REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 382 of 2005 & 383 of 2005

JOSEPH HIUHU KARONGO……...1ST APPELLANT

JOSEPH SHANZO ANDOLE.....2ND APPELLANT

-AND-

REPUBLIC……..…..…….…….…….RESPONDENT

(An appeal from the Judgement of Senior Principal Magistrate Ms. Mwangi dated 19th

July, 2005 in Criminal Case No. 1147 of 2003 at Kibera Law Courts)

JUDGEMENT OF THE COURT

The appellants herein, and a third person (not an appellant) were charged with robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the three persons, on *25th September, 2002* along Rapta Road, Westlands in Nairobi, while armed with dangerous weapons, to wit, pistols, jointly with others not before the Court, robbed *Nyanda Shimba Mairuga* of his motor vehicle Reg. No. KAK 365P, as well as a Rado wrist-watch, a Nokia mobile phone, two golden chains, a jacket and Kshs.1 million – all valued at Kshs.2,269,000/= – and at, or immediately before, or immediately after the time of such robbery threatened to use personal violence upon the said *Nyanda Shimba Mairuga.*

Each of the appellants herein also faced an alternative charge, of handling suspected stolen goods contrary to s.322(2) of the Penal Code. In the case of 2nd appellant herein, it was alleged that on *22nd January, 2003,* near Njewaka Supermarket, Kasarani in Nairobi, he otherwise than in the course of stealing, dishonestly handled a Nokia mobile phone valued at Kshs.15,000/= the property of *Nyanda Shimba Mairuga* knowing or having reasons to believe it to have been stolen or unlawfully obtained. In the case of 1st appellant it was alleged that he, on *22nd January, 2003* at Muthaiga road block along Thika road in Nairobi, otherwise than in the course of stealing, dishonestly handled a Rado wrist-watch valued atKshs.14,000/=, the property of *Nyanda Shimba Mairuga* knowing or having reason to believe it to have been stolen or unlawfully obtained.

It was PW1's testimony that on 21st January, 2003 he received information that there was a suspicious motor vehicle with occupants in the neighbourhood of Muthaiga Police Station. PW1, *Ag. Inspector of Police Thomas Chemweno* and *Chief Inspector Matu* then set up a road-block near the said Police station. These Police officers arrested the occupants of the said motor vehicle, and one of them turned out to be 1st appellant herein. The officers, accompanied by four others, visited 1st appellant's residence, and recovered eight watches of different makes. They also recovered a mobile phone, Nokia 8310; two cameras; two motor vehicle number-plates; cash in U.S. dollars, in the sum of $1400; and a motor

vehicle, Toyota Mark II, with foreign registration.

PW2, *Mulanda Simba Mayunga*, testified that on 23rd September, 2002 at 7.00 p.m., he had gone to "Kenya Continental" to see a friend. Just as he was leaving for home at 9.30 pm, in his motor vehicle registration No. KAK 365P, he heard a knock at the back; and when he turned to see better, there were three men at the rear, wielding guns, and some three other armed men on the side. These intruders ordered: "You dog, jump to the rear!" As the 1st appellant herein opened the car-door, the security lights were on, and he saw the intruder. The 2nd appellant, who sat in the front seat, directed that the motor vehicle be driven following another car. The intruders took PW2's money, in U.S. $1400; and they also took Kshs.500,000/= which had been kept under the driver's seat. There was one intruder who sat next to PW2, and whom PW2 was not able to see very well; he conducted a search on PW2, and took all his belongings – including his belt, jacket, shoes, passing these on to 2nd appellant herein, who sat in front. These intruders drove on, up to Tassia in the Embakasi area, at which point 1st appellant herein, who sat in the front, ordered PW2 out of the car. The intruders were being served by a small car that was trailing; and now they put PW2 in the boot of the car. Among his belongings which were taken was his Nokia 8210 cellphone, which PW2 identified in Court, as he had inscribed his initials inside it. They took his Rado watch which also had his initials, and which he identified in Court. After a long, haphazard drive, the intruders dropped PW2 off, again, at Tassia Estate. PW2 later reported the matter to the Police; and on 27th January, 2003 he was called to identify certain men who had been arrested. He identified his wrist-watch, and his cellphone. He said the dollars which the Police had recovered, in 100-dollar bills, were part of his stolen money. PW2 testified that he had identified 1st appellant herein at an identification parade, but he had not known 1st appellant before the material night. PW2 also identified 2nd appellant herein at an identification parade.

PW3, *Inspector of Police Chacha Okwemba* of the Kilimani CID office, testified that on 27th January, 2003 at about 12.15 am. He conducted an identification parade for 2nd appellant herein. He enlisted the help of 2nd appellant himself, in the identification of parade members from the Police cells. After the parade formalities were complied with, PW3 sent for the identifying witness (PW2), who came and identified 2nd appellant herein. PW3 testified in the cross-examination, that the suspect had been held in the cells all along, and so the complainant could not have seen him before the identification parade.

