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

Criminal Appeal 62 & 63 of 2004

(From original conviction and sentence in criminal case No. 500 of 2003 of the Chief Magistrate's Court at Kibera (Ms. Mwangi- SPM)

SIMON MULI KATIWA .....
APPELLANT

VERSUS

REPUBLIC …….....……RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 63 OF 2004

(From original conviction and sentence in criminal case No. 500 of 2003 of the Chief Magistrate's Court at Kibera (Ms. Mwangi- SPM)

JONATHAN MWANZIA KITHUKA.....
APPELLANT

VERSUS

REPUBLIC …….....……RESPONDENT

J U D G M E N T

SIMON MULI KATIWA and **JONATHAN MWANZIA KITHUKA**, the 1st and 2nd Appellant respectively in this appeal were jointly charged with one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the charge were as follows:-

"On 24th day of December, 2002 at Plains view Estate in Nairobi, jointly with others not before Court while armed with dangerous weapons to wit pistols, robbed BHANGWAN DAS SOMAN of his motor vehicle registration No. KAK 045Y Toyota Corolla White, two wrist watches make Seiko 5 all valued at 350,000/= and threatened BHAGWAN DAS SOMAN with violence."

After the trial both Appellants were convicted for the offence and sentenced to death as prescribed in

the law. It is against this conviction that they both appealed to this Court. The Appellants acted in person. However, the 1st Appellant withdrew the services of his Counsel just before the hearing of the appeal commenced arguing that he desired to proceed in person. **Miss Gateru** learned State Counsel appeared for the State and opposed both appeals.

We go straight to the analysis and evaluation of the evidence before the lower court. The prosecution case was that at 7.45 p.m. on the material day, the Complainant **Simon** left with his wife in their family car to go to kiosks outside the estate. As the complainant drove at a low speed through the main gate four men emerged and one placed a gun-like object on his chest and ordered him out of his car. He obliged. He was asked for money and he gave 150/= which was all he had. The Complainant and his wife P.W.2 were pushed to the back seats and two of the robbers sat on each side while two sat in front with one of them taking over the driving. The complainant and his wife were taken around South B Estate, then to South C and back to South B. The robbers then left the tarmac road and drove towards Hazina Estate in South B where they came face to face with two Police Officers. The Police Officers, among them P.W.3, had received a report from the 999 controller in which the Complainant's vehicle was circulated as having been car jacked. P.W.3 and his colleague immediately went into action and fired at the vehicle. Four men jumped out P.W.3 fired and shot the 2nd Appellant on his ankle and arrested him as he could not walk. The 1st Appellant was later brought back by other Police Officers. The Complainant identified the 2nd Appellant as the one who took over the driving of the vehicle and the 1st Appellant as the man who sat next to him after they were car jacked. The Complainant said that the 2nd Appellant was shot on his leg while he learnt later that the 1st Appellant was shot in the buttocks P.W.2 identified both appellants as their carjackers. The vehicle was identified by the Complainant as an exhibit and two bullet holes were noted on the driver's door and the accelerator pedal.

Both appellants denied the offence. The 1st Appellant claimed that a bar owner caused his arrest for having broken his Television Set. The 2nd Appellant said he was shot as he walked home that evening.

The 1st appellant raised six grounds of appeal as follows:-

One that the learned trial magistrate erred in finding that the 1st appellant was arrested at the locus in quo

Two that the learned trial magistrate erred in finding the 1st appellant was wounded by police bullets.

Three there was no positive identification of the 1st appellant at the scene of attack due to darkness.

Four essential witnesses were not availed.

Five 1st appellant's arrest had no nexus to the crime in question.

Six learned trial magistrate failed to adequately consider the appellants alibi defence.

The 2nd appellant raised five grounds: -

One that the charges were defective

Two learned trial magistrate finding that the 2nd appellant was shot at the scene was based on the evidence of P.W.3 which was full of doubt and inconsistencies.

Three that if there was any identification of the appellant, it was only made upon arrest.

Four that learned trial magistrate erred in not finding for the 2nd appellant that he was charged in

order to cover up the fact the police shot him yet he was innocent of the crime.

Five the learned trial magistrate failed to comply with the provisions of 169(1) of the Criminal Procedure Code when she rejected the 2nd appellants defence.

We shall deal with the 2nd Appellant's first ground that the charge sheet was defective. In his written submission the 2nd Appellant contended that the name of the Complainant in the charge was **BHAGWAN DAS SOMAN** while in evidence it was given as BUGWEN DAS SIMON. **Miss Gateru** for the State did not agree with those submissions. Counsel submitted that the evidence was very clear that the person who testified in Court as the Complainant was the one who was robbed during the incident in question. The 2nd Appellant also contends that P.W.2 should also have been a Complainant in the case to which the learned Counsel submitted was not a serious omission and that the Appellants should consider themselves lucky to face only one charge. On the variation in the names of the complainant as per the charge sheet and the evidence, we have perused the original record of the court. While the spelling of the first name is written as '**BUGWAN**' that of the last name corresponds with the one in the charge sheet '**SOMAN**'. There is a typographical error on the record and the only variation noted is on the first name where the court recorded it as **BUGWAN** while the charge sheet read **BHAGWAN**. The issue being raised here was not raised during the trial and it ought to have been raised at that time. It is rather late in the day to raise the issue during the appeal. Besides considering that the complainant's name was foreign being Asian it is possible that the learned trial magistrate mispelt it during trial. That error is however, insignificant since it is very clear to us, as Counsel for the State submitted that P.W.1 was indeed the complainant in the case. Even if there was an error in the first two letters of the Complainant's name as per the record, the error is purely that of semantics, it is trivial and we are satisfied that it caused no prejudice to the Appellants. It is an error that can be cured by **Section 382** of the **Criminal Procedure Code**. See also **KIMEU vs. REPUBLIC (2002) 1 KAR 757**.

P.W.2's evidence suggests that she too was a victim of the robbery having been robbed of a ring and a watch. The fact the Appellants were not charged with a second capital charge in respect of the items she lost does not affect the prosecutions evidence in support of the first count or the prosecution case in general. Both issues are of no importance and are dismissed.

We shall now consider all the issues raised by the 1st appellant in his petition of appeal as they are all related. The very first ground raised by him questions the findings of the learned trial magistrate. The entire analysis and evaluation of the evidence before the court is contained in one paragraph at pg.J3 of the judgment. We reproduce it here since it is quite brief.

"***The court has gone thoroughly through the prosecution and defence cases. I noted that PW1 and PW2 gave very consistent evidence. the same was further supported by the evidence of PW3. They said they had been carjacked by the two accused and other 2 people. I do believe that having been arrested while still in the presence of both PW1 and PW2 there was no need of an identification parade. The two were said to have been shot by the officers who arrested them. The evidence as so clear that in fact the Latin doctrine of "Res Ipaar Logutur" can safely be applied here i.e. "a thing speaks for itself". I do believe that the two with others who were armed did rob PW1 as charged I convict them accordingly."***

The learned trial magistrate made a generalized finding affecting both appellants in her judgment. Her finding concerning their arrest was that they were arrested in the presence of the Complainant and PW.2. The learned State Counsel in her submissions supported the learned magistrate's finding of fact and reiterated that the two Appellants were arrested in the presence of the two victims.

P.W.3 was the arresting officer. His evidence was clear that he only arrested the 2nd Appellant at the scene. The Complainant himself and his wife corroborated his evidence to that effect. The Complainant and his wife said that the 2nd Appellant was shot right at the spot where the stolen vehicle was stopped and that he immediately fell down on his back and did not move from there. As for the 1st Appellant, P.W.3 said he was brought back to the scene by other Police Officers. That too was corroborated by the

Complainant and P.W.2. It is therefore quite clear that the 1st Appellant was not arrested at the scene in the presence of the Complainant and P.W.2 and to that extent the learned trial magistrate misdirected herself.

The other Complaint the 1st Appellant had was that the learned trial magistrate erred to find that he was wounded by the "police bullets". Actually from the judgment the learned trial magistrate did not make a specific finding of fact on that point. She recorded what was said in her judgment thus:-

"***The two (accused) were said to have been shot by the officers who arrested them"***

That statement appearing as it did in the judgment of the court is a clear demonstration that the learned trial magistrate failed to comply with **Section 169(1)** of the **Criminal Penal Code** as to the manner and content of a judgment. The Section reads as follows:-

"***169(1)Every such judgment shall except as otherwise expressly provided by this code, be written by, or under the direction of the presiding officer of the court and shall contain the point for determination, the decision thereon and the reasons for the decision and shall be dated and signed by the presiding officer in an open court at the time of pronouncing it."***

The statement we have quoted above can best qualify as a "**point for determination**" under **Section 169(1).** What is missing from the judgment is "**the decision** t**hereon**" and the "**reasons for the decision**". Having not given a decision on that point, the learned trial magistrate did not comply with the provisions of **Section 169 (1)** as required and therefore the judgment on that point was incomplete and inconclusive. That state of affairs is also true not only concerning the shooting of the 1st Appellant but also other issues that arise in this case including those raised by the 1st Appellant in his petition of appeal. We are unable to decide from the evidence recorded in court whether the 1st Appellant was shot at the scene. The Complainant's evidence on that point was that he "learnt" later that the 1st Appellant was shot in the buttocks. The Complainant did not see him bleeding or see any evidence of shooting on him. P.W.3 the officer who fired shots at the carjacked vehicle is definite about whom he shot. P.W.3 had said he shot the 1st Appellant but he later corrected that and said that he only shot the 2nd Appellant. Concerning the 1st Appellant, P.W.3 said that he was brought back to the scene by other police officers. Those police officers were not called as witnesses. Failure to call them as witnesses in the circumstances of the case meant that the prosecution case was inclusive as to the circumstances and reasons of the 1st Appellant's arrest.

In **AHMED RAMSON –V- REPUBLIC (1955) E.A. i**t was held:

"***It is the burden of the prosecution to avail all the material evidence to the court to enable the court arrive at a fair and impartial decision. The prosecution must summon all the material witnesses and avail or present the court with all facts even those whose evidence may have been unfavourable for it".***

In the instant case, the persons who arrested the 1st appellant were material witnesses and ought to have been called as witnesses. In **BUKENYA –V- REPUBLIC 1972 E.A. 549**, It was held that where the prosecutor fails to call a witness and it transpires that the evidence in support of the charge against the accused is barely adequate, the court in trying the case is perfectly entitled to draw an adverse inference that had the witness testified, his evidence would have tended to be adverse to the prosecution case. We hold that an adverse inference is justified in this case regarding the arrest of the 1st Appellant and the failure to call the arresting officers. The manner in which the 1st Appellant was arrested was not therefore clearly explained and that raises some doubts as to his participation in the instant robbery especially when his own defence is put into account. The evidence of identification by the Complainant and his wife did not clear the doubt of the 1st Appellant's involvement. Both witnesses admitted that they did not see any of the faces of their carjackers from the scene of crime to the point where P.W.3 started firing at their vehicle. Both were clear that they only saw the assailants after their arrest. For the 1st Appellant, the two were clear that they saw him when he was brought back to the shooting scene after the event. Even

though the Complainant claims that the 1st Appellant was seated next to him during the robbery, we do not find his evidence believable especially considering that the Complainant said he did not identify anyone until after police shot at them. We agree with the 1st Appellant that the prosecution failed to establish a nexus between the 1st Appellant's arrest and the robbery in question. We also agree that had the learned trial magistrate given adequate consideration to the 1st Appellant's defence she may have arrived at a different conclusion in regard to this Appellant.

Having evaluated and analyzed afresh the evidence adduced before the Court and having considered the 1st Appellant's petition of appeal, we find that this appeal has merit and that the conviction entered against the 1st Appellant was not safe. We quash the conviction entered against the 1st appellant and set aside the sentence. The 1st Appellant should be set free unless he is otherwise lawfully held.

We now turn to the 2nd Appellant's appeal. We did set out the grounds of appeal that this Appellant raised in his petition earlier in this judgment.

We have already dealt with the first ground. The second and third and fourth grounds are related and we propose to deal with them together. These three grounds puts to question the finding that the 2nd Appellant was shot at the scene of crime and the finding that the 2nd Appellant was positively identified and also the reason for his being charged with this offence. The evidence against the 2nd Appellant is totally different from that against the 1st Appellant. The difference being that at the time P.W.3 started shooting at the Complainant's vehicle all four robbers were still inside the vehicle. P.W.3 was standing on the right side of the vehicle as evidenced by the bullets holes on the driver's door and the accelerator pedal of the vehicle. P.W.3 was sure he shot one of the robbers. Initially he identified him as the 1st Appellant but later corrected and said it was in fact the 2nd Appellant whom he shot on the ankle. Of course the prosecution could easily have proved this point by adducing medical evidence which was easily available to them because any treatment administered to the 2nd Appellant was so done while he was in remand custody. That not withstanding, the 2nd Appellant admitted having been shot at that scene in his defence so there is do doubt at all that he was short. We find sufficient evidence from both the Complainant, P.W.2 and the arresting officer P.W.3 that upon being shot as he came out of the Complainant's vehicle, the 2nd Appellant fell down on his back and did not rise again until P.W.3 got to him. The evidence against the 2nd Appellant is quite adequate that he was shot at the scene as he came out of the Complainant's vehicle and before he could escape. Since he did not leave the scene from the time he was shot as he disembarked from the vehicle up to the time P.W.3 arrested him, the identification by the Complainant and P.W.2 at the scene half an hour after they had been robbed of their vehicle was still positive identification since there was no breach between the time of the robbery and the time of arrest. Even though both the Complainant and his wife only saw the 2nd Appellant's face sufficiently to be able to identify him at the scene after the shooting, taking into account of all the circumstances of the case, that evidence of identification was positive and conclusive and strong enough to sustain a conviction against the 2nd Appellant. In the circumstances of the 2nd Appellant's arrest we do not agree with him that he was charged with this offence in order to cover up for the shooting.

The fifth and final ground raised by the 2nd Appellant was that the learned trial magistrate did not comply with the provisions of **Section 169(1)** of the **Criminal Procedure Code** when rejecting the 2nd Appellant's defence. In his written submissions the 2nd Appellant contended that the learned trial magistrate did not give reasons for rejecting his defence which he had given on oath and which the court was duty bound to do under **Section 169(1)** of **Criminal Procedure Code**. The 2nd Appellant urged us to find that his defence cast doubts on the prosecution case and that it was not 'displaced' by the prosecution evidence. In the 2nd Appellant's sworn defence he stated thus:-

"***On the way home I met with a car and it also met with others. It was 5 meters away and heard explosives and was hit on the leg. I was hurt on the face and lost consciousness. I saw two doctors who told me I had been shot on the leg. They took me to Industrial Area Police and my leg had***

rubbers."

The evidence of P.W.3 was that the he shot the 2nd Appellant on the leg and that he fell down directly upon being shot. P.W.3's evidence was that there were no people walking on the road at the time he shot at the vehicle and that the only other persons there were kiosk owners who were at their kiosks. He says he fired three shots, one hit the vehicle, the other hit the 2nd Appellant. P.W.3 could not account for the third bullet but we find it accounted for in the evidence of the Complainant who identified two bullet holes on the vehicle, one on the door and the other on the accelerator pedal. The third was therefore the one which hit the 2nd Appellant. P.W.3 was quite clear that he aimed at the 2nd Appellant before shooting him on the leg and was very clear in his mind that he was one of those who had just disembarked from the Complainant's vehicle. We find that there was no doubt at all that the 2nd Appellant came out of the Complainant's vehicle just before P.W.3 shot him. The 2nd Appellant's involvement in the robbery is therefore not in doubt. The 2nd Appellant's sworn defence did not raise any doubts as to his involvement in this offence and therefore did not shake the prosecution case. Even though we agree with the 2nd Appellant that the learned trial magistrate did not give reasons for rejecting his defence as envisaged under **Section 169(1)** of the **Criminal Procedure Code**, we have evaluated and analyzed afresh all the evidence adduced in the Court. We find that the 2nd Appellant was not prejudiced by the learned trial magistrate's failure to comply with the provisions of the **Criminal Procedure Code** since we as the first appellate court have complied with the same. We are satisfied from the available evidence that the 2nd Appellant was one of the four robbers who accosted the Complainant and car-jacked him and that he was shot in the leg before he could escape from the scene where the stolen vehicle was stopped. We find that the 2nd Appellant's defence cast no doubts whatsoever to his involvement in this offence. The conviction was safe and should be allowed to stand. We dismiss the 2nd Appellant's appeal, uphold the conviction and confirm the sentence.

The upshot of this appeal is that the appeal by the 1st Appellant's appeal succeeds, conviction quashed and sentence set aside. The 1st Appellant should be set free unless he is otherwise lawfully held.

The appeal by the 2nd Appellant fails and is dismissed. The conviction is upheld and sentence confirmed.

Dated at Nairobi this 26th day of September 2006.

…….**….**

LESIIT. J.

JUDGE

…….

MAKANDHIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Miss Gateru for State

Tabitha/Erick – CC

……..…….

LESIIT, J.

JUDGE

…….

MAKANDHIA

JUDGE