IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & MURGOR, JJA.)

BETWEEN

CRIMINAL APPEALS NO(S). 72 & 73 OF 2011 (CONSOLIDATED)

MOSES MOSETI OLOO ……FIRST APPELLANT

STEPHEN NYONGESA MAKOKHA..... .SECOND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement of the High Court of at Kitale (Koome & Azangalala JJ.) dated 19th April, 2011 **In** H.C.C.A No. 5 & 6 OF 2009)

JUDGMENT OF THE COURT

1. The appellants were charged with two counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. In the first count it was alleged that on 16th June, 2005 at Kona Mbaya Junction, Matunda, along Eldoret - Kitale Highway jointly with others not before court , while armed with dangerous weapons, namely AK 47 and pistol, they robbed Richard Makhanu Waswa of his motor vehicle registration number KAT 022 F make Toyota Shark (matatu) and immediately before the time of that robbery they threatened to shoot the said person.

2. In the second count it was alleged that on the same date and place as in the first count and in similar circumstances the appellants robbed Moses Wasike Musapasi of K.Shs.4,000/= and immediately after the time of that robbery they shot the said person.

3. After a full trial the appellants were found guilty as charged, convicted and sentenced to death as by law provided. Their first appeal to the High Court was unsuccessful and so they moved to this Court. Through Mr. Miyienda, the appellants raised the following grounds of appeal:

> **"1. The learned Honourable Judges oft e High Court erred in law and fact by holding that the appellants were properly and positively identified contrary to the evidence on record.**
>
> **2. The learned Honourable Judges of the High Court erred in law and fact by failing to find that there was no nexus between the Criminal Case facing the appellants (accuseds) before the trial Magistrate and the arrest of the appellants in Eldoret without any evidence.**

3. The learned Honourable Judges of the High Court erred in law and fact by holding that the appellants were properly identified in the identification parade conducted by PW 7 when the same was actually flawed.

4. The learned Honourable Judges of the High Court Judges erred in law and fact by failing to find that the Charge Sheet before the trial Magistrate was defective in substance and materially in that it did not disclose particulars to warrant the offence of robbery with violence against the appellants.

5. The learned Honourable Judges of the High Court erred in law and fact by failing to find and hold that the trial proceedings before the Subordinate Court were null and void ab-initio by being conducted by incompetent Courts and/or Magistrates contrary to law.

6. The learned Honourable Judges of the High Court erred in law and fact by failing to find and hold that the proceedings and trial before the Honourable Magistrate were fatally defective for failure to comply with mandatory provisions of section 200 C.P.C.

7. The learned Honourable Judges of the High Court erred in law and fact by failing to find that the trial of the case before the Subordinate Court was a sham, null and void as the prosecution failed to call the investigating officer and other crucial witnesses."

4. By virtue of **section 361(1)** of the **Criminal Procedure Code;** this being a second appeal the Court's jurisdiction is limited to consideration of matters of law only. But first a highlight of the facts and evidence that gave rise to the trial court's judgement.

5. The appellant's conviction was largely based on evidence of their identification by **Moses Musabi Wasike, PW 1** and **Makhanu Waswa, PW 2** as well as recovery from the appellants of the weapons - AK 47 riffle and pistol by **Police Constable James Chege, PW 8.**

6. PW 1 was a shopkeeper at Kona Mbaya junction in Matunda. On 16th June, 2005 at about 4.00p.m.,two people whom he did not know passed by his shop. At around 6.00p.m., PW 1 saw the two people again when he talked to them and they responded rather rudely and then went towards a chang'aa den. Meanwhile, PW 1 closed his shop but as he walked out he saw the two people for the third time. They were at the verandah of his shop. He asked them what they wanted but they retort that it was none of his business to make such inquiries.

7. PW 1 went to his house behind the shop and at around 8.00 p.m., he heard a vehicle hooting outside. When he went out to check, he saw a vehicle, a black Nissan van by make, whose head lights were on, in the direction of his shop. He realized there were four people who were standing at the verandah of his shop. PW 1 asked the driver of the motor vehicle what he wanted and the driver informed him that he wanted to collect some diesel that had been left in his shop.

