellants were properly identified in clear and conducive circumstances. He also contended, with regard to breach of constitution al-rights, that the record of the trial court showed that the provisions of Section 77 of the Constitution and Section 198 of the Criminal procedure Code were complied with. The learned State Counsel further contended that the alleged contradictions in the prosecution evidence were not relevant as to occasion a miscarriage of justice.

Having addressed ourselves to all the foregoing arguments and the grounds in support of the appeals, we remind ourselves of our duty as a first appellate court as was set out in the case of **OKENO =vs= REPUBLIC [1972] E A 31**, which is the "**Locus Classicus"** on the point. The duty is to reconsider the evidence, evaluate it and draw our own conclusions in deciding whether the judgment of the trial court should be upheld. Nonetheless, we bear in mind that the trial court had the advantage of seeing and hearing the witnesses.

Towards that end, the case for the prosecution was founded on the evidence of six witnesses.

The complainant was **Benjamin Omondi Ndege** (PW1). He testified that he was a motor cycle operator at Ukwala and that on the material date at about 11:00 a.m. he was at Ugunja Market waiting for potential passengers. He had his motor cycle registration number KBA 862, make Hommy. In the process, a person arrived and asked to be taken to Ngonga market. At Ngonga market the passenger directed that he be taken further ahead towards a river. It was then that the complainant noticed a Subaru motor vehicle parked at a bush and a second person standing beside it. The second person was identified as the third accused (first appellant). On sensing danger, the complainant took a 'U" turn to escape but his motor cycle skidded and landed in a ditch. He was then confronted and held by two men who included the first appellant. He did not clearly see the other person who had a gun. He was taken to the vehicle and blindfolded. He was then driven towards Nzoia river and thrown out of the vehicle whose registration number he had noted. Thereafter, he approached a colleague called Masola Oloo and both went tracking the said vehicle upto a place called Awelo in Siaya. On the way, they reported to the police. They proceeded to a certain home at a place called Bar Olengo after receiving information that the motor cycle had been left there. They met an old woman at the home and recovered the motor cycle. They found the vehicle in a bush close to the Yala River swamp. After about three weeks, the complainant stated that he was called to Siaya Police Station where he identified the first accused (second appellant) as the person who had hired his motor cycle. He had seen him for about thirty minutes and knew his features. He was able to point him out in an identification parade. He also saw and pointed out the first appellant in an identification parade. He said that the first appellant was the person who removed the helmet from his (complainant's) head. The complainant's mobile phone, shoes, money Kshs. 500/= and motor cycle were stolen during the robbery.

Ramadhan Odhiambo Onyango (PW2) was at the material time a cobbler at Siaya town and was at his place of work when he was arrested by police officers and taken to his house where a search was conducted. He was thereafter taken to Siaya Police Station and shown a motor vehicle which was a taxi cab belonging to a person called "Boy". He was placed in the police cells for about one month before the accused persons were brought. His evidence was cut short after the prosecution declared him a hostile witness and on being cross – examined by the prosecution on the statement he had recorded at the police station, he contended that he had been forced and harassed to sign it. In effect, he disowned the statement.

Similarly, **Elias Juma Airo** (PW3) was declared a hostile witness. He also disowned his statement made at the police station and contended that he was beaten, harassed and forced to sign it. He had stated that

he was an agent for Mololine Bus Company and was in Siaya town on the material date of the robbery. He was arrested by police officers on 28th January 2008.

Both Ramadhan (PW2) and Elias (PW3) stated that they were not informed of the reason for their respective arrests.

C. I. P. Mutuota Kariuki (PW4), the officer commanding a police station (O.C.S.) at Siaya, stated that on the material date at 1:00 p.m. he was on his way to a hotel when a motor cyclist reported to him the robbery. He was given the registration number of a motor vehicle carrying the stolen motor cycle i.e. Registration number KSM 049. The O. C. S. received leads from people who had seen the motor cycle in the boot of the vehicle. He tracked the vehicle's tyre marks to a house where there was an old woman. The motor cycle was found there but the old woman denied any knowledge of it.

The O. C. S. thereafter got information that the motor cycle was brought to the home by five men and handed to one Ramadhan who lived there. The vehicle was found parked by a river bank. A pair of shoes, a steel cutter and a T-shirt were found inside the vehicle.

Both the vehicle and motor cycle were exhibited in court. The investigating officer requested **I. P. Jane Muriuki, (PW5)** the deputy O. C. S. Siaya Police Station to conduct the identification parades respecting the two appellants. She produced in court the necessary identification parade forms duly signed by herself and the appellants.

P. C. Dennis Miheso (PW6) of Siaya Police Station acting on a tip-off arrested two suspects viz Ramadhan and Ogonga who gave out the names of people who had taken the stolen motor cycle to them.

With that information, P. C. Miheso, arrested the appellants and charged them after the necessary investigations were carried out.

In his defence, the first appellant made an unsworn statement and stated that he was arrested on 11th February 2008 and taken to Siaya Police station. He was placed in an identification parade on 14th February 2008 where a person appeared and pointed him out. The second appellant also made an unsworn statement and stated that he was arrested at his place of work on 11th February 2008 and taken to the police station. He was in an identification parade conducted on 14th February 2008 where he was pointed out. Earlier, a person was taken to an office where he saw him (second appellant). The said person was the one who identified him.

The learned trial magistrate considered all the foregoing evidence and arrived at the conclusion that not only was the offence of robbery with violence committed against the complainant but also that the first and second appellants were positively identified as having been part of the offenders.

With regard to the commission of the offence, we are satisfied as did the trial magistrate that the prosecution evidence was adequate and credible in establishing the ingredients of the offence of robbery with violence under Section 296 (2) of the Penal Code in terms of the decision in the case of **JOHANA NDUNGU =vs= REPUBLIC CRMINAL APPEAL NO. 116 OF 1995 (unreported).**

With regard to the identification of the first appellant (Martin), the learned trial magistrate noted that it was him (first appellant) who removed the complainant's helmet so that he (complainant) may be blindfolded. With that, the Learned trial magistrate concluded that the identification of the first appellant was proper and safe.

In our view, the opposite was the case. We do not think that the identification of the first appellant was proper and free from the possibility of mistake or error. We say so on the basis that the only identifying witness was the complainant (PW1) and although the offence occurred during the day time thereby providing favourable and condusive circumstances for positive identification of the offenders, the complainant was uncertain of the identification of the first appellant in as much as he gave contradictory

statements regarding him. The complainant said that:-

"**I drove him towards a river. I saw a Subaru vehicle that was parked at a bush. There was a person who was beside the Subaru vehicle. This is the 3rd accused (i.e. first appellant) in the dock. I sensed danger and began to take a U – turn to run off. My cycle however skidded and went to the ditch. Some two men came and held me.**

One of these men is the third accused ……

……., the incident was very fast. I was taken to the vehicle and my eyes tied. I was then driven while blindfolded. I was driven towards Nzoia (sic) river and thrown on the side".

The complainant also stated that:-

"**As for the second accused, he was the person who stood by the vehicle. I saw him only briefly as the robbery was abrupt. I saw him at the parade and also picked him. The 3rd accused is the man who removed my helmet from my head. I also saw him on the parade and also identified him".**

It is clear from the foregoing that the complainant was not sure which of the assailants stood near or beside the Subaru vehicle. He said that it was the first appellant and again said that it was the second accused (the co-accused who was acquitted).

The complainant obviously failed to find ample opportunity to see and clearly identify the first appellant. He said the incident was executed abruptly and rapidly. He therefore saw the robbers briefly and cannot be said to have made a positive and correct identification of the first appellant before he was blindfolded. He did not say that he saw the first appellant when he removed the helmet from him (the complainant) so as to facilitate the blindfold as indicated in the learned trial magistrate's judgment.

We affirm and hold that the alleged identification of the first appellant was unsafe for conviction.

With regard to the second appellant (Dennis), the learned trial magistrate stated that:-

"**Regarding the first accused (i. e. second appellant), the complainant testified that he is the passenger who hired him at Ugunja market. He negotiated the fare with him and was with him for about 30 minutes. He says that he saw him all this time. He later saw him at the identification parade and identified him".**

On that account, the learned trial magistrate concluded that the second appellant was properly and correctly identified. We agree and are satisfied that the second appellant was properly identified. There was adequate opportunity for such identification. He was with the complainant for a duration of about thirty (30) minutes and in broad day light. He was the passenger who hired the motor cycle and led the complainant to a robbers trap.

His defence which we have duly considered was incapable of dislodging the evidence of identification against him. His allegation that he was identified in the identification parade by a person who had earlier seen him in an office was discredited by evidence of the officer who conducted the parade i.e. I. P. Jane Muriuki (PW5) and who produced in evidence the necessary identification forms which did not raise any suspicion that the parade was improperly conducted.

The complainant, indicated that he had given the description of the robbers to the police. This was confirmed by C. I. P. Kariuki, the O. C. S. (PW4).

Although the identification of the second appellant was by a single witness (i. e. the complainant) the learned trial magistrate duly warned himself of the need to treat the evidence with care and caution. Besides, the identification was made in favourable circumstances and with existence of adequate opportunity.

Be that as it may, the issue pertaining to violation of the appellants constitutional rights did not form part of the grounds of appeal. It was only raised in the appellants' "**written submissions".**

In any event, the record of the lower court shows that the proceedings were conducted in a language understood by the appellant in as much as necessary interpretation was provided by a court clerk.

The appellants read too much with regard to the treatment of PW2 and PW3 as hostile witnesses. However, their evidence was not given any consideration by the learned trial magistrate as it had no purpose to serve and was devoid of probative value. We also did not find it necessary to consider it.

All in all, the appeal by the first appellant succeeds. His conviction is quashed and the sentence set aside. He is to be released forthwith unless otherwise lawfully held.

The appeal by the second appellant is unsuccessful. His conviction and sentence are upheld.

It is so ordered.

Dated, signed and delivered at Kisumu this 27th day of October 2009

J. W. MWERA **J. R. KARANJA**

JUDGE **JUDGE**

JRK/aao