REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang & Omondi, JJ.)

CRIMINAL APPEAL NOs. 336 OF 2005 & 338 OF 2005

(CONSOLIDATED)

BETWEEN

HARUN KABUE NG'ANG'A…….....1ST APPELLANT

PETER MUNGAI MUCHIRI……...…….....2ND APPELLANT

-AND-

REPUBLIC……..….RESPONDENT

(An appeal from the Judgment of Senior Resident Magistrate S. Mokua dated 24th June, 2005 in Criminal Case No. 8720 0f 2003 at Thika Law Courts)

JUDGEMENT OF THE COURT

The two appellants herein were charged in two counts, with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya).

The particulars on the first count were that the appellants, on 1st October, 2003 at 1.00 a.m., at Kirikoini Village in Maragua District, within Central Province, jointly with others not before the Court, robbed ***Moffat Mwangi Kamau*** of Kshs.10,000/=, a cellphone, Motorola by make and valued at Kshs.5000, and one Seiko wrist-watch – all valued at Kshs.20,500/= ? and at, or immediately before, or immediately after the time of such robbery, wounded the said ***Moffat Mwangi Kamau.***

The particulars on the second count were that the appellants, on the said date and time and place, jointly with others not before the Court, robbed ***Patrick Njoroge Wanja*** of Kshs.250/=, one kg. of meat valued at Kshs.140/=, one loaf of bread valued Kshs.20/=, and one torch valued at Kshs.60/= ? all valued at Kshs.470/= ? and at, or immediately before, or immediately after the robbery, wounded ***Patrick Njoroge Wanja.***

The prosecution called seven witnesses to prove their case. The appellants made unsworn defences, and did not call any witnesses.

PW1, ***Moffat Mwangi Kamau***, a Government employee living at Karikoini Village, testified that on the

evening of 30th September, 2003 he was at Kandara, Makuti Ndogo, with his friends, and thereafter he and two others were proceeding to their homes, in a motor vehicle which PW1 was driving. When he came by a giant standing tree, PW1 noticed that the road had been blocked with stones. This forced PW1 to stop, though without turning off the engine and the headlights. It is PW3, ***David Maina Karanja***, who alighted to clear the obstacles; but before he could do so, three men emerged from the forest and pelted him with stones; he ran away, under the assault.

PW1 testified that he was able to identify his attackers – and that they were the appellants herein. PW3 said the 1st appellant herein had held him by the throat, and hit him on the left eye, with a stone. PW5, ***Joseph Munyori***, a clinical officer at Kandara, had examined ***Moffat Kamau Mwangi*** (PW1) on 22nd October, 2003 after this complainant presented with a history of assault by people known to him. PW1 found the complainant's left eye red and swollen; he also had an injury on the right hip. The injuries, according to PW5 were caused by a blunt object. The witness produced the P3 medical-reporting form which he had filled in, on that occasion.

According PW1, the accused persons and others entered the stationary car, and one of them drove it, while PW1 was ordered to get on to the back seat. The intruder drove on for some time before stopping and robbing PW1 of money, a wrist-watch, and a cellphone.

PW6, ***Patrick Njoroge Wanja***, was in the same motor vehicle as PW1 and they were driving home, on the material night. The two were accompanied by two others, and while driving they came to a road-block; and one of their number alighted to clear the stones and other items blocking the road. Thugs then emerged, and pelted the motor vehicle with stones, injuring PW6. Did he identify the intruders? PW6 says: "I was hit on the face and I was not able to identify any of them." Those in the vehicle were battered by the attackers, and forced to lie down. Apparently, darkness was prevailing, as the extensive assaults upon the vehicle's passengers were being done using PW6's torch. The vehicle's passengers were then sat upon by the attackers, as it was being driven away. After the robbers had driven along for a long time, they abandoned the vehicle, with the engine running, and the recumbent passengers terrified. It is PW6 who drove the vehicle to the Police station, where he found that the incident had already been reported. PW6 lost to the robbers a piece of meat (1kg.), a loaf of bread, four *mandazi*, sugar (1kg), and his torch. In the meantime, PW1 when he thought the robbers were not an immediate menace to him, at the point where the robbers had left the motor vehicle, ran away and was only found later. And PW1 had then told the Police he had been able to recognize one ***Kabira*** and one ***Mungai***, among the robbers; he said those were the accused persons, and he knew them well.

PW7, Police Force No. 45451, ***Sgt. Fred Muganda*** of Kandara Police Station, testified that on 30th September, 2003 at 1.00 a.m. he had been at the Police station when one ***Inspector of Police Kuria*** informed him (PW7) that he had received a report from Kiiri Asst. Chief, ***Mr. Mwaura***, that a motor vehicle, Reg. No. KYY 272 belonging to PW1, had been carjacked. PW7 recorded this matter in the OB, and accompanied ***Insp. Kuria*** to the scene. Subsequently, PW7 met PW1 who came to the Police station and recorded a statement.

Both the complainants, PW1 and PW6, told PW7 that they were able to identify the suspects – and they gave the names of the appellants herein. PW7 dispatched both complainants to hospital for treatment, and the medical-reporting P3 form was filled-in, for both. Nothing was recovered from the suspects.

