REPUBLIC OF KENYA

IN HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO. 922 OF 2004

MARY NZIWA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 942 OF 2005

DANIEL ASEGA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

The appellants, Mary Nziwa hereinafter referred to as the 1st appellant and Daniel Asega hereinafter referred to as the 2nd appellant were charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. At the conclusion ofthe trial the learned trial magistrate was not satisfied that the ingredients of the offence of robbery with violence had been proved. She however, found that the appellants had committed theoffence of simple robbery contrary to section 296(1) of the PenalCode and accordingly convicted them. They were each sentenced to3 years imprisonment. They have in these two appeals CriminalAppeal Number 922 of 2003 and 942 of 2003 separately challengedboth the conviction and sentence.

The facts of the prosecution case as I understand them werethat on 18th April, 2003 at Kangemi in Nairobi, the complainant P.W.1had just come from officiating a football match and alighted at astage opposite Shell b.p. petrol station in Kangemi at about 8.30 p.m.On her way home she was invited by the owner of the bar in theneighborhood - Kennedy Muchenzi (P.W.3) for a soda. Soon she was joined by her husband who had come along with violet MundabiMarigi - p.w.2. The complainant's husband later on called her outside and gave her Ksh.7,000/- to keep. The complainant had Ksh.820/- of her own. in total the complainant now had Ksh.7,820/- as they fraternized in the bar, some of the patrons on a table nearby who included the 2nd appellant made some unpalatable comments regarding the physical attributes of P.w.2. A quarrel then ensued between the complainant, P.w.2 and those other patrons.as the quarrel escalated, the complainant and P.w.2 opted to leave the bar and go home. As soon as they left, they heard foot steps from behind as if they were being chased. On checking they saw 4 people closing in on them. Two of them were the same people whom they had just quarreled with in the bar. P.w. 2 managed torun away. The complainant was not so lucky as she was captured.The four introduced themselves as flying

squad officers and that they were arresting the complainant for having spoken badly about their colleague in the bar. They took *her* back to the bar and in the presence of the owner of the bar (P.w.3) bundled her in a parastatalmotor vehicle registration number KAL 931 v. They informed P.w.3 that they were taking her to Kabete Police station. The 2nd appellant herein was the one driving the said motor vehicle. The complainantwas held captive from that time until about midnight as she was never taken to Kabete Police Station, in the process she was assaulted and robbed of the items listed in the charge sheet. She was undressed and left with only a T-shirt and a biker. At about midnight She was released and she went home. She had noted the registration number of the Motor vehicle and memorized it. Thefollowing day she reported to the police what transpired and was duly issued with a P.3 form, investigations were launched in earnestand on 14th May 2003 she attended an identification parade and positively identified the 2nd appellant as the person who was driving the motor vehicle, who also assault her and robbed her as well. Thebar owner apparently knew where the 1st appellant resided. Hepointed out the residence to the complainant who in turn called thepolice the 1st appellant was arrested. The two appellants weresubsequently charged with the offence of robbery with violence. In their defence the appellants denied taking part in the robbery and wondered why they were each arrested. The appellant stated that they were each separately arrested on 20th April 2003 and15th May 2003 respectively after searches in their individual housesyielded nothing incriminating.

The honourable trial magistrate considered evidence adducedand came to the conclusion that the 1st appellant was a person wellknown to P.W.3 prior to the incident. When the appellants tookaway the complainant, it was in the presence of P.w.3 who eventalked to them wanting to know where they were taking thecomplainant. The complainant remained in the company of thesepeople for a long time and when she was eventually dropped it wasin an area that was well lit. Apparently the, complainant was able tosee the culprits clearly. According to the trial magistrate, the appellants were positively identified by the complainant and P.w.3.

There was evidence that motor vehicle kal 931 v in which thecomplainant was bundled in was in the possession of the 2ndappellant according to the records kept by Jomo KenyattaFoundation, the owner the motor vehicle and employer of the 2ndappellant. The work ticket indicated that on 18th and 19th April 2003the Motor vehicle was in the possession of the 2nd appellant. Thisfact placed the 2nd appellant at the scene of Crime. The trialmagistrate was not impressed by the defences advanced by theappellants as they were mere denials. She accordingly convictedthem however of the lesser offence of simple robbery.

