REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPEAL NOs. 405 OF 2006 & 404 OF 2006

(CONSOLIDATED)

-BETWEEN-

ROBERT MAKUMI WAWERU.....…….....1ST APPELLANT

EVANS MAKUMI WANYUTU.....2ND APPELLANT

-AND-

REPUBLIC…….……..…….RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate L. Mutai dated 25th July, 2006 in Criminal Case No.1916 of 2006 at Githunguri Law Courts)

JUDGEMENT

The appellants herein were charged with the offence of robbery with violence under s.296(2) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellants, on 29th October, 2005 at Mbai Yaigi Village in Kiambu District, in Central Province, jointly with another not before the Court and while armed with machetes and iron bars, robbed ***George Kamau Kibui*** of one mobile phone, a Motorola C200 valued at Kshs.5,500/=, and at, or immediately after the said robbery, used actual violence against the said ***George Kamau Kibui***.

The learned Magistrate, however, found that such a charge could not stand, and entered a conviction for simple robbery under s. 296 (1) of the Penal Code.

The learned Magistrate held:

> **"I have carefully evaluated….the prosecution [evidence] and I found that the charge under section 296(2) [of the Penal Code] cannot stand, for the prosecution failed to demonstrate that [the] complainant was assaulted and injured….on the material date during the robbery."**

The foregoing statement would have been, all by itself, a misapprehension of the law, especially in the light of a further finding by the trial Court:

> **"I was also satisfied that the two accused were well armed with dangerous weapons [on the material date] meant to facilitate the robbery."**

So, in the light of such findings, how did the Court come to find that the offence committed was *simple robbery* and not capital robbery? It seems clear that the trial Court misdirected itself, in law.

But on the occasion of hearing, learned counsel ***Mr. Makura*** said the State was not contesting the two appeals because *the charge* was not proved beyond reasonable doubt; conviction was based on the testimony of the complainant (PW1); it was urged that PW1's evidence of recognition was not free from error, since the offence took place at night; PW1 said he lost consciousness during the attack, and lost his sense of recognition; it was aid there were discrepancies in the testimonies of PW1 and PW3, as neither could state the exact time when the offence took place; it was urged that the Court did not administer the necessary cautions when admitting certain evidence.

I have read the evidence of witnesses – especially that of PW1 and PW3 – to see if it bore inculpatory material, in respect of the appellants herein.

The complainant left the shopping centre just after 10.00p.m., to get to his home which is only a short distance away. There were security lights at the shopping centre, where the shops are lined on one side of the road, and on the other side there are coffee plantations. As he walked on, and when he was only some five metres from the shops, several men emerged from the coffee plantation; they were wielding a machete and an iron bar, and with these, they fell upon the complainant, cut him on the head, and hit him with an object on the back of the head, so he fell down. *Immediately*, a motor vehicle being driven by a person well known to the complainant, by name, ***Ndirangu,*** came along; the attackers ran away; and the complainant, who was bleeding, went up to him and his companions (***Murigu*** and ***Kiarie***), and told him that he (the complainant) had been attacked by robbers.

The complainant said he had been able to identify the appellants herein as his attackers; he had known them before; so he recognised them. The complainant's cellphone was stolen in the incident; and he reported to Kibichoi Police Station that the appellants herein had assaulted him. When he learned, on 4th November, 2005 that the 1st appellant was at a certain bar, the complainant alerted the Police, who then effected arrest; and on *20th November, 2005* the complainant alerted the Police when 2nd appellant was located in the same bar; and this appellant was also arrested.

On cross-examination by 1st appellant, the complainant said:

> "When you were running towards me I saw you well, since the scene was well lit. I don't know [which one of you took] my cellphone. The first report was made at Ngewa [Police Post]. I gave your names to the Police. I went to Kibichoi Police Station on 2nd November, 2005. You were arrested on 4th November, 2005."

On cross-examination by 2nd appellant, the complainant said:

> "I did identify you at the scene. I [had known] you very well…..I know you as ***Makumi.*** I was conscious after the attack. I did see you well as you came running towards me from the coffee plantation. The scene was well lit with electric security lights. You ran away after you realized a vehicle [was] moving towards us. You were three [attackers] and the third [attacker] had a hood-cap that covered his face. One [of you] had a machete and the other had an iron bar."

PW3, Police Force No.31552 ***Sgt. Ben Ngure*** of Kibichoi Police Station said he was on duty on 12th November, 2004 at about 12.25 p.m. when the complainant came to complain about a robbery against him, staged by three persons within the Mbari Yaigi area. Later PW3 learned that 1st appellant herein had been spotted in the area, and he went and arrested this appellant. The 2nd appellant was arrested later.

On cross-examination, PW3 testified that the complaint to the Police had been made on 4th November, 2005, but the offence had been committed on 29th October, 2005.

It is clear to me that any inconsistency in the testimonies would by no means undermine the force of the prosecution case, as all the evidence has a fundamental consistency.

It follows, firstly, that the learned trial Magistrate misdirected herself on the true nature of the prosecution case; the trial Court failed to appreciate the terms of s.296 (2) of the Penal Code, and was in error, in its assessment of the evidence.

On appeal, such errors of law must be considered for the purpose of *rectification.* But the effect is that the appellants could find themselves subjected to a *more severe penalty* than that which had been imposed on them. It is the *duty of the prosecution* to appreciate the situation, and to seek the Court's leave to put the appellants on notice that, as they proceed with their appeal, they should recognize that the appellate Court is not *bound* either to acquit them or to maintain the *status quo* originating from the trial Court; where it is found that the appellants had benefited from a misdirection by the trial Court, the appellate Court would *rectify that misdirection*, and impose the deserved sentence upon them if the appeal fails. It is now accepted as a principle of the administration of justice, however, that an enhanced sentence is not to be imposed upon the appellants as a *surprise*; the appellants are to be warned well in advance, so they may appreciate the possible consequences of proceeding with an appeal where the appeal rests not on sincerity, conviction and veracity.

I now declare that the appeal heard before me on 28th July, 2008 is a *mistrial.* This matter shall be listed for mention before a *two-Judge Bench*, on the basis of priority; the prosecution shall give the necessary notice; and the appellants shall state their preference, on the question of being re-heard, or not.

In the meantime, the appellants shall remain in prison custody.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 8th day of October, 2008.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mr. Makura

Appellants in person