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

Criminal Appeal 1088 & 1089 of 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 3799

of 2003 of the Chief Magistrate's Court at Kibera (Ms. Mwangi – PM)

NICHOLAS KINYANJUI…..……..……..…….……APPELLANT

VERSUS

REPUBLIC…… ……...RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1089 OF 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 3799

of 2003 of the Chief Magistrate's Court at Kibera (Ms. Mwangi – PM)

MICHAEL GACHIRA …..……..……....…….……APPELLANT

VERSUS

REPUBLIC…… ……..……...RESPONDENT

J U D G M E N T

NICHOLAS KINYANJUI hereinafter referred to as the 1st Appellant and **MICHAEL GACHIRA** 2nd Appellant were the 1st and 2nd Accused persons in the trial. They were jointly charged with two counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. It was alleged that on 5th May 2003 at Kawangare in Nairobi, while armed with dangerous or offensive weapons namely rungus and pangas robbed **JUSTUS MWANGANG MUTINDA** of Kshs.4,200/- in count 1 and robbed **STEPHEN NGOTHO WAWREU** of Kshs.5,000/- and a bicycle worth Kshs.4,000/- in count II and also used actual violence against both of them. The two Appellants were convicted of both counts and sentenced to death as prescribed by the law. Being aggrieved by the conviction, they each lodged their appeals which we have consolidated for ease of hearing.

Each Appellant has raised several grounds of appeal which are similar in nature. They both challenge

the conviction entered against them on grounds that they were not positively identified by the two Complainants, PW1 and PW2, that there were unresolved material contradictions in the prosecution case, that none of the Appellants were found with the recovered exhibit, a bicycle and finally that their defences were not given due consideration.

The chief facts of the prosecution case were that the two Complainant's herein, PW1 and PW2, were sent by their employer to get loose change with PW1 being given Kshs.4,200/- in notes while PW2 got Kshs.5,000/- also in notes. They took a bicycle to help them move faster. The two were confronted by a group of five men. PW1 was punched on the face and hit with a rungu and held. He identified the two Appellants as the ones who attacked him. He was robbed of the cash and the bicycle. PW2 ran away soon after encountering the men but not before the money he had was taken away.

PW2 identified the 2nd Appellant as the one who robbed him of the money and also tore his shirt while armed with a panga. PW3 Dr. Kamau confirmed injuries suffered by PW1. PW1 and PW2 said they led Police to the house of the 1st Appellant soon after the attack. They found 2nd Appellant in the house with the stolen bicycle. PW1 said that the same evening he saw 1st Appellant and had him arrested. PW5 re-arrested 2nd Appellant and took possession of the bicycle at Muthangari Police Station. PW6 on the other hand re-arrested the 1st Appellant at 9.40 a.m. on the same day. PW4, a youth winger, who assisted in the arrest of the Appellants, said he arrested the 1st Appellant at 7.00 p.m. on the day of incident. That the 1st Appellant led to the 2nd Appellant whom he also arrested.

The appeals were opposed. **MRS. GAKOBO**, learned counsel for the State submitted that the ingredients of the offence charged were met in terms of the number of assailants being more than one, that they were armed with offensive weapons, that they stole from the Complainants and also caused injury to the Complainant, PW1. Counsel submitted that the convictions were safe and ought to be upheld.

We have subjected the evidence adduced before the trial court to fresh analysis and re-evaluation bearing in mind that we neither saw nor heard any of the witnesses and giving due consideration in line with the case of **OKENO vs. REPUBLIC 1972 EA 32**.

The Appellants were convicted on the basis of visual identification by PW1 and PW2. The learned trial magistrate convicted the 2nd Appellants on the basis of the evidence of recognition of given by PW1 who also caused their arrest. In her judgment at page J2 the learned trial magistrate observed.

"This is a case where the incidence (sic) took place during the day of 9.30 a.m. The 1st Accused was not a stranger to PW1 or PW2. in fact PW2 says after they reported to the Chief and then employer, they went looking for the 1st accused at his house but never found him. Instead they found the 2nd accused who had the bicycle with him and the panga. They arrested him. Later in the day the 1st accused too was arrested. He could not say why people who had stolen from (sic) during the day would confuse him with anybody else or get him arrested for nothing. The 2nd accused could not say where he got the bicycle so soon robbed off (sic) the two Complainants. I do believe the two committed the offence they are charged with and I convict them accordingly."

The learned trial magistrate correctly observed that the incident in question took place at 9.30 a.m. However, the observation that both PW1 and PW2 knew the 1st Appellant before is not correct. It was PW1 who said that he knew the 1st Appellant before. First PW1 said he had seen the 1st Appellant three times in a bar. In cross-examination PW1 said he knew the 1st Appellant because his house was not far from his. PW2 did not know either of the Appellants before.

The incident took place in broad daylight. The attack appears to have been sudden and by five people. The evidence of the two eye witnesses, concerning the actual role played by the Appellants seems to conflict. While PW1 said that both Appellants descended on him with punches and blows using

a rungu, PW2 said the 2nd Appellant took his money. PW2 ran away soon after the attack. His evidence that the 2nd Appellant robbed him of cash while PW2 also saw the same 2nd Appellant hit him with a rungu don't quite tally. Further to that both witnesses were inconsistent as to how the attackers were armed. While PW1 saw a knife and rungu, PW2 saw only pangas. The inconsistency in these two witnesses evidence as to the weapons the attackers had, can be explained away as minor and inconsequential but that of the role played by each cannot be dismissed so easily.

