REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL APPEAL 85, 86,&88 OF 2006

DANIEL KIMANI……...……1ST APPELLANT

CHARLES MWANGI……...……...…… 2ND APPELLANT

JACKSON MAINA ……...…….…….. 3RD APPELLANT

VERSUS

REPUBLIC……..…… R E S P O N D E N T

(From the original decision in Criminal Case No.7098 of 2004 in the Chief Magistrate Court at Makadara – Mrs. Nzioka PM)

J U D G M E N T

DANIEL KIMANI (1st appellant), **CHARLES MWANGI** (2nd appellant), and **JACKSON MAINA** (3rd appellant) were charged in the subordinate court with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of offence were that on 13th March 2004 along Tom Mboya Street in Nairobi within Nairobi area jointly with others not before court while armed with dangerous weapons namely knives and rungus robbed FELIX MUTHOKA of a wrist watch make Rado and mobile phone make Nokia all valued at Kshs.17,000 and at or immediately before or immediately after the time of such robbery wounded the said FELIX MUTHOKA. In the subordinate court DANIEL KIMANI was 1st accused, JACKSON MAINA was 2nd accused and CHARLES MWANGI was 3rd accused. After a full trial, all the three appellants were found guilty as charged and sentenced to suffer death. Being aggrieved by the decision of the subordinate court, they have come to this court on appeal.

At the hearing, the three appeals were consolidated and heard together. Mr. Kanyi appeared for the 1st appellant and Mr. Kinuthia and Ms. Kimiti appeared for the 3rd appellant. The 2nd appellant CHARLES MWANGI appeared in person. Mrs. Gakobo appeared for the State.

Ms. Kimiti submitted that the learned magistrate relied upon contradictory evidence of the complainant (PW1) who claimed to have been in company of PW2 and PW3 at 9.30 p.m., when he was attacked by three people. The witness (PW1) could not identify the attackers. In fact he was hit on the head and became unconscious. Counsel emphasized that, in any event, the scene was dark. Counsel submitted that though PW1 said that he was hit with a rungu, PW2 and PW3 stated that he was hit with an

iron bar. Counsel contended that this was material contradiction. Counsel also submitted that PW4 stated that he was with PW5 when they were approached by youth who informed them that their colleague (a police officer) had been attacked. His evidence was that they went to the alley and saw 2 people beating PW1, and that they arrested 3 people and recovered a mobile phone and bottle opener. This witness stated that the time was 11 pm not 9.30 pm as alleged by other witnesses. Also, PW6 stated that he was called on the mobile phone at 11 pm and went to the scene. Counsel contended that the difference of time by more than one hour between witnesses was a significant contradiction in evidence, which the magistrate should have taken into account.

On identification, counsel submitted that this issue was not addressed by the trial magistrate. PW1 stated that the alley was dark, and PW2 and PW3 conceded in cross-examination that the alley was dark. Counsel emphasized that since the only light was from the street, the evidence of PW2 and PW3 on identification should not have been relied upon.

On the defences, counsel submitted that the remark by the trial magistrate that the defence was unsworn and not tested by the prosecution meant that the magistrate did not consider the defences of the appellants.

Mr. Kinuthia, on the other hand, submitted that the watch allegedly stolen was not exhibited in court. Additionally, PW1 produced from his pocket in court a mobile phone, which is alleged to have been the recovered phone, and PW4 confirmed in evidence that the phone was given back to PW1. Counsel contended that it was a fatal error, to purport to hand over a recovered exhibit to witnesses before the same was produced in court as an exhibit. Counsel sought to rely on the case of SAMUEL KECHEL – VS- REPUBLIC – Nairobi HC Criminal Appeal No.753 of 1982 in which Effie Owuor Ag. J (as she then was) held that disposal of an exhibit before production in court was a fatal error. Counsel argued that the conviction was not safe.

Mr. Kanyi, counsel for 1st appellant, associated himself with the submissions of the other two counsel. He submitted that the conditions for identification were not favourable for positive identification. It was dark and PW1 could not identify the attackers. PW2 and PW3 also stated that the attack was on a dark alley.

Counsel also argued that there were several contradictions. Though the charge sheet talks of Tom Mboya Street, PW1 and PW3 testified about Mfangano Street. On the other hand, PW2 testified about Luthuli Avenue. PW5 on the other hand mentioned Mfangano Street. Counsel argued that the benefit of the contradictions should be given to the appellants.

On exhibits, counsel argued that though in the charge sheet there was mention of knives and rungus, no such knives or rungus were produced in court. On the rado watch and Nokia phone, there was no description of the Nokia phone in the charge sheet. Additionally the rado watch was not produced in court and PW1 himself stated that the Nokia phone was recovered later and handed over to his wife. The wife was not called to testify regarding the mobile phone which they received after the alleged recovery. Counsel contended that the failure to call crucial witnesses should lead this court to make an adverse inference on the prosecution case; as the prosecution was always required to prove its case beyond any reasonable doubt. Counsel argued that his client had been injured by the police, that was why they decided to charge him to avoid civil liability. Counsel also argued that the judgment did not comply with the requirements of section 169 of the Criminal Procedure Code (Cap. 75), in that the court shifted the burden of proof to the appellants. Counsel emphasized that the appellants were entitled to give unsworn defences. Counsel also argued that the judgment appeared to have been read privately, and thereafter in public.

The 2nd appellant, CHARLES MWANGI on the other hand, submitted that he was not given a chance to mitigate.

The State Counsel, Mrs. Gakobo, opposed the appeals and supported both convictions and sentence. On identification, counsel submitted that though PW1 stated that he could not identity the attackers, the

evidence of PW2 and PW3 was clear that they were able to see the attackers, and what was going on from the street lights. In addition, the appellants were arrested at the scene of attack and their identity was therefore not in dispute as they were seen by the arresting officers, including PW4 and PW5. In addition, PW4 recovered a mobile phone from the 1st appellant and a bottle opener from the 2nd appellant which was blood stained.

On the issue of contradictions the learned State counsel submitted that both PW1 and PW2 stated that the alley was not lit. However, there was light from the street light. Counsel also argued that the time of occurrence of incident indicated by witnesses was merely an estimate as no one had a watch. Therefore, the variance of time was not a material contradiction. Counsel also submitted that the doctor confirmed that the complainant, PW1, suffered injuries which he classified as harm. Whether it was by a blunt object or a nail was not material. Counsel submitted that though the mobile phone was recovered, the watch was not recovered.

Counsel further submitted that though a number of witnesses were police officers, there was nothing to indicate that they were not credible witnesses. The fact that the charge sheet mentioned knives on which no evidence was tendered, did not make the charge defective. In any event, the appellants were represented at the trial and objections should have been raised at the trial.

Counsel also argued that there was no misdirection on the ownership of the mobile phone and there was no shift of the burden of proof.

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

Briefly, the prosecution case is that PW1, PW2 and PW3 were around Mfangano Street on 13/3/2004 at night. PW1 FELIX MUTHOKA was a police officer from Kamukunji Police Station. While walking in an alley the said PW1 was attacked by about 4 people. He was hit with an object that appeared to be a wooden bar on the head and became unconscious. The prosecution case was that he was injured by a nail on a wooden bar. Police Officers who were nearby, PW4 and PW5, came to the scene and arrested three people. The prosecution contended that the three people who were arrested robbed the complainant (PW1) a rado wrist watch and a Nokia mobile phone. The rado wrist watch was not produced in court. However, a Nokia mobile phone was produced in court. The complainant was treated and the injury suffered was classified by the doctor (PW7) who filled the P3 form, as harm.

In their defences the appellants gave unsworn testimony. Their defences were that they were arrested on the same date and night (apparently near the scene of crime) but for different reasons. In short, their defences were that they were framed up.

We have to state at the outset that in criminal cases, the burden is always on the prosecution to prove its case against the accused person beyond any reasonable doubt. The prosecution has to prove all the ingredients of the offence – see MUIRURI –VS- REPUBLIC [1983] KLR 205.

We have re-evaluated the evidence on record. We have also considered the submissions made before us. The conviction of the appellants is predicated on their arrest, and possession of stolen items.

On the arrest, the learned magistrate stated in the judgment ?

"**I find on the other side, the prosecution case is well corroborated, PW1 Muthoka, PW2 Masua and PW3 Ndeto all testified they were attacked by four people.**

They all testified one ran away and three remained. That the three who remained are the accused herein. That the accused were at the scene of the crime as they had not gotten an opportunity to leave as the 4th accused. The evidence of these three witnesses was corroborated by the arresting officers PW4 Pc Nyakundi and PW5 Pc Kariuki confirmed the accused were arrested there and then and in the act".

Indeed, there was an attack on PW1. He was injured and became unconscious. Indeed, the appellants were arrested and charged with the offence of robbery. However, there was no evidence that the appellants were arrested without PW1 and PW2 losing sight of them. It was a dark alley, and it was easy enough for someone to be arrested by mistake. This is especially so as the arresting officers stated that they arrested the appellants beating the complainant, while the complainant was already unconscious, and there being no evidence of extensive assault on the appellant other than the single injury to the head. In our view, if it was true the three appellants were beating the complainant after he fell unconscious he would have been found with more injuries than the single injury found on him. The burden was on the prosecution to provide cogent evidence that would connect the appellants with the crime. There was no detailed description of how the arrest took place. The learned magistrate should have addressed herself to this requirement for cogent proof beyond reasonable doubt. Instead, the learned magistrate seemed to shift the burden of proof to the defence when she stated in the

judgment ?

"**I note that each one of them gave an unsworn statement therefore their evidence was not tested on oath like the prosecution witnesses who testified and were cross-examined".**

It is trite that an accused person has a right to defend himself on oath, or give an unsworn statement or even keep quiet – see s.211 of the Criminal Procedure Code (cap.75). Whatever choice the accused takes should not be taken against him as such, but the court should consider whether from the evidence on record, the prosecution has proved its case against the accused beyond reasonable doubt. In discrediting the defences of the appellants simply because they were not on oath, the learned magistrate erred, and as such prejudice the appellants.

In our view, considering both the prosecution and defence case, we arrive at the conclusion that the wrong people might have been arrested for the offence. None of PW4 or PW5 the arresting officers described to court the details of how they arrested the appellants. Each of the appellants gave their own version of how they were arrested, which could as well be true. The benefit should have been given to the appellants.

There is the issue of recovery of items. Pc Gerald Nyakundi (PW4) and PC David Kariuki (PW5) claim to have recovered a mobile phone and blood stained bottle opener, and a wooden bar with a blood stained nail. A wooden bar, bottle opener and mobile phone were produced in court as exhibits. However, of the bottle opener and wooden bar which were alleged to be blood stained none was taken to the Government Analyst to establish whether indeed there were blood stains similar to the blood group of the complainant. As for the mobile phone, PW1 the complainant, clearly stated that the phone recovered was later given to his wife. It is not clear from this witness where, when and by whom that mobile phone was recovered. His wife did not come to court to testify on whether the phone produced in court was the one which she was given or clarify as to when and by whom she was given the said mobile phone. PW5, on the other hand, clearly stated in cross-examination that he handed over the exhibits recovered to the duty officer, who did not testify in court either. Certainly, the way the exhibits were handled leaves some gaps, and creates doubts in our minds as to whether they are connected to the alleged offence or they were just planted to implicate the appellants. The benefit of that doubt we give to the appellants.

The failure to call the wife of the appellant as well as the duty officer to testify in court also makes us uneasy. They were certainly crucial witnesses in this case. In BUKENYA –VS- UGANDA [1972] EA 549, Spry Ag. P, Lutta Ag VP and Mustafa JA held ?

"**(i) ----------**

(ii) the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.

(iii) the court has a right, and the duty, to call witnesses whose evidence appears essential to the just decision of the case.

(iv) where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution case."

In the circumstances of our present case, we draw such an adverse inference against the prosecution that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution case.

Having evaluated all the evidence on record, we are of the view that the convictions of all the three appellants were not safe and cannot be sustained.

Consequently, we allow the appeals, quash the convictions of all the three appellants and set aside the sentence imposed. We order that the three appellants be set as liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 4th March 2008.

……..…….…… **…….**

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

JUDGE **JUDGE**

In the presence of –

st appellant

2nd appellant in person

3rd appellant

Mr. Kanyi for 1st appellant

Ms. Kimiti for 3rd appellant

Mrs. Gakobo for State

Huka Mwangi – Court clerk