When the appeal came before me for hearing the appellantswere represented by Mr. Mburu learned counsel. The state wasrepresented by Miss Nyamosi learned state counsel. On theapplication of the learned state counsel, and counsel for theappellants not objecting, the appeals were consolidated.

Counsel for the appellants relied on the petitions of appeallodged individually by the appellants, in summary, counsel for theappellants submitted that the state did not prove the offence ofrobbery against the appellant beyond reasonable doubt. That thecourt shifted the burden of proof to the appellants, that theprosecution failed to call material witnesses and that the prosecution case was riddled with such contradiction and inconsistencies as to be worthless. The counsel for the appellant further submitted that there was no corroboration and that the appellants were not properly identified as having participated in the crime, counsel also lamented that no attempts were made to lift fingerprints from the paper bag that was dropped the day after the incident and which was found to contain items belonging to the complainant. He also observed that the motor vehicle was not produced in court as an exhibit. Finally he concluded his submissions by stating that although the appellants advanced an alibi defence, the same was not adequately considered by the trial magistrate.

The learned state counsel on her part supported theconviction and sentence of the appellants. She submitted that theprosecution discredited the alibi put forth by the appellants. Theappellants were seen and identified at the scene. On the issue offinger prints, such evidence was not necessary as there was alreadyevidence by the complainant, PW2 and PW3 placing the appellantsat the scene of crime, in any event the 2nd appellant was inpossession of the motor vehicle KAL 931 v that the complainant wasforced

into. She submitted that the prosecution proved the caseagainst the appellant beyond reasonable doubt. The prosecutionproved that a robbery took place and the complainant was robbed.PW3 was an independent witness whose evidence corroborated theevidence of PWI & PW2. The appellants were properly identified at the scene of the crime. The 2nd appellant was further positivelyidentified at a subsequent identification parade, as the complainantand PW3 recognized the 1st appellant there was no need for anidentification parade, She further submitted. She concluded hersubmissions by stating that all the ingredients of the offence withwhich the appellants were convicted of were met. The appealtherefore had no merit and ought to be dismissed.

I have carefully considered and re-evaluated the evidence on record as expected of me as a first appellate court. I have also considered the conclusions that the trial magistrate reached before she convicted the appellant. To my mind the basic issue for the determination of this court is whether there is on record proper and adequate evidence to sustain the appellants' conviction.

Some 8 prosecution witnesses testified against the appellants.The evidence touching on the appellants is well analyzed andsummarized by the learned trial magistrate. But to give context tomy findings I highlight the following:

On the issue of Alibi counsel for the appellants submitted thatthe appellants' Alibi was not challenged. It was also not investigatedby the prosecution as expected. He relied on two authorities.Wang'ombe -vrs- Republic, KLR 149 and David Kingori Gitau -vrs-Republic, cr. App. No. 2 of 1985 (unreported) to buttress hisargument that, "When an accused raises an alibi as an answer to a charge made against him he assumes no burden of proof and theburden of proving his guilt remains with the prosecution. That it is aduty of the prosecution to lest the alibi whenever it is raised." Thiswas not done in the instant case, it was therefore wrong for themagistrate to fail to consider the defence of Alibi that was raised bythe appellant. The trial magistrate failure therefore occasionedinjustice to the appellants. I have perused the appellant's unswornstatements. To claim that in those statements they raised thedefence of alibi is a misnomer. The appellants in their unswornstatements merely confined themselves on the activities of the daythat they were arrested. They did not say where they were on thenight of 18th of December 2003. to say that I was not involved in thecrime does not necessarily mean that you were not at the scene ofthe crime, in my view there was no Alibi raised to have required anyinvestigation by the prosecution nor to be considered by the trialmagistrate. The authorities cited do not therefore advance theappellants' case.

I now turn to consider the issue of identification, to me this isthe most critical aspect of this appeal, it is the appellants' case thatthey were not properly identified as the culprits in the commissionof the offence as conditions obtaining could not have favoured such positive identification. That although the complainant identified the 2nd appellant at an identification parade the parade was conducted in breach of the judge's rules, in response I wish to state that the record of the trial magistrate indicates that the 2nd appellant was in the bar with a group of other people when the complainant entered the bar. They were drinking. The complainant was subsequently joined by PW2. it was then that a person on the 2nd appellant's table made sarcastic comments about PW2's anatomy. A quarrel ensued. Later the complainant and P.w.2 opted to leave the bar.

They were followed by the appellants who managed to "arrest" the complainant and later bundled her in the car that was in the possession of the 2nd appellant. By then the 1st appellant had joined the group. I am convinced that the circumstances obtaining in the bar were such that the 2nd appellant could have been positively identified by the complainant, PW2 and P.W.3. After all they were quarrelling. There is no evidence that the complainant, P.w. 2 and P.W.3 were drunk and therefore could not identify the appellants. In any event the record shows that the complainant had only taken a soda.

Once the appellants chased and arrested the complainant theybrought her back to the bar. as they were bundling thecomplainant in the motor vehicle registration number KAL 931v in the presence of P.w.3 they informed him that they were taking thecomplainant to Kabete Police station. The 1st appellant who was wellknown to the bar owner, was the one pushing the complainant intothe car. it is also noteworthy that the 2nd appellant did not denybeing in possession of motor vehicle kal 931 v on the material

night,indeed the records kept by his employer and particularly the workticket testify to the fact that the 2nd appellant was in possession ofthe subject motor vehicle on 18th and 19th April 2003 respectively.This is the motor vehicle in which the complainant was forced intoand subsequently robbed, it is the same vehicle that was spottedthe following day dropping a plastic bag which when opened wasfound to contain some of the complainant's items that she had beenrobbed off the previous night. The 2nd appellant in his defence didnot at any given time say that he was not driving the subject motorvehicle on the material night or that the subject motor vehicle wasin the possession of another person apart from him. He also did notdisclaim the fact that he was an employee of Jomo KenyattaFoundation, a parastatal and the owner of the vehicle. Recordsshowed that he was in possession of the motor. The evidence onrecord as regards identification of the appellants whether direct orcircumstantial is in my view simply overwhelming, with or withoutthe identification parade the evidence on record was sufficient toconvict the appellants. Although the 2nd appellant complains that theidentification parade was conducted in breach of the Judge's rules,l do not think that the complaint is valid. I have perused the reportof the identification parade and I have seen nothing to persuade methat it was improperly conducted.

As regards the 1st appellant, and as already stated elsewhere inthis judgment she was clearly recognized by PW3, the bar owner asshe pushed the complainant into the subject motor vehicle. Thecomplainant also identified the 1st appellant in the process.

The appellants also allude to the many contradictions andinconsistencies in the prosecution case in support of theirsubmission that the prosecution evidence should not have beenbelieved. To reinforce their argument, they pointed out thefollowing contradictions. That although p.w.1 testified that whenforced in the motor vehicle she sat between 2 women, theprosecution case throughout was based on the fact that there wereonly 3 men and one woman involved in the crime, that the itemswhich were dropped in the paper bag and which were positivelyidentified as belonging to the complainant did not tally as PW4stated that the paper bag contained trousers and a short, whereasPW2 stated it had a referee card, trouser, 2 shorts and an abstract.The appellant's counsel argued that where the state adducesevidence which is contradictory and inconsistent, a conviction should not be founded on such evidence. He relied on the authorityof Pandya vs R (1957) e.a.336 in support of this position.

I have carefully considered and perused the record and although there are minor contradictions here and there I am satisfied that such contradictions and or inconsistencies are not so grave as to warrant the conviction being set aside. As I have already stated the evidence that nailed the appellants and placed thems quarely at the scene of the crime was the evidence of identification.

For the aforesaid reasons I find that the appellants' appeals onconviction have no merit and I consequently dismiss them.

As regards sentence, the maximum sentence provided undersection 296(1) of the Penal Code is 14 years. The appellants wereeach sentenced to 3 years imprisonment. This is by any standardsmore than lenient sentence and it is surprising that the appellantsappealed on sentence as well. The appellants should consider themselves very lucky for escaping with such lenient sentence. Theappeal on sentence is dismissed as well.

In the upshot the appeals are dismissed in toto.

Dated and delivered at Nairobi this 6th day of *May.* 2004.

M.S.A. MAKHANDIA

Ag. JUDGE