We think that the most difficult inconsistency to reconcile and resolve is that concerning the Appellants arrest. It is also our view that the identification of the Appellants must be considered together with the evidence of arrest. There were different versions of how and when the Appellants were arrested.

PW1 and PW2 said that the 2nd Appellant was the first one to be arrested immediately after the attack. It was therefore during the same morning. PW1 led PW2 and others to the 1st Appellant's house. They said that they met the 2nd Appellant instead. The same evening, PW1's said he saw the 1st Appellant as he went to buy food and he caused his arrest the same day in the evening.

PW4 was a youth winger and he said he was involved in the Appellant's arrest. He said that the 7.00 p.m. he arrested the 1st Appellant and that the 1st Appellant led them to the 2nd Appellant who was also arrested. PW4's evidence contradicted the evidence of PW1 and PW2 concerning the 2nd Appellant's arrest and PW1 concerning the situation, PW4 even contradicted the order in which the Appellants were arrested and introduced a new dimension when he said that the 1st Appellant led to the 2nd Appellant's arrest.

As if the contradiction in PW4's evidence was not enough, in came the two re-arresting officers. PW5 PC NORAH said that she re-arrested the 2nd Appellant and took over 2 exhibits, a knife and a bicycle at Muthangari Police Station. **PC NORAH** said that she did so at 5.00 p.m. on the same day of incident. If PW5 re-arrested the 2nd Appellant at the Station at 5.00 p.m., she did so before he was arrested according to PW4's evidence and many hours after this arrest according to PW1 and PW2.

PW6 **PC THEURI** made the situation much worse because he re-arrested the 1st Appellant at 94.0 a.m. on the same day of incident. That was many hours before his arrest according to the evidence of PW1 and PW4.

The evidence of the Appellant's arrest was muddled up that it created a doubt in two aspects. Either the witnesses confused which of the Appellants was the first to be arrested and in which circumstances. Alternatively the witnesses may have been lying. Why would a police officer re-arrest offenders before their arrest by those they allege took them to the police station? How else can that inconsistency in evidence be explained?

There were other important issues as well. The 1st Appellant was recognized by PW1 only. The Evidence of recognition against him is by a single witness. Evidence of identification by a single witness must be subjected to two tests. One, whether the circumstances under which it was made was conducive for positive identification. From the evidence on record, PW1 had a fleeting glance at his attacker. He was attacked suddenly and by a group of five men. They first punched him on his face then his stomach, and the only chance PW1 had to recognize his attackers was before the blow fell on his face. We do not find those conditions favourable for positive identification even of the person is a person this witness had met before.

The second test is whether such evidence standing alone could sustain a conviction. There was no other evidence against the Appellant except that of PW1. The other evidence posed a different question. It was PW1's evidence that the stolen bicycle was found in the 1st Appellant's house in his absence. The 1st Appellant denied that it was recovered in his house. The 1st Appellant's defence cannot be ignored because of the evidence of PW4 who said he arrested both Appellants by virtue of being a youth winger. PW4 said he arrested the 1st Appellant and that he led to the 2nd Appellant's arrest. PW4 never

mentioned the recovery of the bicycle. The evidence of recovery of the bicycle does not provide the necessary corroboration to PW1's evidence because it was itself doubtful and needed corroboration. The evidence that needs corroboration cannot be used to corroborate other evidence also needing corroboration.

As for the 2nd Appellant the evidence against him was of identification by PW1 and PW2. As we mentioned earlier, both witnesses said that the 2nd Appellant descended on them both which as we found did not make much sense due to the fact that the attack on both Complainants was sudden and simultaneous and the fact that PW2 ran away almost immediately. The other evidence against the 2nd Appellant was the alleged recovery of the bicycle. PW1 was clear that the bicycle was in a house. No evidence was adduced to create a nexus between the 2nd Appellant and that house. The issue of possession, whether the 2nd Appellant can be said to have been in possession of the bicycle was never considered by the learned trial magistrate. That issue is easily solved if one considers the evidence of PW1 that the house where the 2nd Appellant was found did not belong to him. Secondly the evidence adduced did not address the all important issue of possession. PW1 said: -

"***We went to the place of work and we went back. I knew the 1st accused house and we found the 1st accused missing but we found the 2nd accused with the bicycle and this knife…"***

That was all PW1 said about the recovery of the bicycle and the 2nd Appellant's arrest. That evidence was insufficient to justify a finding that the 2nd Appellant was found with recently stolen property and therefore must have been one of those who robbed the Complainant. The learned trial magistrate misled herself when she found as follows of PW1: -

"***He could not say why people who had stolen from during the day would confuse him with anybody else or get him arrested for nothing."***

And of the 2nd Appellant she said as follows: -

"***The 2nd accused could not say where the got the bicycle so soon robed off the two Complainants."***

In so finding the learned trial magistrate shifted the burden of proof causing the Appellants prejudice and arriving at the wrong conclusion.

After considering these two appeals, we find that they have merit and allow them. We quash the convictions, set aside the sentences and order that the Appellants should be set free unless otherwise lawfully held.

Dated at Nairobi this 25th day of May 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants

Mrs. Gakobo for State

CC: Erick/Ann

…….**...**

LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE