REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE 283 & 284 OF 2005

PETER BORE WANJOHI ……..…….. APPELLANT

Versus

REPUBLIC ……..…….. RESPONDENT

CONSOLIDATED WITH

CRIMINAL CASE 284 OF 2005

JOHN LALA MWANGI …..... ……...…….. APPELLANT

Versus

REPUBLIC …….. RESPONDENT

(Being appeal against the conviction and sentence by R. N. MURIUKI Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 1629 of 2004 at Nanyuki)

JUDGMENT

When the above two appeals came for hearing the same were consolidated with Criminal Appeal No. 283 of 2005 being the lead file. Both appellants were charged in the lower court with robbery with violence contrary to section 296(2) of the Penal Code. After trial before the lower court, both appellants were convicted of that charge and sentenced on 19th December 2005 to death as provided by the law. They have preferred these two appeals against both conviction and sentence.

This court is duty bound to re-evaluate the evidence of the lower court and in this regard the case of **OKENO** vs **REPUBLIC 1972 EA 32** is relevant. It was stated in that case as follows:-

"***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya VS R., (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs R.(1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958)E.A. 424."***

In keeping with that duty we shall reconsider and re-evaluate the evidence adduced in the lower court. The complainant PW 1 recalled that on the 5th November 2004 at about midnight he was in Nanyuki town with his colleagues and other army officers. He was at a place called Joskaki. He left that place and went to Central Bar. At about 3.30 a.m. he went to Horizon Hotel to drink some tea. As he left that hotel he was stopped by three (3) people. One of them held him from the back. The other one removed a panga and cut him on his face. In the process they robbed him of kshs. 17,000. After that robbery the three people ran towards Central Bar. The complainant ran after them and as he did so he met with police officers. These police officers called 999 and also took him to hospital. He said that when the attack took place he was in the company of his girl friend Irene Njeri. Amongst the three people he was able to identify two of them. He used to see one of them in the town. He also identified the one who held him. He was able to identify the two by means of electric security lighting which was at the scene. He was admitted in hospital for treatment and on his discharge he made a formal report to the police. He was taken to an identification parade where he was able to identify the second appellant. He also in reporting to the police had given the name of the other person he identified as Peter. He identified that Peter as he sat in the dock who is the first appellant. It was the first appellant that had cut him with a panga. He was unable to identify the person who removed his wallet from his pocket. During the hearing he identified the panga that was used to cut him. On being cross examined by the second appellant he said that he had seen him for the first time on that material night. This contradicted his earlier evidence that the 2nd appellant was a person he used to see in town. He said that the robbery took a very short time. On being cross examined by the first appellant he confirmed that the robbery took place on 6th November 2004. This is because he had left his home on 5th November 2004 at 5 p.m. He went to Joskaki Hotel at that time where he bought miraa. He drank soda whilst chewing the miraa. At 12.30 a.m. he went to Central Bar. Then at 3.30 he went to horizon hotel. All this time he was chewing miraa. On being questioned he said that miraa does not make one drunk but it only makes them happy. He confirmed that he chewed miraa from 5 p.m. to 3.30 p.m. All this time he had not slept. He was clear that it was 3 people that robbed him. He reiterated that he was sober during the robbery. He identified the second appellant as tall brown and slim. In respect of the first appellant he noted that he was wearing a black jacket. At one time during cross examination he said that he had been cut by accused No. 1 who is not a party in this present appeal but later he said that it was the first appellant that had cut him. PW 2 conducted the identification parade where the complainant identified the second appellant. On being identified the first time the second appellant shifted his position in the line when he was identified the second time. He again shifted his position in the line and the complainant did identify him for the third time. PW 3 Irene Njeri described the complainant as her husband. She was with him when the robbery took place. She said that they first went to Joskaki, to Central Bar then later to Horizon Hotel. At 3.30 a.m. as they left horizon hotel they were stopped by two people. One of those people held the complainant whilst the other one cut him on his face. They thereafter robbed the complainant of kshs. 17,000/=. This witness said that she screamed and the police came on the scene. The complainant was taken to hospital and on the following day she made a report to the police. She was able to see what was happening because there was electric light at the scene. She was emphatic that there were only two robbers whom she was able to identify because she used to see them in the town on many occasions. On 18th November 2004 at 1.30 p.m. at Majengo this witness met one of the men who had attacked the complainant. With the assistance of other people she managed to apprehend the man and took him to the police station. This person she identified as the second appellant. She said that it was the second appellant who held the complainant whilst the first appellant cut him with a panga. She too identified the panga in court. On being cross examined by the second appellant she denied that he had been her husband. She also denied that her name was Irene Wangechi. On being cross examined by the first appellant she said that she too was chewing miraa. That up to the time of the attack she had not slept. She however said she was not drunk. She said that the robbery took 10 minutes. The appellants were found by the trial court to have a case to answer. The second appellant in his defence said that PW 3 Irene Njeri had been his wife and that they had quarreled and separated. That on 9th November 2004 this appellant went to speak to the brother of Irene Njeri with a view to having her return to him his property. Irene Njeri on coming to scene said that if he wanted his property he would only get them at the police station. They therefore went to Nanyuki police station together and on arriving Irene Njeri informed the police that the appellant was the one who had attacked the complainant. He further stated in his defence that the complainant had been his neighbour and therefore knew him and although he complained to the officer conducting the identification parade the

parade was allowed to continue. The second appellant called a witness to confirm that Irene Njeri was his wife for a period of one year. First appellant in his defence described himself as a golf caddy. On 28th January 2005 he looked for his girlfriend Wanjiru at her home and on not finding her he went to the Reeds Bar. He found his girlfriend in the company of a Police Officer PC Osango. He got angry and slapped that police officer who then shot him. He said that the charges he faced in this case were a means to cover up that illegal shooting by that police officer.

We have reconsidered the lower court evidence and we note that the complainant stated that the robbery took place in a short span of time. His companion Irene Njeri however said the robbery took 10 minutes. It would seem that their evidence on this aspect does not agree because as we understand it a short span is almost immediate. The complainant relocated that three people approached and attacking him. His companion however on being questioned insisted that they were only two people that attacked the complainant. It ought to be noted that both the complainant and his companion from 5 pm to 330 am were chewing miraa and visiting one bar after another. On being questioned whether the miraa caused them to be drunk both of them responded in the negative. The complainant however said that it made them to be happy. It is not clear to us the distinction between being happy and being drunk. We are of the view that both state of mind could have led to poor identification of the persons who committed the robbery. Should also be noted that the second appellant according to the evidence of PW 2 did complain that the complainant knew him before the identification parade was conducted. The second appellant in his defence reiterated that complaint. Despite that complaint the identification parade was conducted. Both the complainant and pw3 identified what they called a panga which was before the court. However the police officers who arrested the first appellant said that they recovered from the home where he was, a Somali sword. On the whole in considering the prosecutions evidence we find that the identification of both appellants was not satisfactory. The prosecution did not adduce evidence as to the type of lighting that was present at the scene. He failed to adduce evidence on whether the lighting was bright sufficiently to allow identification and also fail to show where the light was in relation to the attack. The identification of the appellant should be taken in the context of that lack of evidence on the light and also in the context that both the complainant and pw3 had been chewing miraa and going from bar to bar for many hours. It should also be noted that there were inconsistencies in their evidence. It should be remembered that there was no agreement between the complainant and PW 3 in the number of persons that had attacked them. We are of the view that that inconsistency and lack of evidence on the type of lighting that was there is sufficient to lead us to the conclusion that there was doubt in the prosecutions evidence and that doubt leads us to hold that the conviction of the appellant in the lower court was not safe. We are therefore of the view that the appeal on both the conviction and sentence should succeed. Accordingly we do hereby quash the conviction of the appellants by the lower court. We set aside the sentence of death imposed on of both appellants by the lower court. The appellants are hereby be set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 30TH DAY OF APRIL 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE