REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, & DULU, JJ.)

CRIMINAL APPEALS Nos. 564 & 565 OF 2005

(CONSOLIDATED)

BETWEEN

SAMUEL MWANGI KAGUNDA……..……..…… 1ST APPELLANT

CHARLES KAMANDE KAMAU ……..…… 2ND APPELLANT

-AND-

REPUBLIC……..……...RESPONDENT

(An appeal from the Judgement of Chief Magistrate Mrs. U.P. Kidula dated 24th November, 2005 in Criminal Case No. 3480/2004 at the Thika Law Courts)

JUDGEMENT OF THE COURT

Learned State Counsel *Ms. Gateru* applied for a consolidation of the two appeals, which had arisen from the same trial at the Thika Law Courts, which application was granted, as it was not contested.

The two appellants had been charged with the offence of robbery with violence, contrary to s.296(2) of the Penal Code (Cap.63). The particulars were that the appellants herein, on 15th April, 2004 at Kabati Trading Centre, in Maragwa District, in Central Province, jointly with others not before the Court and while armed with crude weapons, namely *pangas* and *rungus*, robbed ***Francis Mburugu Kariuki*** of one video deck, of make JVC valued at Kshs.8000/=, one DVD player valued at Kshs.10,000/=, one mountain bike, make Phoenix, valued at Kshs.10,000/=, one mobile phone, being Nokia 5110 valued at Kshs.8,500/=, and a gas cooker valued at Kshs.5,000/=, and at, immediately before, or immediately after the time of such robbery, threatened to use actual violence against the said ***Francis Mburugu Kariuki.***

A second count of the same charge, was also brought against the appellants herein, the particulars being as follows. The appellants, on 15th April, 2004 at Kabati Trading Centre, jointly with others not before the Court, and while armed with crude weapons, namely *pangas* and *rungus*, robbed ***Lucy Waitherero Gitau*** of cash in the sum of Kshs.7000/=, and, at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence against the said ***Lucy Waitherero Gitau***.

The finding of the learned trial Magistrate was set out as follows:

"***The people who entered and robbed PW2 of his property were in this group of 20. They were people who were acting in concert, and the actions of each and everyone of them were the actions of the others. They had set out with only one aim in mind, to rob the residents of this plot. Therefore the lack of identification on the part of PW2 notwithstanding, I have no doubt in my mind that whoever it is that entered PW2's house and robbed him was acting in concert with these two accused in Court. Their actions were the actions of the two accused and, therefore, they are guilty of the offences that were committed in that plot on that night.***

"***On that basis I have no difficulties finding that the prosecution has proved the case against the two accused beyond reasonable doubt in count 2."***

The learned Chief Magistrate found the appellants herein guilty and convicted each of them of the offence of robbery contrary to s.296(2) of the Penal Code (Cap.63).

As regards count 1, the learned Magistrate similarly found the case against the appellants to have been proved beyond reasonable doubt. The following passage in the judgement may be set out:

"***[PW1] saw people outside breaking into other houses. His house was the last one to be broken into. By then, he was fully alert; he first called the Police, then kept the money he had at the ready. So when the robbers came to his house, he conversed with them when they demanded money….***

"***So here, the circumstances of identification were good. There was light in the house. The attackers were unmasked…The robbers stayed in his house for about 10 minutes. This, in my view, was an ideal situation for PW1 to identify both accused persons beyond reasonable doubt….***

"***In count 1 I find the case against accused 1 and 2 proved beyond reasonable doubt…***

"***I find each accused guilty and convict each of them of the offence of robbery contrary to section 296(2) [of the Penal Code] in count 1."***

Both appellants having been sentenced to death, as provided by law, they brought this appeal on the following grounds:

(i) that they were not properly identified as suspects in connection with the robbery;

(ii) that the prosecution evidence had been contradictory;

(iii) that evidence of the circumstances of arrest was erroneous.

Learned counsel ***Ms. Gateru*** contested the appeal, but only in respect of the conviction of the appellants on the first count. As regards count 1, learned counsel submitted that proof of guilt had been made up to the required standard, and that all the ingredients of s.296(2) of the Penal Code had been met.

The main witness, PW1 had been able to see the robbers who broke into his house between 2.00 a.m. and 4.00 a.m; the lights were switched on; PW1 could see well. It was 1st appellant who took money from PW1, even as 2nd appellant stood by, wielding a *panga*. The robbers were unmasked, and PW1 did see them; he told the Police that he would be able to identify the two robbers if he saw them. Counsel urged that any contradictions in the testimonies were minor, and by no means shook the Prosecution case. She submitted that the trial Court had duly considered the unsworn defences of the appellants herein, but found the same wanting on merits.

PW1, ***Francis Mburugu Kariuki*** had testified that, on 14th April, 2004 he was asleep in his house, which is set in a plot, where there are several other residential houses. At about 2.30 a.m., some 20 robbers invaded the plot. They locked each of the neighbouring housing units, on the outside, so that their

occupiers would not escape. When PW1 found his door locked on the outside, he called the Police; but the robbers began their attack on his house before the Police arrived. They forced PW1 to open the door, and he switched on the lights. Some six people entered, forced him to kneel down, and held a threatening sword or *panga* to his head. PW1 at the time had Kshs.6000/= in his trouser-pocket, and he gave it out to the thieves. He had dressed up when he realised that robbery attacks were being staged at the neighbouring houses. The attackers then took his cellphone, vide-cassette player, and DVD. The robbers entered the children's room, calling these children by their names. They took the children's mountain bike; they then left the house, and locked the door from the outside. The Police soon arrived, and opened the doors which had been locked from the outside.

In the course of 15th April, 2004 PW1 and others were helping the Police with the search. He later saw several people at the bus stage, and he identified two of them as having been among the robbers. He went to call Police officers to come to the bus stage; but the two suspects, upon seeing the Police officers, took to their heels; they were chased and arrested by members of the public and the Police. Nothing was recovered from the two, but PW1 testified that those two, the appellants herein, were part of the gang that robbed them on the material night.

On cross-examination, PW1 testified that he had seen the appellants herein for the first time during the robbery staged at his house; he had reported the matter to the Police, and he had recorded a statement; although he did not describe their appearance, he told the Police he could identify the two robbers if he saw them again.

PW2, ***Elijah Kiruthi Kimaru***, testified that those who broke into his house had torches and sticks, and they demanded money and cellphones. They conducted a search in PW2's house; they hit him on the face; they took money from his wallet, they took several effects of his. The robbers ordered PW2 to lie down. In the evening, PW2 heard that two persons had been arrested at the stage, in connection with the robbery. At the time of the robbery, PW2 had not seen the robbers well; in his words:

> "The [robbers] put off the lights in the plot. [They] blinded me. I did not see them well enough."

PW3, ***Stephen Mbau Chege,*** too, was not able to identify the robbers; in his words:

> "They ordered me to lie down. I didn't know who these people were. Later I learned of the arrest of some people."

PW4, ***P.C. Peter Delumana*** of Kabati Police Station testified that he had been called on telephone by PW1, at the time of the robbery. PW4 and his fellow officers rushed to the scene after he received PW1's call; but they found that "the robbers had vanished." Later, PW4 learned that members of the public had arrested suspects; and he and his colleagues proceeded to the scene and re-arrested two people – the appellants herein. Although the two had a bag containing certain effects, none of the victims of the robbery identified any of the items in the bag.

On cross-examination, PW4 testified that the main complainant (PW1) had not, at the time of reporting the incident, given descriptions of the attackers.

The appellants herein, in their unsworn testimonies, stated they lived and worked in Nairobi, and had entirely innocent reasons for being at the bus stage when they were arrested by members of the public, on 15th April, 2004.

The most pointed testimony coming from the prosecution witnesses, is that of PW1 who says he saw the appellants herein, during the robbery in his house at night. Notwithstanding the clarity with which PW1 says he saw the appellants, the prevailing circumstances do not appear, in our view, to have enabled him to make a positive identification, which should be relied upon by the Court as a basis for entering convictions.

It was PW1's evidence that he had been kept kneeling down, by the robbers who held a lethal weapon

against his head, to keep him under control. PW2 testified that the robbers had switched off the lights in the plot, and they were using torches to show them objects of interest to them. PW1 testified that the robbers were in his house for just about ten minutes.

Could PW1 have seen the robbers, who were five in number, well enough to positively identify the appellants herein as having been part of the gang that attacked his house?

PW4 testifies that even though PW1 informed the Police he could identify the robbers if he saw them, he did not give any description of the outstanding features of the robbers.

Such a state of the evidence is, in our view, not consistent with an inference that, indeed, a positive identification of the suspects had taken place. There is distinguished authority that, for visual identification of a suspect, by a victim, the Court must be circumspect in reaching the conclusion that, indeed, the accused was the offender. We sounded this caution in ***Evans Kamau Wangari & Another v. Republic,*** Criminal Appeals No. 206 of 2005 & 208 of 2005 (Consolidated):

> "***It is an established principle of law that certain safety measures have to be taken to ensure reliability and safety of evidence, as a basis for conviction, where visual identification is concerned."***

We derived the foregoing principle from ***Blackstone's Criminal Practice 2002*** (12th ed. By Peter Murphy and Eric Stockdale) (Oxford: OUP, 2002), p.2304, para. F 18.2:

> "***The visual identification of suspects or defendants by witnesses has for many years been recognised as problematic and potentially unreliable. It is easy for an honest witness to make a confident, but false, identification of a subject, even in some cases where the suspect is well known to him. There are several possible reasons for errors of this kind. Some persons may have difficulty in distinguishing between different subjects of only moderately similar appearance, and many witnesses to crime are able to see the perpetrators only fleetingly, often in stressful circumstances. Visual memory may fade with the passage of time, and may become confused or distorted by suggestive influences from photographs or other sources of contamination. There is evidence that false identification can sometimes be caused by a process known as unconscious transference, in which the witness confuses a face he recognises from the scene of the crime (perhaps that of an innocent bystander) with that of the offender. Such problems may then be compounded by the understandable, but often misguided, eagerness of many witnesses to help the police by making a positive identification."***

We rely again on this caution, as we see clearly that, whereas a large gang of some 20 robbers did invade the residents of the plot in question, the main complainant had to deal with as many as five of them in his own house, and no definite corroborative evidence was placed before the trial Court that he, indeed, had an opportunity to properly perceive, by the sense of sight, the appellants herein as members of the gang.

Even though it is only legitimate in human nature that PW1 would want to see somebody fixed with responsibility for the torment he suffered at the hands of a lawless gang, on the material night, this inclination, in civilised society, is subordinated to the dictates of the rule of law, the pertinent element of which requires that the accused is not to prove himself or herself innocent, and must be proved guilty by the prosecution, beyond reasonable doubt. In the circumstances of this case, we find inadequate identification of the appellants as members of the gang of robbers; and, therefore, we must conclude that the proof-beyond-reasonable-doubt standard required, has not been achieved. This failing, in our assessment, affects the first count of the charge and, *ipso facto* depreciates the conviction on the second count even more completely.

Consequently, we allow the appeal, and acquit both appellants in respect of the convictions on the first and the second counts. The appellants shall be set at liberty forthwith, unless otherwise lawfully held.

Orders accordingly.

DATED and DELIVERED at Nairobi this 24th day of October, 2007.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ

Court Clerks: Tabitha Wanjiku & Erick

For the Respondent: Ms. Gateru

Appellants in person