REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 936 & 937 of 2003

LESINKO NKONENE…..……..……..…….……..APPELLANT

VERSUS

REPUBLIC…… ……..……....RESPONDENT

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 937 OF 2003

(From original conviction(s) and Sentence(s) in Criminal case No. 2022 of 2003 of the

Chief Magistrate's Court at Kibera (Ms. Mwangi - PM)

JOHN OLE SHIELE..…....……....……....…….……..APPELLANT

VERSUS

REPUBLIC…….……...……....RESPONDENT

J U D G M E N T

The appeals of **LESINKO NKONENE,** herein referred to as the 1st Appellant and **JOHN OLE SHIELE** the 2nd Appellant were consolidated for convenience having arisen out of the same trial. Both Appellants had been charged jointly with four counts as follows:

Counts 1 and II **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. Offences were allegedly committed on 21st January 2003 at Ongata Rongai in respect of count 1 and on 5th February 2003 in respect of count 2.

In counts 3 and 4 the Appellants face charges of **BURGLARY** and **STEALING** contrary to **Section 304** and **279(b)** of the Penal Code. The **BURGLARY** in count 1 is alleged to have been committed at Ongata Rongai on 21st February 2003 and in respect of count 4 on 7th January 2003 in the same town. After hearing the case, the learned trial magistrate acquitted the Appellants of counts 1, 3 and 4, but convicted them of count 2 and sentenced them to death. It is against this conviction and sentence that the two Appellants lodged their appeals.

The particulars of the second count are as follows: -

"on the 5th February 2003, AT Laiser Hill, Ongata Rongai township in Kajiado District within the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely pistols, pangas and swords, robbed of FREDRICK NYABUTO MOGAKA a T.V. set, make

sonny, music system, Video camera make sonny, cash, Kshs.20,000/- and other house hold items all valued at Kshs.410,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said FREDRICK NYABUTO MOGAKA."

Since the offences in each count are different, we shall deal with the evidence which supported only the second count. PW5, **FRIDAH** told the court that on 3rd February 2003, herself, her husband PW8 and a worker PW6 were attacked by 5 to 10 men armed with pistols. From her purse the robbers took cash Kshs.20,000/-. They also stole a radio, video camera and TV set. From their visitor the robbers stole a mobile phone and Ksh.20,000/- in cash. PW5 said that the 1st Appellant had an iron bar and a pair of cutters and that he stole a leather jacket from him and a video camera. PW5 said that the 2nd Appellant was armed with a pistol and a knife and that he helped carry the radio. PW5 said she could be able to identify the two and that she did so one month later at an identification parade. She said that the robbery took 1½ hours.

PW6, the Complainant's worker said that it was 8.00 p.m. when the robbers, numbering over 5 struck. That he was robbed of Kshs.1500/- from his pocket. He said that he identified two of the robbers in the parade. PW6 just said in examination in chief that the 1st Appellant was armed with cutters and the 2nd Appellant unarmed. In cross-examination he changed his story and said that the 1st Appellant was unarmed and that the 2nd Appellant was armed with cutters.

PW8 the husband of PW5 said that when the robbers struck, he and his family had just shifted in Ongata Rongai from South 'B' and so the household goods were not fully arranged. That at 8.30a.m. as they waited to arrange things and while watching the T.V. five people entered the house. That the lights were on because the generator was on. That one of the men had a gun; another had a cutter and another, a panga. That one took his jacket and wore it while another locked him inside the toilet. That shortly later his worker was also brought and locked in the same toilet. They remained there for 15 minutes. He went out to check and found his wife and a worker lying down on the floor. He went outside and found one of the robbers who forced him back into the house. That 15 to 20 minutes later the robbers left. He identified the Appellants in a parade a month latter. He said that the 1st Appellant was the one who was armed with a panga and that he carried the video camera. He said that the 2nd Appellant had cutting scissors and that he searched his (PW8's) pockets. PW9 arrested the Appellants and two others on 28th February 2003. PW11 also claimed to have arrested the Appellants and another but on 1st March 2003. PW10, **IP MWANGI** conducted the identification parades in which PW5, PW6 and PW8 identified both Appellants.

In their unsworn defences, 1st Appellant and 2nd Appellant denied the offences. The 1st Appellant said that he was arrested on 1st March 2003 at his house after police missed a young man they wanted. The two Appellants said that they worked as guards at Ongata Rongai.

We have carefully analyzed and re-evaluated the evidence adduced before the lower court while giving allowance for the fact that we neither saw nor heard the witnesses. See **OKENO vs. REPUBLIC 1972 EA 32.**

The Appellants have raised similar grounds of appeal in their amended grounds and written submissions. They challenge the conviction on basis of the identification by witnesses in identification parades that were improperly conducted. They also raised issue with the learned trial magistrate's decision to admit and subsequently rely on hearsay evidence by PW9 and PW11, the arresting officers in this case. Finally the Appellants maintained that their defences were not given due consideration.

The appeal was opposed by the State. **MRS. KAGIRI**, learned counsel for the State submitted that a spate of robberies and burglaries were committed at Ongata Rongai between February and March 2003 against PW1 and PW8 all inclusive. That PW1, PW5, PW6 and PW8 had clearly and consistently identified the Appellants as those who robbed them by means of electricity lights. Learned counsel submitted that each witness was able to tell the role played by each of the Appellants and how each was

armed during the robbery. Learned counsel submitted that evidence of identification was strong, that witnesses corroborated each other and that the ingredients of the offence were met.

Learned counsel overlooked the fact that the Appellants were convicted only in respect of count 2 which was the robbery committed against PW8 and in which PW5 and PW6 were eye-witnesses. The Appellants were acquitted of count 1 in which PW1 was the Complainant. The learned counsel's submission touching on the evidence of PW1 and on the first count and in general terms on spates of robberies and burglaries was therefore uncalled for. We shall ignore that aspect of the counsel's submission.

We shall first deal with the issue of identification. We have noted that all three witnesses, that is PW8, PW5 and PW6 claimed that they could identify the Appellants as those who robbed them. Except for PW8 who described clearly the events of the robbery, PW5 and PW6 gave very scanty evidence devoid of detail. We bring out this fact to demonstrate that from the evidence of PW5 and PW6 one does not get a clear picture of what happened. They did not describe the scene and considering each of their evidence, one gets the impression that they were alone at the time the robbers confronted them. It is PW8 who describes well that they were watching television with PW5 and a worker. Apparently there was more than one worker because PW8 was locked in a toilet with one worker yet 15 minutes later when he went to the sitting room, he found his wife and another worker lying down.

Most important however is the lack of a proper inquiry during the trial of this case to establish important aspects that touch on the all important issue of the ability of these three witnesses to identify the Appellants. While PW6 does not talk about any light, PW5 and PW8 talked of lights without describing the nature or intensity of the same. Despite these three witnesses saying that they could identify the Appellants and in cross-examination that they could identify them by their physical appearances, none of them described what those appearances were. That was a glaring omission bearing in mind, one, that none of the witnesses knew the appellants before, two, that the incident took place inside a house and at night and finally that it was only one month later that they three purported to identify the Appellants in identification parades. We are concerned about the quality of identification by these three witnesses. On the critical issue of identification, the learned trial magistrate directed herself as follows: -

"***However PW5, PW6, PW7 and PW8 did identify the two even at a parade as the ones who carried out the robbery in count 2 with others not in court. The witnesses said the lights were on, they were able to identify the accused and thus find accused guilty of count 2 as charged and in fact the 2nd accused (2nd Appellant on appeal) denied that they were not identified is not recorded. I convict them accordingly."***

