REPUBLIC OF KENYA

HIGH COURT AT NYERI

Criminal Appeal 175 of 2003 & 246 of 2003 (Consolidated)

LAWRENCE WACHIRA MAHINDA……..……..APPELLANT

Versus

REPUBLIC……..……..RESPONDENT

CRIMINAL APPEAL NO. 246 OF 2003

GEORGE MUCHIRI RITHO…….……..APPELLANT

Versus

REPUBLIC……RESPONDENT

(Being appeals against conviction and sentence by J. N. Nyagah, S.R.M. in the Senior Resident Magistrate's Criminal Case No. 420 of 2002 at Karatina)

JUDGMENT

The two criminals appeals numbers 246 of 2003 **GEORGE MUCHIRI RITHO -V- REPUBLIC** and 175 of 2003 **LAWRENCE WACHIRA MAHINDA -V- REPUBLIC** were consolidated for ease of hearing and as they arose from the same case in the lower court. Consequently the lead file was ordered

by us to be Criminal Appeal No. 175 of 2003 and the First Appellant being **LAWRENCE WACHIRA MAHINDA** and the Second Appellant, **GEORGE MUCHIRI RITHO**.

Both Appellants were charged with two counts of robbery with violence against P.W.1 F W Kand P.W.2 C WW. The particulars of the offence were that on 29th June 2004 at around 1.00 a.m. at Nyeri District of the Central Province, the Appellant with other Co-accused jointly and while armed with dangerous weapons namely pangas, Rungus, Somali Swords, Axes and harmers robbed F WKof cash Ksh.180,000/=, 2 video machines, 1 video camera, 1 video game (DVD), 3 mobile phones, 15 pieces of Blankets, 6 pieces of Bedsheets, 5 CD cassettes, 1 small radio cassettes, 1 pocket radio cassette, 3 wrist watches, 5 pieces of bedcovers, 4 aviation bags, 3 rain coats, 3 meters clothing material and 5 torches all valued at Ksh.250,000/= and also robbed C W W cash Ksh.5,000/= one shoulder bag, one mobile phone make Erickson and one purse all valued at Ksh.12,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said F W K and CW W. The Appellants' three Co-accused were, after full trial acquitted. The 2nd and 4th co-accused were acquitted under Section 210 of the Criminal Procedure Code, whereas the 3rd co-accused was acquitted for lack of evidence by the trial magistrate. The appellants were however convicted and sentenced to lesser charge of simple robbery and sentenced to five (5) years imprisonment plus six(6) strokes of the cane. Being dissatisfied with the conviction and sentence, the Appellants individually and separately lodged these appeals which as already indicated have been consolidated.

The evidence of P.W.1 was that on that fateful day she was asleep in her house when she was awoken by a knock on the window. She woke up and opened the bedroom window whereupon she was told that she was keeping thieves. The persons who were saying so claimed to be policemen. P.W.1 closed the window and went to the sitting room where she opened a window and began to scream. The "policemen" broke the bedroom window with an axe and entered the house. P.W.1 said that there were no lights in the house but that the people had torches. They were seven (7) people. The Second Appellant whom she named and whom she claimed to have known before and whom she recognized during the incident ordered her to keep quiet. One of the people suggested that they should kill her. The Second Appellant pricked her with a Somali sword on the stomach and threatened to stab her. He then ordered her to remove money. She together with Second Appellant went to her bedroom where she removed from the drawer Ksh.11,500. She gave it to the Second Appellant. At that time there were four (4) people with her in the bedroom. Second Appellant asked for more money whereupon P.W.1 told him that there was more money in a carton in the ceiling. Another lady in P.W.'s house Susan Nduta (P.W.6) was ordered to climb into the ceiling and bring down the carton. She did so and came down with Ksh.165,000/= in the carton. The Second Appellant then threatened to rape P.W.1 but was dissuaded by his accomplice. Second Appellant then led P.W.1 back to the sitting room whereupon she feigned illness and fell down. The robbers then thereafter left.

P.W.2 also gave evidence on how on the fateful day at about 1.00 a.m. while asleep in the house of P.W.1, her grandmother, she heard robbers saying that they were policemen looking for thieves. She went to the sitting room and found P.W.1. They both screamed. One of the robbers threatened to rape her and when she told him that she had AIDS he retorted that he also had AIDS. She identified that person. He was however, among those who were acquitted. P.W.5 Jonah Muya Maina stated that he was an employee of P.W.1. He was a resident within the Complainant's compound. He described how some people came on that date at 1.00 a.m., and broke down his door. He began to scream and then he beamed his torch on the said people and managed to recognize the First Appellant. The first Appellant then ordered him to switch off the torch and return to his house and sleep. He was able to observe from his house though that one of the robbers was left outside while others went into P.W.1.'s house. He again noticed that the robber so left outside was the First Appellant. First Appellant had a torch and P.W.5 was able to recognize him as the person who had previously been arrested for stealing maize from the 'shamba'. In cross-examination P.W.5 confirmed that since the arrest of the First Appellant for stealing maize he had severally seen him again from afar. P.W.6 identified the Second Appellant whom she recognized when she climbed upto the ceiling to get the money. He had left a torch in the ceiling which the witness used to beam at him as he placed the ladder against the wall for the witness to use.

As already stated the Learned Magistrate found the two appellants guilty *Section 296(1)* of the Penal

Code.