Both defendants pleaded ignorance about the robbery of the material night, and said they did not know why they had been arrested and charged.

On the foregoing state of the evidence, the learned Magistrate, who took over after a different Magistrate had heard all the seven witnesses, thus held:

> **"I believe the prosecution's evidence, as the same is water-tight in so far as the identification of the perpetrators was concerned. The motor vehicle's lights were adequate to enable the prosecution witnesses, more particularly PW2 and PW3…, [to see the suspects].**

"Therefore, the prosecution have proved their case beyond reasonable doubt…[and] the accused are found guilty as charged."

In their appeals the appellants claimed *inter alia* that they had not been positively identified at the *locus in quo*; that the prosecution witnesses had contradicted one another; that the trial Court failed to take the defence evidence into account. In the oral submissions, 2nd appellant remarked the testimony of one of the complainants, PW6, that he had *not* seen or recognized any of the robbery suspects of the material night.

Learned counsel ***Mrs. Gakobo*** made submissions on some discrepancy in dates (when the robbery took place), as between witnesses, and notes in particular that PW3 had spoken of 30th March, 2003 rather than 30th September – 1st October, 2003. On that account, and in particular as the judgment made no reference to the question, learned counsel would concede to the appeal.

We have carefully looked at the Court file and its documents of record. The charge sheet is quite clear: the offence took place during the night of 30th September, 2003 – 1st October, 2003; that is also what is on record in the evidence of PW1, PW3, PW4, PW5, PW6, PW7. The overwhelming account is that the offence took place on the dates shown on the charge sheet; and we do not think it was right for learned counsel to concede simply on one clearly-erroneous record attributed to a single witness. ***Mrs. Gakobo*** urged the Court not to order a retrial, as this would merely serve as an opportunity for the prosecution to bring new evidence to fill the gaps in the original case. While such a statement would be correct in principle – that a retrial is not meant to serve the interests of a prosecution which *had achieved a conviction albeit without cogent evidence* – learned counsel ought, in our respectful opinion, to have gone further and identified what was short-of-the-mark in the original prosecution evidence.

We have *different reasons* for arriving at the conclusion that the appellants should not have been convicted.

Firstly, we are not convinced that any of the passengers in the 1st complainant's car on the material night, had *positively identified* the appellants herein as part of the gang of robbers. We are unable to come to the conclusion that the first complainant had a good opportunity to observe the robbers; and PW6 stated that he had been hit on the face, and was in no position to identify the robbers. We cannot believe the occasional contradictory testimony that both complainants (PW1 and PW6) did at some stage, find themselves in a favourable position in which they were able to identify the robbers. There is also no consistent account that a link of the appellants herein to the robbery-incident could be established through physical evidence recovered in the possession of the suspects.

Apart from the foregoing issues of merit, we have noted that judgment was written and delivered by a Magistrate other than the one who heard the witnesses. The learned Chief Magistrate, ***Mr. Boaz Olao*** recorded on 5th May, 2004 that –

> *"Following the retirement of the trial Magistrate, this case shall have to be allocated to another Magistrate. The proceedings be typed meanwhile, and the matter be mentioned on 20th May, 2004 for directions as to the new trial Court."*

On 9th July, 2004 the learned Chief Magistrate recorded:

> *"Further Orders: since the trial Magistrate retired and the proceedings have now been typed, I direct that this case shall now be heard by* ***Mr. Mokua*** *(SRM) on 13th August, 2004 in accordance with the provisions of section 200 CPC."*

On 13th August, 2004 ***Mr. Mokua*** records: "section now complied with." But no *details* are given of the said compliance. Compliance in that regard, we believe, refers to the terms of *s.200 of the Criminal Procedure Code (Cap.75, Laws of Kenya),* and that provision (in sub-section (3)) thus states:

"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right."

There is no record showing that learned Magistrate ***Mr. Mokua***, before giving his judgment, did inform the appellants herein of their rights of *witness-recall*, even though, indeed, the Chief Magistrate, ***Mrs. U.P. Kidulla*** who was not seised of the matter on the merits, gave the required information to the appellants. Subsequently the prosecution closed their case, with no further witness being heard, save for the unsworn statements of the appellants. ***Mr. Mokua*** then proceeded to write and to deliver judgment.

As ***Mr. Mokua*** was the Magistrate seised of the merits of the case, he, in our opinion, is the Judicial Officer who should have notified the appellants herein of their rights to recall witnesses, following the change of trial Magistrates. What resulted was an *irregularity*, even though it did not, in the circumstances, materially prejudice the appellants' trial-rights.

A retrial in the foregoing circumstances, and in particular, in view of the status of the evidence of identification, would, in our view, be inappropriate.

Consequently, we hereby allow the appellants' appeal, and set aside the conviction and sentence. We order that the appellants shall be released forthwith, unless otherwise lawfully held.

DATED and DELIVERED at Nairobi this 22nd day of July, 2008.

J.B. OJWANG **H.A. OMONDI**

JUDGE **JUDGE**

Coram: Ojwang & Omondi, JJ.

Court Clerk: Huka

For the Respondent: Mrs. Gakobo

Appellants in person