8 . The four men approached the driver of the motor vehicle and requested for a lift to Kitale. The driver was suspicious and so he declined. The four men offered to hire the vehicle to take them to Kitale but the driver still turned down their request. PW 1 walked back to his house and left his son, David Werunga, removing the diesel from the shop to give it to the driver.

9. Suddenly, PW 1 heard screams and he dashed out, only to be confronted by a pistol wielding man, who ordered him back to the house. The two struggled for a while before PW 1 was hit with a metal bar on his right hand and robbed ofK.Shs.4,000/= that was in his pocket. As PW 1 was being pushed to the verandah of his shop, he heard a gunshot and he took off. He was however not lucky; he was shot on the left thigh and fell down. He lost consciousness and when he came round he realized he was at Moi Referral Hospital, Eldoret; where he remained for about five days.

10. After his discharge he learnt from the police that some people had been arrested. When he went to

Matunda Police Station he found about 20 people who were under arrest and he was asked to identify whether any of them was among the ones who had attacked and robbed him. PW 1 said that he was able to identify the two appellants herein. He said they were among the four people he had seen on the material day. He added that his attackers had two guns, a pistol and an AK 47 riffle. The 2nd appellant had the pistol while the 1st appellant had the AK 47. He said that it was the 2nd appellant who robbed him of the K.Shs.4,000/=.

11. PW 2 testified as to how he was robbed of his motor vehicle registration number KAT 022 F. This was the vehicle that had stopped outside the shop of PW 1 to collect diesel. He said that at about 8.30 p.m., three people appeared, and one of them, brandishing pistol, went to the driver's side while two went to the side of the fuel tank. One of these two had a big gun while other had a metal bar. PW 2 was forced into the vehicle but shortly before it was driven off he managed to jump out.

12. PW 2 reported the incident at Matunda Police Station. **P.C. Richard Nyakora, PW 4,** and one Inspector Ondisi visited the scene and recovered four empty cartridges and one that was misfired. The police recovered the vehicle at Kimilili on the following day. PW 2 said that with aid of the vehicle lights, he was able to see the face of one of the three assailants, the one who had gone to the driver's side. He had a scar on the head, PW 2 stated. On 8th September, 2005 an identification parade was mounted at Matunda Police Station, and PW 2 was able to identify the second appellant because of the scar on his head. The witness added that the 2nd appellant was driving the motor vehicle with one hand while holding the pistol with the other hand.

13. The appellants were arrested by **P. C. James Chege, PW 8,** on 20th June, 2005 at about 5.00 a.m., outside Salama Hotel, Eldoret. The police had been tipped by an informer that a taxi registration number KAE 567 Q that had been stolen at Kitale on 19th June, 2005 had been spotted outside Salama Hotel. PW 8 accompanied by one Corporal Ombati and P.C. Driver Nagai identified themselves to the occupants of the said taxi as Police Officers and commanded them not to move. PW 8 opened the co-driver's door where the 1st appellant was sitting and he noticed an AK 47 rifle on the floor mat of the car. The 2nd appellant was at the driver's seat. Suddenly PW 8 heard gunshots and he fired back but the person who had fired at the police managed to escape.

14. Corporal Ombati recovered the AK 47 rifle, which had neither a magazine nor ammunition, from the second appellant and a pistol from the first appellant. The two appellants were escorted to Eldoret Police Station. In the morning it was reported that four armed gangsters using a motor vehicle registration number KAE 579 Q had committed a series of robberies. PW 8 and his colleagues informed the C.I.D. That they had recovered the motor vehicle that was used by the robbers and arrested two suspects in it.

15. The AK 47 rifle and the two empty cartridges at had been picked outside the shop of PW 1 where was shot at were examined by **Lindsay Klpkemei, PW 6,** a ball1stic expert. He ascertained that the cartridges were fired from the AK 47 riffle that had been recovered from the appellant. That, according to the prosecution, is the evidence that linked the appellants to the robbery of PW 2's vehicle and the shooting of PW 1.

16. In their defence, the appellants did not deny that they had been arrested on 20th June, 2005 outside Salama Hotel, Eldoret. The 1st appellant said that on his arrest at about 3.00 or 4.00a.m. he was

Watching football together with some friends and when the game ended he decided to go and take tea at Salama Hotel. He then heard gunshots and saw people running. Thereafter he was arrested.

17. The 2nd appellant said that on 20th June 2005 at about 5.30a.m., he alighted from a public service vehicle and decided to go to Salama Hotel for a cup of tea. As he walked out of the hotel, he heard gun shots and decided to run back to the hotel. He was followed up by three Police officers who arrested him and took him Kitale Police Station

18. **Mr. Miyienda,** learned counsel for the appellants, started by arguing grounds 1 and 3 which relate to identification of the appellants. In respect of the first ground appeal, counsel submitted that there were no favourable circumstances that would have enabled PW 1 and PW 2 to identify their assailants. The robbery took place at about 8.30p.m., and there was no sufficient light except that from PW 2's motor vehicle, he contended. He added that the two witnesses had not given to the police an appropriate description of their attackers before the identification parade was conducted.

19. Regarding the identification parade, Mr. Miyienda submitted that, the same was flawed because it was held under circumstances that contravened police orders. He added that the police officer who was conducting the parade was the same one who went to call the witnesses to identify the suspects. He further submitted that the 1st appellant alleged that the two witnesses who identified him had been with the Officer Commanding Station before they purported to pick him out and so they must have been given some leads by him.

20. Turning to ground two of the appeal, Mr. Miyienda submitted that although it was alleged by the prosecution that the gun that the appellants were allegedly found in possession of was the one that was used to commit the robberies at Kitale, there was no conclusive evidence to that effect. He stated that the appellants had no weapons at the time of arrest.

21. **Mr. Omwenga, Assistant Deputy Public Prosecutor,** conceded the appeal. He supported Mr. Miyienda's submission that there was no nexus between the gun that the appellants were found in possession of and the offences that they had been charged with. He submitted that Corporal Ombati, who PW 8 said he was with and who recovered the AK 47 rifle and the pistol was not called as a witness. It was therefore not clear whether the recovered riffle was the same one that was eventually passed on to the ballistic expert, PW 6, for examination and comparison with the empty cartridges that had been recovered outside the shop of PW 1.

22. While we agree that Corporal Ombati did not testify, we do not entertain doubt that he was together with PW 8 when the former recovered the guns while the latter was engaging a person who was shooting at them. What is doubtful is whether the AK 47 rifle that was recovered was the same one that was forwarded to ballistic experts for examination. PW 8 did not state the serial number of the gun. AK 47 rifles look alike and it is only their serial numbers that can be used to distinguish one from another. PW 6 said that he received the AK 47 that he examined together with the two spent cartridges from P. C. Sammy Kimaiyo Tanui of C.I.D. Lugari, who was not in any way associated with the case that was before the trial court. One other discrepancy is that PW 4 had recovered four spent cartridges at the place where PW 2 was shot, but PW 6 stated that only two spent cartridges were given to him for examination and comparison with the recovered AK 47 rifle. In such circumstances, the benefit of doubt must be given to the appellants because criminal cases must be proved beyond any reasonable doubt.

23. Turning to the issue of identification of the appellants, it is not in dispute that the robberies were committed between 8.00p.m., and 8.30p.m., PW 1 said that he had seen the appellants several times since 4.00p.m. on the material day and was able to remember their faces. The only source of light that would have enabled PW 1 to see the faces of the assailants at night was light from a motor vehicle. However, the light was beamed towards be shop of PW 1 and not directly on the faces of the robbers. PW 1 attended the identification parade nearly one month after the robbery and in the circumstances it is doubtful if he could correctly identify his assailants.