At the hearing of the Appeal both Appellants were put on notice that, if we after evaluating the trial court's evidence, we were satisfied that the ingredients of robbery with violence under *Section 296(2)* had been met, we would be minded to enhance their sentence to that provided for capital robbery which is death. The Appellants, despite that warning, chose to proceed with their appeals nevertheless. What constitutes ingredients of robbery with violence under *Section 296(2)?* The answer can be found in the case of **JOHANA NDUNGU -V- REPUBLIC CRIMINAL APPEAL NO. 116 OF 1995** where the Court of Appeal stated as follows:

""***In order to appreciate properly as to what acts constitute an offence under Section 296(2) one must consider the subsection in conjunction with Section 295 of the Penal Code. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore the existence of the afore-described ingredient constituting robbery are pre-supposed in the three sets of circumstances prescribed in Section 296(2) which we give below and any one of which if proved will constitute the offence under the sub-section:***

(1) If the offender is armed with any dangerous or offensive weapon or instrument, or

(2) If he is in company with one or more other person or persons, or

(3) If at immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person……..

With regard to the third set of circumstances there is no mention of the offender being armed or being in the company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find offence under subsection 2 proved and convict accordingly."

The Learned Magistrate reduced the charge to simple robbery because "**there was no evidence that the people used any personal violence on the complainants."** This was a gross misdirection in law. The evidence on record shows that the robbers were more than one. This evidence was accepted by the court. This element alone was sufficient to convict the Appellants of capital robbery. Similarly there is evidence that the Appellants were also armed with a sword, an offensive weapon in the circumstances of this case. This evidence again was sufficient to return a conviction for robbery with violence. There was also threat to use actual violence on the complainants. Indeed P.W.1 was pricked on the stomach by the Somali sword. The particulars of the charge indicated threat to use violence. This evidence again in our view was sufficient to convict the appellants on the initial charge.

We are required as the first appellate court to subject the evidence tendered at the trial to fresh evaluation and analysis so as to reach our own verdict as to the guilt or otherwise of the appellants. See **OKENO -V- REPUBLIC (1972) E.A. 32**. The conviction of the Appellants was predicated upon the evidence of recognition

In the case of **R -V- TURNBULL [1976] 3 ALLER 549** it was stated thus:

"***Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

It is recognized that evidence of visual identification in Criminal cases can cause miscarriage of justice if it is not carefully tested. In **KIARIE V REPUBLIC (1984) KLR 739**, the Court of Appeal said that where the evidence relied on to implicate an accused person is entirely of identification that evidence

should be water tight to justify a conviction. In the same case the court stated that it is possible for a witness to be honest but mistaken and a number of witnesses to be all mistaken. Lastly, although recognition is more reliable than identification of a stranger, such recognition should be tested carefully seeing that mistaken recognition of close relatives and friends sometimes match. See **ANJONONI & OTHERS -V- THE REPUBLIC (1989) KLR 424.** In this case we note that the whole episode of that fateful day took two hours. During that time P.W.1 stated that the seven (7) assailants were all having bright torches which illuminated the house. P.W.1 was very clear that the person who told her to keep quiet was the Second Appellant whom she knew for a long time. That his village was near hers. That he was very close to her during the entire incident. At one time he even threatened to rape her whilst she was on the bed and he was standing nearby. She had talked to him before when she met him with his grandfather who is her friend. She was also able to describe his clothing, that is, Adidas Jacket. She finally confirmed that she saw the face of Second Appellant during the robbery.

P.W.5 confirmed that when his door was broken down by robbers he directed his torch on to the face of the First Appellant. He knew the First Appellant from the time he had stolen maize from the shamba and he had occasion to see him thereafter severally. He was very clear in his evidence that he recognized him.

We also note that both witnesses mentioned the names of the appellants in their first reports to the police. This fortifies their evidence that indeed they had been able to recognize them during the robbery. It would also appear that as they went about their business, they made no attempts at all to disguise and or camouflage themselves so that they could not be easily identified and or recognized. It would appear that the robbers were armed with bright and powerful torches, which they were beaming in every direction. Indeed according to P.W.1 all the robbers had torches on and the whole house was properly lit by the torch lights. It would appear from the foregoing therefore that conditions obtaining were favourable for positive recognition. As the appellants were not disguised at all, and made no efforts to avoid being seen for instance by avoiding the beam from the torches, it was therefore possible for this witness to see them sufficiently to identify them.

We further note that although the learned magistrate did not make inquiries regarding condition of light obtain as referred in terms of **MAITANYI V REPUBLIC (1986) KAR, 75** we find and accept the uncontradicted evidence of P.W.1 and P.W.5 was that the assailants had bright torches which illuminated the entire house thereby making it easy for the witnesses to recognize First and Second Appellants who were well known to them before this incident. We find having tested that evidence that the recognition of the Appellants was free from possibility of mistake and or error. Having so found we also find that the charge of robbery with violence under *Section 296(2)* was proved by the facts detailed in this judgment. There were more than one ingredients of robbery with violence. Accordingly we find that both appellants should have been found guilty of robbery with violence as initially charged. Having so found we would set aside the conviction and sentence entered against the Appellant and substitute therefore a conviction for robbery with violence contrary to Section 296(2) of the Penal Code on both counts. Accordingly the Appellants shall suffer death as prescribed by the law. Pending the execution of the sentence in respect of count one, the execution of sentence in respect of count two shall be kept in abeyance and or shall remain suspended. The appeal otherwise stands dismissed.

Dated and delivered at Nyeri this 11th day of May 2007.

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE