REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CONSOLIDATED CRIMINAL APPEALS 156 & 157 OF 2012

NELSON MWACHI…….1ST APPELLANT

AMOS KIPRONO LANGAT…….……..2ND APPELLANT

VERSUS

REPUBLIC……...…RESPONDENT

(Being consolidated appeals from the original conviction and sentence by Hon. F. N. Kyambia, Principal Magistrate, dated 13th September 2012 in Eldoret Criminal Case No. 4480 of 2011)

JUDGMENT

1. The appellants were convicted for robbery with violence contrary to section 296 (2) of the Penal Code. They were sentenced to suffer death.
2. The particulars of the charge read as follows-

> *"On the 6th day of December 2011 at Langas Estate in Wareng District within Rift Valley Province, jointly with another not before court, while armed with offensive weapons namely stones, robbed Steven Enock Ewola of a torch and baton valued at Kshs 300 and immediately before the time of such robbery used actual violence on Steven Enock Ewola."*

3. The appellants filed separate appeals on 21st September 2012. The two petitions were consolidated on 21st April 2016. The appellants are aggrieved by the conviction and sentence. On 5th February 2014, the appellants were granted leave under section 350 of the Criminal Procedure Code to amend the grounds of appeal.
4. There are six principal grounds of appeal. First, that the prosecution failed to prove the charge beyond reasonable doubt; secondly, that the charge sheet was defective or at variance with the evidence; thirdly, that the learned trial magistrate erred by relying on the evidence of a sole identifying witness. In that regard, the appellants contend that the police erred by not carrying out an identification parade. Fourthly, the appellants state that the blood samples found on a *panga* were not subjected to chemical analysis; fifthly; that no exhibits were found in possession of the appellants; and, sixthly, that the trial court disregarded the defence proffered by the appellants without giving reasons. At the hearing of the appeals, the appellants relied wholly on their hand-written submissions filed on 26th February 2015.

5. The State contests the appeal. The position of the State is that all the key ingredients of the offence were proved beyond reasonable doubt. The learned Prosecution Counsel submitted that the defects in the charge sheet were not material and can be cured under section 382 of the Criminal Procedure Code. She submitted that the appellants were positively identified by the complainant who knew the 2nd appellant. Learned Prosecution Counsel also relied on the evidence of PW5 who had given chase to the attackers; arrested the appellants; and, recovered the *panga*. PW5 testified that the *panga* was blood-stained. Granted the circumstances, it was submitted that an identification parade was unnecessary. The State conceded that no exhibits were recovered in possession of the appellants. However, the totality of evidence linked the appellants to the crime; and, the trial court correctly found that the defences were unbelievable. In a synopsis, the State submitted that the appeal lacked merit and should be dismissed.

6. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw independent conclusions. In doing so, I have been careful because I have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
7. The key ingredients for the offence of *robbery with violence* are contained in section 296(2) of the Penal Code which provides-

> *"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death".*

8. From the evidence, PW1 was attacked by *three* assailants. They were armed with a *panga* and a stick. One of the assailants bit him. PW7 confirmed the injuries *"were caused by a human bite and a blunt object"*. The key ingredients of robbery with violence were all present.
9. The appellants however contend that the *particulars* in the charge sheet were at *variance* with the *evidence*. I fully agree. The particulars were that the appellants *"jointly with another not before court while armed with offensive weapons namely stones"* robbed the complainant. I have studied page 11 of the record. The complainant testified that *"suddenly I saw him raising a panga trying to cut me"*. At page 20 of the record, PW6 stated that *"we received the panga from one Barasa [PW5]. The panga had blood stains"*. Dr. Imbenzi, PW7, examined the complainant. He filled out a P3 form on 20th February 2012. He produced the P3 form (exhibit 1). He stated that the injuries to the complainant *"were caused by a human bite and a blunt object"*.
10. The offensive weapons in the charge sheet were *stones*. They were not produced at the trial. The evidence of PW1 pointed to a *panga* and a human bite. The *panga* was produced as exhibit 2. The evidence of Dr. Imbenzi (PW7) did not point to use of a *sharp* object. Clearly, the particulars of the charge were at *great variance* with the evidence. I find the discrepancies to be *material* and *not* curable under section 382 of the Criminal Procedure Act.
11. I will now turn to identification. The 2nd appellant and the complainant (PW1) knew one another. The 2nd appellant was a former employee of *Growel Security Company* where PW1 was working. PW1 knew him only by his first name, *Amos*. They had only worked together for one day. PW1 was on guard duties at Nexus Hotel on the night of 6th December 2011. He testified that Amos came to the premises at 9:00 p.m. He found him manning the gate. They spoke. PW1 was surprised because Amos lived in Huruma; and, it was at night. Amos said he had come to visit. Amos went to buy some cigarettes at the hotel counter. PW1 asked him about some company equipment (arrows) that Amos had taken away. Amos agreed to give them to PW1 the next day. Amos then left.
12. PW1 said that later that night at 1:00 a.m., he heard a dog barking. He decided to investigate. He testified as follows-

> *"I flashed my torch. I saw a person crawling. He went and hid behind the door. I was able to identify that person. It was the accused whom I had seen earlier. (Witness points at 1st*

accused person dressed in red T-shirt). When I saw him I decided to throw stones at him……but he was not moved. He ran towards me. I did not see what he was carrying. Suddenly I saw him raising a panga trying to cut me. I had a rungu and a torch. He was with two other persons. They came behind me. I was able to identify them by appearance. They all attacked me. The one who had a panga wanted to cut me but I held his hand. Amos bit me on the face. I raised an alarm. They overpowered me; one attacker ran away. It is Amos and 2nd accused who were left attacking me. 2nd accused hit me with a stick. I lost consciousness……When I regained consciousness, I found they had taken off with my rungu and torch"

13. Upon cross-examination by the 1st appellant, PW1 claimed he identified him from the electricity lights. The learned trial magistrate found that with regard to the 2nd appellant, the evidence was one of recognition; and, because *"there was electricity light emanating from security lights makes the possibility of mistaken identity remote"*. With respect, I disagree. I am alive that the learned trial magistrate warned himself of the dangers of relying on a single identifying witness. Granted all the circumstances and the authorities, I entertain serious doubts that PW1 *positively* identified his attackers.
14. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal had this to say-

"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."