PW1 when recalled, had produced the several items recovered at the house of 1st appellant herein. It is 1st appellant who had led the Police team to the house of 2nd appellant.

PW4, *Chief Inspector of Police Peter Matu*, gave evidence similar to that given by PW1. The search for and recovery of the stolen items was conducted in PW4's presence.

The 1st appellant gave sworn defence in which he said he was a businessman selling clothes in Nairobi. He said he had only known 2nd appellant as his customer. The 1st appellant said he had, on *21st January, 2003* taken 2nd appellant and his three aunts in his Toyota Mark II car to Ruiru, to attend a ceremony for his deceased grandfather and, on their way back, they found a Police road-block at Muthaiga in Nairobi; the Police officers arrested him, took him to his house, and took away his personal belongings. The 1st appellant said PW4, *Chief Inspector Peter Matu*, forced him to lead the Police team to 2nd appellant herein. The 1st appellant said the money found on him, in dollars, was his own and he had obtained it from a Forex Bureau; he could not, however, say the name of the Forex Bureau, though he stated that he had taken there to be changed, Kshs.400,000/=. The 1st appellant said he does not keep his money in a bank, and that he had purchased his Toyota Mark II at a car bazaar along Nairobi's Outer Ring Road for U.S.$3,600 cash. The 1st appellant also said he buys goods from Dubai in the Middle East, and Kigali in Rwanda; but he had no travel documents.

The 2nd appellant testified on oath that he had met 1st appellant on 20th January, 2003 and 1st appellant invited him to join 1st appellant at a memorial for the 1st appellant's deceased grandfather. Sometime

after the two had returned to Nairobi, 2nd appellant learned that 1st appellant had been arrested. Soon thereafter 1st appellant came with Police officers to 2nd appellant's home and they recovered effects which he, 2nd appellant, claimed as his.

The learned Magistrate noted that the items recovered from the two appellants herein, had been positively identified as the property of the complainant which had been stolen. She also took note of the fact that the complainant had had an opportunity to see 1st appellant when the car door was opened and 1st appellant got in; and a similar opportunity to see 2nd appellant who was a passenger in the front seat of the motor vehicle. The trial Court also took into account the fact that the complainant had identified both appellants at an identification parade as part of the gang of robbers at the material time. The complainant also identified as his effects, the items recovered from the respective residences of the two appellants. The complainant had averred that he had no opportunity to identify a third person who was charged with the appellants herein; and the learned Magistrate formed the opinion that the complainant had not lied in his testimony against the appellants. In the Magistrate's words:

"I do believe that the 1st and 3rd accused were part of the [gang] who robbed the complainant on the fateful day, and they were armed – so the offence...is proved beyond reasonable doubt."

The learned Magistrate convicted the appellants herein, and sentenced them to death as required by law, in respect of count 1 of the charge. As regards the alternative counts, each of the appellants was sentenced to a two-year term of imprisonment.

At the hearing of this appeal, learned counsel *Mr. Kang'ahi* appeared for 1st appellant, while learned counsel *Mr. Simani* appeared for 2nd appellant.

Mr. Kang'ahi contested the conviction of 1st appellant on the ground of identification. He urged as follows: arrest of 1st appellant took place nearly four months since the date of the offence; by the testimony of the complainant the robbery took place in the evening, when his perception of 1st appellant was aided by the lights on the stolen motor vehicle; the complainant had not described to the Police the persons he had perceived as the robbers; the record didn't show it, even though the record shows that the complainant described the attackers to the Police; although the complainant said he identified 1st appellant on the identification parade, no parade forms were produced in Court, in that regard; and so, in these circumstances, "the identification of 1st appellant was extremely wanting."

As to the weight of the evidence, counsel urged that it was riddled with inconsistencies and contradictions: no evidence was tendered to show that the stolen motor vehicle, Mitsubishi Pajero Reg. No. KAK 365P was the property of the complainant; the said registration number was sometimes referred to as KAK 365F; the amounts of money said to have been robbed from the complainant varied between charge-sheet content and testimony; the complainant sometimes talked of security lights as his aid-to-visibility at the material time, and sometimes he talked of car-lights; there was no evidence that the motor vehicle in which 1st appellant was arrested, was a stolen one.

As to the alternative charge of handling stolen property, *Mr. Kangahi* submitted that the complainant had produced no proof that the Rado wrist-watch recovered was his property. So the arrest in connection with the watch, counsel submitted, was based purely on suspicion. He asked that the conviction be quashed.

Learned counsel's submissions were adopted in respect of 2nd appellant, by learned counsel *Mr. Simani*. *Mr. Simani* urged that the complainant could not have identified 2nd appellant on the material evening; for the complainant had said he saw 2nd appellant wearing a coat and a hat, with the help of car lights – yet such lights are normally on the exterior panels and shining away from the motor vehicle; and the Magistrate's finding that the identification was possible thanks to security lights, was not supported by evidence.

Mr. Simani submitted that there were inconsistencies in the testimonies, regarding the mobile phone said to have been robbed from the complainant; in some cases it was a Nokia 8310, and in other cases a Nokia 8210 – with *S.N.* (meaning *Simba Nyanda*) inscribed on it. Counsel urged that the record did not show who *Simba Nyanda* was. He urged that the trial Court had erred, in treating the mobile phone in question as the property of the complainant.

Mr. Simani urged that the identification parade at which the complainant is said to have identified 2nd appellant, would not have been properly conducted; and he called the Court's attention to a section of the complainant's evidence given during re-examination; it runs as follows:

"*The statement was recorded for me by the Police. I was able to identify the [appellants herein]. They never told me I was allowed to ask [the suspects] to speak. If they were not in the parade I would not have identified them."*

At the cross-examination stage, the complainant had said:

"On 27th January, 2003 the Flying Squad called me to go for an identification parade. They said they had arrested the car thieves. I [attended] two identification parades. ...The Police told me they had arrested some robbers. I can [say] *Mr. Githui* told me the thieves were arrested. The [parade-members] were in a queue. They were dressed well...I identified the two accused. [There] were over six [parade-members]. I identified the accused in the queue. They were about 11 people. Six were short. I touched him. The first has a light voice. The [2nd appellant] has a heavy voice...I could identify him by his physical appearance. I had no reason to tell him to speak because I knew him also by appearance."

Counsel urged that the said identification parade was not fairly conducted, in view of the fact that the parade-members were not as similar as possible, in physical appearance.

Learned respondent's counsel, *Mrs. Kagiri* contested the case made for the appellants on appeal. She urged that a robbery with violence had indeed taken place, and that the complainant had been able to see the appellants herein, among the gang of three; the complainant had been aided by lights from the stolen motor vehicle, he had reported the incident to the Police; he had identified the suspects at two separate identification parades; by the evidence of the parade officer (PW3), the parade had been properly conducted, in accordance with Police Standing Orders; the motor vehicle and some stolen items were not recovered – only the wrist-watch, the cellphone, and money had been recovered. The recovered items, counsel urged, had been found in the possession of the appellants, and none of the appellants claimed they owned the same.

As to discrepancies in the evidence, *Mrs. Kagiri* submitted that this was not fatal to the prosecution case – as it had not been shown that such discrepancies had caused a failure of justice. Counsel urged that even though this had been the typical scenario of single-identifying-witness, the evidence of the complainant was free from error, as the prevailing circumstances at the material time were favourable to proper identification.

Counsel urged that the appellants were guilty on the main count, and so were quite properly sentenced to death. Counsel considered it irregular that conviction had also been entered on the alternative count.

On the question whether, on the material date, the appellants herein committed the offence of robbery with violence, identification is all-important, for purposes of the law. It is conceded by the respondent that this is a case of the single-identifying-witness, and that the act of identification was taking place at night. During the trial it was not made clear whether the illumination facilitating identification was emanating from inside or outside motor vehicle lights; or lights from *which* particular vehicle; or from security lights. This situation leaves a state of dubiety in the Court's perception, as to whether the complainant clearly perceived the appellants herein at the *locus in quo*, a state of affairs even further exacerbated by the complainant's testimony that Police officers told him: "We have arrested the car thieves; come and identify the ones who stole your car." Whenever evidence of perception is so tenuous, the law requires the trial Court to proceed cautiously, and to caution itself that there are dangers

in proceeding to convict, without some decisive factor, quite apparent to the mind of the Magistrate, weighing in favour of entering a conviction. In this particular case, such self-caution was *not* administered; and so the basis in law for convicting was not satisfied. The benefit of the doubt must go to the appellants.

We are, however, in agreement with the learned Magistrate that the recovered items were identified by the complainant as his property; and this fact could not be contested by the appellants who only demurred: "Where is your indicia of ownership?" The testimony regarding the identification of the stolen items, in our opinion, is sound testimony which proves beyond any reasonable doubt, that the appellants had handled property which they knew to have been stolen or otherwise ill-gotten.

We therefore allow the appeal, in respect of the main count of robbery with violence, and set aside both conviction and sentence, in that regard, and for both appellants.

However, we dismiss the two appeals in respect of the alternative counts, uphold conviction, and affirm sentence in respect of both appellants.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 26th day of September, 2008.

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

JUDGE **JUDGE**

Coram: Ojwang & Omondi, JJ.

Court Clerk: Huka & Erick

For 1st Appellant: Mr. Kangahi

For 2nd Appellant: Mr. Simani

For the Respondent: Mrs. Kagiri