REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 990 & 991of 2003

STEPHEN MUNGAI KINYANJUI…….....…….....……..APPELLANT

VERSUS

REPUBLIC…….....……..…….....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 991 OF 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 369 of 2003 of the Chief Magistrate's Court at Nairobi (Mrs. M. Mlanga – SRM)

PAUL NGUGI NDUNGU…….....……...……..APPELLANT

VERSUS

REPUBLIC…….....……..…….....RESPONDENT

J U D G M E N T

STEPHEN MUNGAI KINYANJUI and **PAUL NGUGI NDUNGU** were convicted by the Nairobi Chief Magistrate Court of violently robbing **PAUL WAKIBI MUNGAI** of a mobile phone and cash on the 5th February 2003. They were both sentenced to death as by law prescribed. Having been aggrieved by the conviction and sentence, they each separately lodged an appeal to the High Court. For ease of hearing and since the two appeals originated fro the same trial in the lower court, we ordered the same to be consolidated.

We have carefully analyzed and re-evaluated the evidence adduced before the trial court.

The Appellants have raised similar grounds of appeal. The key ground was that the charge was defective for reasons that the name of the Complainant given in the charge sheet did not tally with the names of any of the two Complainants who testified. **MR. MAKURA** learned Counsel for the State, while admitting that there was a variation in the names of the Complainants given in the charge sheet and in the evidence adduced, he submitted that the same was minor.

The defect complained of by the Appellants in their petition of appeal is not without merit and calls for

consideration. The Complainant according to the charge sheet was one **PAUL WAKIBI MUNGA** who was allegedly robbed of Kshs.3,500/- cash and a mobile phone Erickson T10 on the 5th February 2003. The two witnesses called to testify by the prosecution in support of the charge PW1 and PW2 were actually both Complainants. PW1's name was Paul Mucheru and according to his evidence, he was robbed on 6th February 2002 at 8.30 p.m. on the stairs inside Matungo bar. He lost an Erickson Mobile Phone and Kshs.3,500/- in cash. PW2's name was Paul Waititu and according to his evidence he was robbed along Tom Mboya Street on 5th February 2002, at 8.30 p.m. of cash Kshs.1,200/-. Both these witnesses said that they were together at the time of attack. However, going by their names, none of them fits the name mentioned in the charge sheet. The items stolen from the Complainant, PW1, seem to tally with those in the charge. Yet again the date of the attack on PW1 does not tally. Are these variations minor as argued by the learned state counsel?

The issue is whether the defect in the charge is curable under **Section 382** of the **Criminal Procedure Code** which provides: -

"***Section 382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***

Provided that in determinating whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

We do not know whether the Complainant named in the charge existed and was not called to give evidence or whether, as the Appellant's argued, the name given in the charge sheet was in fact a mistake. From the evidence of PW1 and PW2, particularly PW1, it seems that there were many victims of robberies that were committed. PW1 mentioned meeting with a woman running away before he was attacked and with a man also running away after he was robbed. It could as well be that a person by the name given in the charge was actually a victim and a Complainant of the offence on the same day. This argument or view is fortified by the evidence of PW3, **PC KISOI**. **PC KISOI** was on duty at Central Police Station Nairobi on 5th February 2002 and at 9.00 he received a report from two Complainants. He did not give their names. He says that after their report, he sent the two to Kilome Road. That thereafter the same night, they went back with the two Appellants whom he eventually handed over to the Investigating Officer. Whereas PW3 was clear that the two Complainants reported to him before the Appellants' arrest, and he sent them specifically to Kilome Road, neither PW1 nor PW2 stated that any Police Officer sent them to such a road after they made the report. What the variation between the name in the charge and that given by the Complainants has done is to create room for speculation as to who could have been the Complainant in this case.

This issue is closely related to another, that is that there were various inconsistencies in the evidence of the two Complainants. While we find that the Appellant ought to have raised the issue of the 'defect' in the charge sheet during the trial before the lower court for purposes of clarification, the proviso to **Section 382** of the **Criminal Procedure Code** is very clear that such an issue ought to have been raised at an earlier stage in the proceedings. However the nature of the defect and the need for clarification was an important aspect that it went to the core of the prosecution case. It actually went to the substance of the charge against the Appellants. Who the Appellants are alleged to have robbed was such an important issue that the learned trial magistrate ought, at the very least, have dealt with the issue in the Judgment. The issue was not considered at all in the Judgment. It is our view that in the circumstances of this case the variation in the evidence and the charge sheet was material to the prosecution case and remained unresolved in the trial court's judgment thus we cannot say that the Appellants were not prejudiced. We find the defect incurable under **Section 382** of the **Criminal Procedure Code**.

The inconsistencies in the evidence of the 2 witnesses were also material. The two witnesses contradicted each other's evidence on all material particulars of the charge. They contradicted each other

on the date of the offence, the place of the offence and the place of the arrest of the Appellants. We have already given dates and the place of the offence according to the two witnesses. In addition whereas PW1 said that the Appellants were arrested twenty metres away from the scene of crime, PW2 said that they were arrested on the same spot of the robbery. The inconsistencies have been subject of the 1st Appellant's reply to the learned State counsel's submissions. The Appellants maintained that due to the inconsistencies in the evidence of the prosecution the evidence could hardly be considered sufficient to base a conviction upon. **MR. MAKURA** did not think much of the inconsistencies and as far as his submissions went, the prosecution evidence remained strong enough to sustain a conviction.

The inconsistencies in the evidence of the prosecution were quite glaring. These should have been addressed in the learned trial magistrate's judgment and resolved. However, they received no consideration at all. In our view, it was the duty of the trial court to resolve the inconsistencies in the evidence before him or her and where the Court found the inconsistencies irresolvable, then that finding ought to have been made within the judgment. If the inconsistencies were material and important to the prosecution case and were of substance and not merely of form, in the trial court's view, then the case ought to have been decided in favour of the accused persons. The learned trial magistrate did not direct his mind to this issue at all and that non-direction, in our view, had caused the Appellants to suffer prejudice.

The final ground raised by the Appellants was that their defences were not considered. **MR. MAKURA** submitted that the defence was considered in the trial court's judgment but rejected on account of the overwhelming evidence against the Appellants.

We agree with the learned State Counsel that the Appellants' defences were considered. However, we do not agree that the evidence against the Appellants was overwhelming. We have already discussed the inconsistencies in the evidence of the two key witnesses in this case. The issue of identification was a very important one which the Appellants have not raised directly. It is relevant however to their second ground which touched on the sufficiency of the prosecution case. PW1 only identified the 2nd Appellant as one of the six men who robbed him while PW2 identified the 1st Appellant. Their evidence of identification was however scanty and devoid of any sound basis. PW1 made no mention of the lighting conditions at the stairs where the alleged the attack took place until during cross-examination. He also did not say what it is about the 2nd Appellant that enabled him to identify him as the attacker. The same goes for PW2. PW2 made no mention of the lighting conditions at all or of the reasons for identifying the 1st Appellant as the one who robbed him. It is however clear that the incident was at 8.00 p.m. The learned trial magistrate ought to have inquired into this issue during the trial, if the prosecution had failed in their duty to do so. Having failed to make the inquiry, the evidence as recorded was totally insufficient. Each Complainant identified only one of the Appellants and due to the difficult conditions under which the identification was made, such evidence needed corroboration either by direct or circumstantial evidence implicating the Appellants with the offence. We have sought for any corroboration in the evidence and find none. After considering these appeals at length, we find that they both have merits. The convictions entered herein were unsafe. We allow the appeals, quash the convictions and set aside the sentences. The Appellants should be set free unless they are otherwise lawfully held.

Dated at Nairobi this 27th day of April 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE