REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

APPELLATE SIDE

CRIMINAL APPEAL NO 1218 OF 2001

(From Original Conviction(s) and Sentence(s) in Criminal Case No. 1927 of 2001 of the Snr. Principal Magistrate's court at Kiambu

PETER NJOROGE KINGARA…..…….APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

J U D G M E N T

These two appeals are consolidated. The appellants John Kingara Njuguna and Peter Njoroge Kingara were convicted of the offence of Robbery with violence c/s 296(2) and sentenced to death. Being aggrieved by the said conviction they appealed.

In this appeal the appellants were represented by Mr. Wandugi while Miss Okumu appeared for the state. The learned counsel for the appellants has taken issue with the existence of two charge sheets on the record which contain different dates and complainants respectively.

The discrepancies therein may have caused prejudice to the appellants but the record shows that charge that was first filed with wrong particulars in respect of the date and complainant was subsequently amended. The two appellants were required to plead to the amend charge and did plead thereto denying the same. Thereafter the trial proceeded and at no point was the issue of prejudice raised. If anything, both appellants fully participated in the trial. We find therefore that, the discrepancies were cured by the amended charge and no prejudice whatsoever was occasioned to the appellants.

The alleged offence was committed at about 9.00p.m. The complainant had just alighted form a motor vehicle and was on his way home when he allegedly met the two appellants armed with iron bars and torches. He knew them as they came form that area.

After walking for about 20 metres he noticed torch light behind him and on turning the same were shone on him. There was electric light from the shops on the opposite side of the road. He saw Njoroge who assaulted him before his father Kingara came and ran through his pockets. He added that Kingara assisted Njoroge to assault him and remove the property mentioned in the charge sheet. When the members of the public arrived the assailants fled.

Pw3 allegedly encountered the appellants assaulting the complainant while pw2 met the two(the appellants) after the said assault. Both said some light was coming from the kiosks "not far away'. The complainant was subsequently examined by a clinical officer who certified his injuries as grievous harm.

He added however that the injuries were consistent with falling on the ground.

Following the report to the police, the two appellants were arrested. In their respective defences. They denied the charge.

The conviction of the appellants was based on the identification of the two. The attack was on a dark night. In the words of the complaint, when he turned torch light was shown on him. The consequence thereof is that he was blinded. How then was he able to positively identify the appellants? Granted that, there may have been some light from the shops not far away, the question that arises is, how far is "not far away" or "opposite side of the road"? Again if it is true, sufficient light reached the scene, why would anyone need torch light in the circumstances?

If pw3 were to be believed, that is, he witnesses the assault, how come he did not notice the frisking of the complainants pockets or removal of his shoes? These actions were simultenous with the attack and one cannot notice one and miss the other. The answer is that he did not see the encounter and if he did at all, then the conditions were such that he could not see what was actually taking place because of poor lighting.

There is then the evidence that the appellants used iron bars to assault the complainant. This must have been a vicious attack. Yet the medial evidence was that the injuries were consistent with a fall. These are irreconcilable differences.

As the first appellate court, we have made an independent evaluation of the evidence. We are of the view that the conditions for positive identification were not favourable in the circumstances of this case. The charge that carries a mandatory death sentence is very serious and any doubt should always be extended to the accused person.

In our view the conviction was most unsafe. Accordingly we allow these appeals by quashing the convictions and setting aside the death sentences. We order that both appellants shall be set free forthwith unless otherwise lawfully held.

Orders accordingly

Dated and delivered at Nairobi this 25th day of July, 2002.

MBOGHOLI MSAGHA

JUDGE

W. TUIYOT

JUDGE

Judgment delivered in the presence of Miss Okumu for the Republic and the two appellants.