15. In *Obwana & Others v Uganda* [2009] 2 EA 333, the Court of Appeal of Uganda stated as follows at page 337;

"It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. The rationale for this is that a witness may be honest and prepared to tell the truth, but he might as well be mistaken. This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence"

16. In *Maitanyi v Republic* [1986] KLR 198 at 201, the Court of Appeal delivered itself as follows-

"It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the "greatest care" the evidence of a single witness?"

17. When I juxtapose those authorities against the evidence, I find as follows. PW1 said he saw someone crawling in the dark. He flashed his torch. That can only mean it was *dark*. If there was

sufficient electric lighting, there would have been little need for the torch. There were three attackers. He claimed to have identified the appellants by the clothes they wore. He had not seen the 1st appellant earlier; he did not know him. PW1's opinion must have been coloured by his *subsequent* visit to the police station where he saw the appellants. The appellants had been arrested the same night at Elgon View area by PW5. PW1 did *not* identify the third assailant. The only one he seemed to identify during the attack was Amos (2nd appellant). Even then, the attack was *brief* and lasted only 8 to 10 minutes; and, the identification was made under *difficult* or *unfavourable* circumstances.

18. PW2 and PW3 responded to the alarm by PW1. They gave him first aid. PW4, who also worked at Nexus Hotel, was alerted of the attack by PW3. He contacted a traffic officer from Langas Police Station. The police came to the scene. PW4 claimed to have seen the 2nd appellant earlier in the day when he bought cigarettes at the counter. PW3 on the other hand claimed she saw the 2nd appellant smoking outside the hotel. That tallies with the evidence of PW1 that the 2nd appellant had come to the hotel earlier that evening. But the point to be made is that PW2, PW3 and PW4 did *not* witness the attack on PW1 at 1:00 a.m.
19. There is then the evidence of Godfrey Barasa (PW5). He was a guard with a different company. On the same night at about 2:00 a.m., he was on patrol duties with two of his colleagues at Elgon View area. They saw three people approaching from the direction of Racecourse area. When the three people saw PW5 and his colleagues, they started running away. PW5 and his colleagues gave chase. They apprehended the two appellants. They did not recover anything from the 2nd appellant. PW5 said that the 1st appellant had a blood-stained *panga*. PW5 called the police. They handed over the suspects and the *panga* to Police Constable Okello (PW6) of Langas Police Station. In the meantime, PW1 had reported the attack. He went back to the police station where he identified the appellants as his attackers.
20. I have already found that PW1 did *not* identify the appellants *positively*. PW5 and his colleagues arrested the appellants an *hour* after the attack in a different *location*. The evidence of PW5 is relevant but does *not* corroborate the identification of the appellants at the *time* of the *robbery*. The identification in *difficult* circumstances by a *single* witness in this case was *not* water tight. I *cannot* then say with confidence that the conviction was safe. See *Maitanyi v Republic* [1986] KLR 198 at 201, *Joseph Ngumbao Nzaro v Republic* [1991] 2 KAR 212.
21. PW1 lost consciousness in the course of the attack. When he came to, he found his torch and *rungu* missing. When PW5 and his colleagues arrested the appellants, they did not recover the torch or *rungu*. One of the three attackers escaped. It can be *presumed* that the items were stolen by the attackers; but there is no proof. It may be *inferred* from a set of circumstances; but doubt still lingers. The benefit of that doubt, coupled with doubtful identification, must go to the appellants. See *R v Kipkering arap Koske & another* 16 EACA 135 (1949), *Sawe v Republic* [2003] KLR 364.
22. Lack of positive identification casts a long shadow of doubt on the prosecution's case. The burden of proof fell squarely on the shoulders of the prosecution. It did not shift to the appellant. See *Kiarie v Republic* [1984] KLR 739, *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332 at 334, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).
23. I have also found that the particulars of the charge were at *great variance* with the evidence at the trial; and, that the *discrepancies* were *material;* and, therefore *not* curable under section 382 of the Criminal Procedure Act.
24. I have said enough to dispose of this appeal. But I am minded to comment on one other ground of appeal. The appellants contended that the trial court disregarded their defence without assigning any reasons. It is not true. The learned trial magistrate dwelt at length with the defence of both appellants at page 32 and 34 of the record. The learned trial magistrate found that the defence of the 2nd appellant merely related to the circumstances of his arrest. The 1st appellant on the other hand alleged there was a grudge between him and the complainant over a woman. On the totality of the evidence, the trial court rejected the defence. I cannot then say that there were *no* reasons given by the learned trial magistrate. It follows that there was *full* compliance with section 169 (1) of the Criminal Procedure Code.
25. In the end, I am *not* satisfied that the prosecution proved *all* the ingredients of the offence beyond

reasonable doubt. It follows as a corollary that the conviction was *unsafe*. The upshot is that the consolidated appeals are allowed. The conviction and sentence are hereby set aside. Both appellants shall be released forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 12th day of May 2016

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

1st and 2nd appellants (in person).

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.