REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 28 & 29 of 2007

JACKSON MWANGANGI KITI……..…..1ST APPELLANT

ANTHONY KAMAU KIBE……..…….2ND APPELLANT

VERSUS

REPUBLIC……...……..RESPONDENT

(From the original decision in the Chief Magistrate's Court at Thika Criminal Case No. 2716 of 2005 – U.P. Kidula CM)

J U D G M E N T

The two appeals herein were consolidated and heard together.

JACKSON MWANGAGI KITI (1st appellant) and **ANTHONY KAMAU KIBE** (2nd appellant) were tried together in the subordinate court. Several counts were filed against them. Count 1 was for personating a police officer contrary to section 105(b) of the Penal Code. In this count the second appellant was charged jointly with another by the name **KENNEDY WAMBUA MUIA**. Count 2 was for robbery with violence contrary to section 296(2) of the Penal Code. In this count the 2nd appellant was charged jointly with another called KENNEDY WAMBUA MUIA. Count 3 was for personating a police officer contrary to section 105(b) of the Penal Code. In this count the two appellants were jointly charged with KENNEDY WAMBUA MUIA. Count 4 was for robbery with violence contrary to section 296(2) of the Penal Code. In this count the two appellants were charged jointly with KENNEDY WAMBUA MUIA. Count 5 was for personating a police officer contrary to section 105(b) of the Penal Code. In this count the two appellant were charged jointly with KENNEDY WAMBUA MUIA. Count 6 was for robbery with violence contrary to section 296(2) of the Penal Code. In this count the two appellants were charged jointly with KENNEDY WAMBUA MUIA. Count 7 was for being in possession of public stores contrary to section 324(3) of the Penal Code. In this count the 1st appellant was charged alone. After a full trial, the 1st appellant was convicted of counts 5 and count 6. The 2nd t appellant, on the other hand, was convicted of counts 1 and 2. The charges of capital robbery were reduced by the learned magistrate to siple robbery contrary to section 296((1). Each of the appellants was sentenced to serve 1 year imprisonment with respect to counts 1 and count 5. Each was also sentenced to serve 5 years imprisonment in respect of counts 2 and 6. Being aggrieved by the decision of the subordinate court the appellants have appealed to this court. They filed grounds of appeal as well as supplementary grounds of appeal. They also filed written submissions.

At the hearing of the appeals, the 1st appellant submitted that his rights under section 77 of the

Constitution for a fair trial were contravened as the statement of PW2 whom the magistrate relied upon to convict him was not signed by the maker. The 2nd appellant merely relied on his written submissions.

The learned State Counsel, Ms. Gateru, opposed the appeals and supported both convictions and sentences. Counsel submitted that the 1st appellant was convicted of robbery and personating a police officer; while the 2nd appellant was convicted of personating a police officer and robbery. Counsel submitted that the prosecution adduced evidence linking both appellants with the offences in question. Counsel submitted that both PW1 and PW2 adduced evidence in the lower court that connected the two appellants to the commission of the offences. Counsel submitted that the offences were committed in broad daylight and there would therefore be no possibility of mistaken identity. Counsel submitted that the evidence of PW1 was corroborated by that of PW3 who had carried PW1 on a bicycle. With regard to the 1st appellant PW2 testified as to how the 1st appellant asked him whom he was and whether he was involved in contraband business and demanded his identity card. At that time the 1st appellant was in the company of the 2nd appellant. PW2 observed that the 1st appellant appeared to be the mastermind of the operation and was the one driving the vehicle. Counsel contended that the role played by each of the two appellants was described by witnesses. Counsel also submitted that the charges were not defective. Counsel further submitted that if there were any contradictions the same were minor and did not shake the prosecution case. Counsel lastly submitted that the respective defences of the appellants were duly considered and found to have no merits.

This being a first appeal, I am duty bound to re-evaluate the evidence on record and come to my own conclusions and inferences ? see **OKENO –VS- REPUBLIC [1972] EA 32**.

I have evaluated the evidence on record. The conviction of both appellants is predicated on evidence of visual identification and possession of handcuffs.

The evidence of visual identification of both appellants is that of the complainants **PW1 DANIEL MACHELE** and **PW2 JOHN KIMANI NGUGI**. The considerations to be taken into account regarding evidence of visual identification were stated by the Court of Appeal in the case of **PAUL ETOLE & ANOTHER –VS- REPUBLIC – Criminal Appeal No. 24 of 2000** (unreported), in which the Court of Appeal started ?

"**The appeal of second appellant raises problems relating to evidence of visual identification. Such evidence can bring about a miscarriage of justice. But such miscarriage of justice occurring can be much reduced if wherever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made."**

Both incidents in which the complainants PW1 and PW2 were victims occurred during broad daylight. However, other than what they said in the dock that they had reported that they could identify both the appellants, there is no evidence of such report. The police statements do not suggest so. The appellants were not arrested because of any description given by any of the complainants. The specific reason for the detention of their vehicle and their arrest was not given. There is no evidence that they were arrested because of any of the incidences relating to the charges for which they were convicted. Nobody testified that the vehicle was the same or similar to the one used in the robbery. Nobody described or gave the registration number of the vehicle used during the commission of the offence. I am aware that identification parades were held in which PW1 identified the 2nd appellant and PW2 identified both appellants. However the said identification parades were not properly conducted. The participants were of different sizes, height, and some were even hooded. Even the trial magistrate had strong observations about the identification parades and how they were conducted when she remarked ?

"**Police witnesses were however a pathetic lot ---------. Who made up the identification parade, was it conducted in a regular manner? Were the parade, members of similar build and appearance?"**

The learned magistrate did not appear to answer the above questions, which were clearly relevant as the issues regarding the conduct of the parades were raised in evidence on record. From the evidence on record, the identification parades were not conducted as required by law. It is trite that the rules pertaining to identification parades dictate "**that the accused be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself of herself" – MWANGO s/o MANAA –VS- R (1936)3 EACA 29.** As the persons who participated in the identification parades herein were clearly of different appearances the court erred in relying on the evidence of such identification parades.

The other evidence that could connect the appellants to the offences was the recovery of handcuffs, and handcuffs keys. Again, there is no evidence to connect the handcuff and keys to the appellants. The vehicle in which the handcuffs were said to have been recovered was searched twice, when it was impounded by the police and no such handcuffs were recovered. The wallet of the 1st appellant was taken away from the police and no key was said to have been found at that time. The vehicle was towed by the police on their own in the absence of the appellants. The said recovery of the handcuffs and the key was not done in the presence of any of the appellants. Clearly, there is no evidence that any of the said items were recovered from any of the appellants. It is highly possible that the police planted the items. The defences of the appellants, which were sworn defences, had credence, and the learned magistrate should have given weight to the same. She did not do so. There being no evidence that any of the two items were recovered from the appellants, the alleged recovery of the handcuffs and handcuff keys cannot be a basis for connecting any of the appellants to the alleged offences.

Having re-evaluated all the evidence on record, I come to the conclusion that the prosecution did not prove its case against the appellants beyond any reasonable doubt. The convictions are not safe and cannot stand.

Consequently, I allow the appeals, quash the convictions and set aside the sentences. I order that both appellants be set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 13th day of February, 2008.

George Dulu

Judge

In the presence of ?

1st appellant in person

2nd appellant in person

Ms. Gateru for State

Eric – court clerk