The learned trial magistrate failed to address the issue of quality of identification and the basis of the witnesses claiming that they could identify the Appellants. In fact the paragraph we have quoted from the learned trial magistrate's judgment was what served as the analysis and evaluation of the evidence adduced before the court. It was an insufficient analysis of the evidence and we shall demonstrate why. First of all, PW7 was not a witness in support of count2. PW7 gave evidence regarding a burglary that had taken place in his shop on 7th January 2003 a date different from the one the subject matter of count 2. His evidence should not have formed the analysis of the evidence adduced in support of count 2. Secondly PW5, PW6 and PW8 gave inconsistent evidence on very material facts of the case. On how the 1st Appellant was armed during the robbery it was PW5's evidence that the 1st Appellant had an iron bar and cutters while PW6 contradicted himself as to whether he was armed at all or had cutters. PW8 said that the 1st Appellant was armed with a panga. On how the 2nd Appellant was armed, PW5 said he had a pistol and a knife while PW6 was not sure whether he was unarmed or had cutters. PW8 said he had cutters or cutting scissors. Definitely those witnesses were not describing the same people in their evidence and going by what the Appellants were armed with, the prosecution evidence failed to establish a consistent and strong case against them. There was more inconsistency touching on what they stole. While PW5 was sure that the 1st Appellant stole the leather jacket from PW8 and also carried away the video camera, PW8 was clear that the 1st Appellant carried only the video camera. That is odd because

PW8 should have been able to know that it was the 1st Appellant who stole his jacket if indeed he was the one as PW5 said. On the part of the 2nd Appellant, it was PW5's evidence that he was the one who helped carry the radio while PW8 said that he searched his pockets. In summary whether on issue of how the Appellants were armed or what role they each played in the robbery PW5, PW6 and PW8 contradicted each other. If they could not agree on these important aspects of the case then, we find their evidence that they could identify the Appellants as among those who robbed them on the material day cannot be regarded as safe and free from the possibility of error. See **KARATON OLE LESRAV vs. REPUBLIC CA. NO. 78 of 1988**; **ABDALLA BIN WENDO vs. REPUBLIC 20 EACA 166** and **REPUBLIC vs. TURNBULL [1976] 3 ALL ER 551**. Turning now to the second issue of the evidence of PW9 and PW11, we have already noted in our analysis of the evidence of these two witnesses that they contradict each other. Whereas PW9 said that he and other officers he did not name arrested the two Appellants with another man and woman on 28th February 2003, PW11 said he and other officers he named and who did not include PW9 arrested the Appellants and another man on 1st March 2003.

The Appellants however admitted in their evidence that their arrest was on 1st March 2003. The Appellants complain that the two gave hearsay evidence. In the learned trial magistrate's judgment at page J2 she observed thus: -

"***PW11 said that the accused are the ones who offered to show them where they had stolen. Later the police called the owner for identification parades…"***

At page J3 the learned trial magistrate continued to observe:-

"***The court has gone through the evidence adduced before court and has already considered the same. Its apparent the accused are the ones who told the police the places thy had carried out the theft…"***

Clearly from these observations, the learned trial magistrate included in the proceedings inadmissible evidence. Not on grounds it was hearsay as the Appellants submitted but for being admissions allegedly made by the Appellants which admissions implicated them and which were made before the Appellants were cautioned in the usual away. Even if the evidence were admissible, it could not have been admitted in evidence as the Appellants' admissions without proof of which of the two said what. The alleged admissions were bare statements by PW11. The learned trial magistrate took those statements into consideration and convicted the Appellants. We cannot say that the Appellants have not been prejudiced by the admission of this clearly inadmissible evidence.

Finally the Appellants complained that their defences were not given due consideration. The learned trial magistrate did summarize their defences in her judgment but was not convinced by them. As we have demonstrated in this judgment, the learned trial magistrate failed to be impressed by the Appellants defence due to misdirection on the evidence of identification and for admitting purported admissions that ought to have been excluded. In so doing the learned trial magistrate came to wrong conclusions and acted in error.

After considering the Appellants defence, for reasons we have given, we allow the appeals, quash the conviction and set aside the sentences. The Appellants should be set at liberty unless they are otherwise lawfully held.

Dated at Nairobi this 2nd 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;

……**...…**

LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE