REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Criminal Appeal 247 & 248 of 2002

(Appeal against both conviction and sentence of the Vihiga Senior Resident Magistrate's Court in Criminal Case No. 1507 of 2000. (F. M. KINYANJUI, SRM)

WILSON KEYA NYONYI

HARUN MIKWA OCHIENG .....APPELLANTS

V E R S U S

REPUBLIC .....RESPONDENT

J U D G E M E N T

Criminal appeals Numbers 247/02 and 248/02 were consolidated when they came up for hearing. The appellant in Criminal appeal No. 248/02 HARUN MIKWA OCHIENG, became on consolidation the 1st appellant and the appellant in

Cr. appeal No. 247/01, WILSON KEYA NYONYI became the 2nd appellant. The 1st and 2nd appellants in these consolidated appeals were the first and second accused in Vihiga Senior Resident Magistrate Criminal Case No.1507 of 2000 in which they were jointly charged in one count with robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the first count were that the two appellants,

"on the night of 1st and 2nd August 1998 at Vigege village, Wanondi Sub-location Chavakali Location in Vihiga District, within Western Province, jointly with others not before the court being armed with a panga and spear robbed LUCAS KIBOGO ELISHA of a Somali sword, 3 radio cassettes, 1 blouse, 1 bed sheet and cash Kshs.13,000/= all valued at Kshs.15,000/= and at or immediately before or immediately after the time of such robbery wounded the said LUCAS KIBOGO ELISHA."

The second appellant was alone charged in count two of the charge. The particulars of the second count were that the 2nd appellant,

"on the 1st day of August 1998 at Vigege village, Wanondi Sub-location, Chavakali Location in Vihiga District within Western Province, jointly with others not before the court being armed with a panga and spear robbed LUCAS KIBOGO ELISHA of Kshs.13,000/= and at or immediately after the time of such robbery wounded the said LUCAS KIBOGO ELISHA."

The evidence adduced in the trial court shows that on 1st August 1998 at 11.00 p.m. Lucas Kebogo (PW1) and his wife Benedina Adele Kibogo (PW4) were in their house in Vigege village, Wanondi Sub-location, in Chavakali when they heard their dogs barking outside the house. PW1 was a farmer and PW4 was a businesswoman. They were about to go to bed. Then suddenly, the door of their house was broken and as one robber entered, and PW1 cut him with a panga. This did not deter the gang of four. One of the other gang members cut PW1 on the left hand. They entered and demanded money. They beat up PW1. They took Shs.13,000/= from a cupboard. There was a pressure lamp in the house. PW1 did not know and had not seen Appellant No.1 before. But PW1 could remember when being cross-examined that the

1st appellant was the one who had cut him. His memory was better earlier. Memory unlike wine does not get better with time. PW4 escaped through the back door when the robbers were breaking the door to the house. She went to the police station to report and upon her return she found her husband bleeding from the injury inflicted on him by the robbers and the money having been stolen. It was while she was on the way to the police station that she heard screams in the house of one David Swele (PW2) who testified that he was attacked at about 1 a.m. on the morning of 2/8/98 when robbers broke into his house and demanded money from him. He hid in the ceiling of his house and was pieced thrice. He said he had a torch which he switched on and was able to see the 1st and the 2nd appellants but was not able to identify the others. It is unlikely that PW2 would have had opportunity to see and identify the robbers as he hid in the ceiling of the house. It is also unlikely that he would have wanted the robbers to know where he was hiding or to see him in his hide-out or safe haven. But they did as they pieced him with a spear ostensibly on the rear. He could not have had his head to the ceiling. The only persons he claimed to have been able to see were the two appellants in the dock. He alleged in his evidence that he had given the police the names of the 2nd appellant and that the latter was a village mate but none of the law enforcement officers who testified stated that PW2 had given names of the 2nd appellant as one of the robbers. Silpa Mboga (PW3) saw her husband (PW2) being pieced in the rear with a spear. The attack was at 2 a.m. She said she knew Appellant No. 2 very well.

In the identification parade mounted by Chief Inspector of Police Kirui (PW8) the first appellant was identified by PW2 who said that the 1st appellant was his neighbour. PW3 also identified the 1st appellant who said she knew him very well and had given the police his name.

In his sworn statement, the 1st appellant, without stating his whereabouts on the night of 1st and 2nd August, 1998, not that he was under any obligation to prove his innocence, stated that he was arrested while praying in church on 25.9.99. He stated in cross-examination that he was in Kisumu at the time of the robbery. He admitted that he knew very well both PW2 and PW3 who were a man and wife.

The second appellant in his unsworn statement denied he knew the 1st appellant and denied committing the offence.

In their Petition of Appeal the Appellants in summary submitted that there was no evidence on the basis of which they could be convicted and that there was no evidence to establish that the appellants were identified as having been among the robbers.

The trial magistrate in his judgement made a finding that the appellants were "***part of the gang that violently robbed the complainant."*** He rejected the defence of the Appellants as well as the alibi defence by the 1st appellant in which the latter said he was selling fish in Kisumu. He found the guilt of the appellants proved beyond any reasonable doubt and sentenced them to death.

As a first appellate court, we are alive to the need, indeed duty, to peruse the record of the trial court and to evaluate the evidence and to make our own findings and draw our own conclusions ***(Shantilal M. Ruwala v. R (1957)EA 570 and Pandya v. R (1957)EA 336).*** We are also cognizant of the fact that in evaluating the evidence and examining both questions of fact or law and weighing conflicting evidence and drawing our own inferences and conclusions, we must bear in mind that unlike the trial court, we have neither seen nor heard the witnesses and must therefore make due allowance for this ***(see Okeno v. R.(1972)EA 32)***

The conviction of the appellants was based on evidence of identification and recognition. PW1 said he had recognized the 1st Appellant as the one who had cut him. His memory in this regard came back when he was being cross examined. Our earlier comment on this is adequate and we need not say more.

PW4, did not see any of the robbers and she said as much. David Swale (PW2) said he saw the 1st appellant when he switched on his torch as he hid in the ceiling. We make no apology for being skeptical about his ability to watch from the save-haven when he did not have his head on the pigeon hole. He was pierced in the rear by one of the robbers, a fact that shows that his head was away from the aperture

through which he could observe the robbers in the room. PW4's own wife, Silpa Mboga, (PW3), said she knew the 2nd Appellant very well. She identified the 1st appellant. PW3 said she had put on the lamp when she heard the robbers breaking the doors. She said that when the robbers gained entry, the 1st appellant hit her with is hand and knocked her and the second Appellant also hit her with a rungu dislocating her leg. She did not give descriptions of the robbers. The time of the robbery was 2.00 a.m. The son of David Swele (PW2), Julius Okungu (PW5) ran from the house through the window into the banana plantation when he heard his mother screaming. He hid there. He said there was moonlight and he could see the robbers from there. He said he knew the second appellant very well and that he saw him among the gang of robbers. He did not say how far away he was from the house, nor did he offer any description of the person he said was the 2nd appellant.

Generally, evidence of identification requires great care before basing a conviction on it. The circumstances in which identification is alleged to have taken place must be examined with circumspection to ensure that the identification was free from the possibility of error. The circumstances in which PW1, PW2, PW3 and PW5 claimed to have identified the appellants were not unfavourable for positive identification. We are unable to say with confidence that the identifications of the appellants were without the possibility of error. The finding by the learned trial magistrate that the appellants were two of the robbers was not supported by evidence and was erroneous. It may very well be that the appellants were two of the robbers. But a court of law must base its decision on evidence and that is why even where persons who have committed crimes and ought to be convicted and sometimes removed from society through appropriate sentences go scot free because the court can only convict where there is evidence beyond any reasonable doubt. In these appeals, the evidence fell shot but the trial magistrate misdirected his mind in convicting and sentencing the appellants.

We quash the convictions and set aside the sentences.

Unless otherwise lawfully held, the Appellants shall be released and set free.

DATED AND SIGNED AT KAKAMEGA THIS 28TH DAY OF APRIL, 2005.

J. K. SERGON

J U D G E

G. B. M. KARIUKI

J U D G E