24. PW 2 had a very brief encounter with the robbers. He said he was able to see the face of the 2nd appellant only. It was not until 8th September, 2005, nearly three months after the robbery, when PW 2 attended the identification parade. Both PW 1 and PW 2 categorically stated that the identification parade consisted of twenty (20) members. PW 2 said that the 20 people were of different height and size, some were tall, others short, some slim and others big in size. None of the two identifying witnesses had given the police a description of their assailants before the identification parade was conducted as by law required. See **AJODE V REPUBLIC [2004) 2** KLR 81.

The evidence of PW 1 and PW 2 was in sharp contrast with that of Inspector **Walter Owino, PW 7,** who

conducted the identification parade. PW 7 testified that there were only eight members of the parade with close semblance to the appellants in height and body size. The two witnesses said that the identification parade had twenty (20) members whose semblance to that of the appellants was quite different.

25. Clause 6 (iv) (d) of Force Standing Orders states that:

> **"The accused/suspected person will be as possible of similar age, height, general appearance and class of life as himself."**

The evidence of the complainants, who were also the identifying witnesses, suggested that the identification parade was not conducted in strict conformity to the above quoted requirements of the force standing orders.

For all these reasons, it was unsafe to convict the appellants on the evidence of identification by PW1 and PW2.

26. What we have stated so far is sufficient to dispose of this appeal. We shall however comment on a few other issues that were raised by the appellants' advocate.

Firstly, we do not agree that the charge as drawn was defective in substance and that it did not disclose the offence of robbery with violence simply because it was alleged that the appellants "threatened" to shoot the complainants. The ingredients of a charge of robbery with violence are defined by **section 296 (2) of the Penal Code.** In **OLUOCH v REPUBLIC [1985]** KLR 549 this Court rendered itself in the following manner

> **"The ingredients of the offence of robbery under section 296 (1) of the Penal Code are:**
>
> **a. Stealing anything and**
>
> **b. At or immediately before or immediately after the time of stealing,**
>
> **c. Using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained."**

27. **Section 296 (2)** of the Penal Code states that:

> **"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 robbery he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death"**

Sections 296 (1) and (2) must therefore be read together. Proof of any one of the aforesaid elements of the offence of robbery with violence is sufficient. See **DANIEL MUTHOMI M'ARIMI V REPUBLIC** [2013] eKLR.

28. The appellants' counsel further argued that failure to call the investigating officer rendered the trial a sham, null and void. While we agree that it is a good practice to have the investigating officer testify and tie all the pieces of evidence together, we do not agree that failure to call such witness must automatically result in an acquittal. Each case must be considered on its own circumstances in order to determine the effect of such failure on the entire case. This Court so held in **HARWARD SHIKANGA ALIAS KADOGO & ANOTHER V REPUBLIC** [2008] eKLR.

29. In this case, the investigating officer would have been of great assistance to the prosecution case and

to the court. The record shows that on 3rd March, 2008 the prosecution sought an adjournment of the case because of the investigating officer's absence. Although the appellants opposed the application, the trial magistrate adjourned the hearing. When the trial resumed on 27th March, 2008, without any explanation as to what had become of the investigating officer, the prosecutor told the learned magistrate that he wished to close the prosecution case. Obviously the failure to call the investigating officer to testify weakened the prosecution case but that ***per se*** did not render the entire case a sham. If there was otherwise sufficient evidence linking the appellants to the charges that they faced the trial court would have been right in convicting the appellants, but as we have already demonstrated, the evidence was not watertight.

30. For all the reasons as stated herein, these appeals must be allowed, which we hereby do. We quash the appellants' conviction by the trial court and set aside the death sentence that was pronounced against each of the appellants. The appellants are set at liberty unless otherwise lawfully held.

DATED AT ELDORET THIS 25TH DAY OF JUNE, 2015

D.K.MARAGA

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

A.K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR