IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 215 & 216 OF 2011

BETWEEN

ANDREW MOMANYI NYAUMA ……..……..1ST APPELLANT

ERICK MOSIGISI MOMANYI ……..2ND APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisii (Makhandia & Sitati, JJ.) dated 20th May, 2011

in

H.C.CR.A. NO. 203 OF 2010)

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JUDGEMENT OF THE COURT

The record before us in this appeal shows that ***Bernard Obiero*** *(PW2)* ***(Bernard***) and ***Davis Monyage Miregwa*** *(PW4)* ***(Davies)*** were both motor bike riders operating their motor bikes for profit along Ikonge-Chebilat road within Nyamira District. The motor bike Bernard was operating belonged to ***Phares Mosigiri Nyamongo*** *(PW3)* ***(Phares***), whereas the motor bike Davies operated was ***"contracted"*** to him by one Kiage.

On 9th February, 2010 at about 7.00 pm., Bernard's motor bike had a puncture when he was at Nyankano area of Ikonge market. He took it for repair at the same Nyankano area. At about 7.30 pm. Davies was at Nyankano stage at Ikonge market with his motor bike. A man he knew before, as his sister was married at his place, approached him and asked to be taken to Sotik Highlands Tea estate. That man, whose one name he knew as Andrew and who is the first appellant in this appeal, was with another person. Davies told him that as it was late, they would pay Ksh.100 each. They agreed and boarded the motor bike and Davies took off. After 70 metres, another customer appeared and asked Davies to allow him board the motor bike but Davies told him the motor bike was full, but Andrew now first appellant told Davies to carry that other person as well as it was late. Davies agreed and picked that third person. He was then carrying three persons. When he reached Nyankano area, he found Bernard, whose motor bike's puncture repair had been completed. He stopped Bernard and asked Bernard to carry one of the three people he

was carrying promising to give Bernard Ksh.150/=. Bernard agreed and carried a person he later came to identify as Erick, the second appellant – a person he had known earlier on as according to Bernard, Erick had also been a motor bike rider in the same area sometime back and Bernard had been his passenger. Thus Bernard now had second appellant as his passenger whereas Davies remained with the first appellant and another man he did not know. The two, together with their passengers then started off for the original destination. At the start of the journey for Nyankano Davies was ahead, but Bernard overtook him as when Davies reached junction to Kerito, his passengers said they wanted to go to Kerito and Davies told them he did not have enough fuel and so he had stopped his motor bike. In the meanwhile Bernard had felt uneasy about his passenger who apparently was also changing the original destination. He told Davies that the passengers had sinister plans. On turning his motor bike to face Ikonge where they had come from, his passenger, the second appellant hit him on the leg with an iron bar. As Bernard wanted to take off, the second appellant hit him on the left thigh, Bernard felt pain and the motor bike fell down. Second appellant then knocked Bernard down and punched him several times and thereafter stabbed him with a knife on the neck and on the left upper arm as Bernard tried to struggle with him. Second appellant took Ksh.800/= which Bernard had and the second appellant thereafter took the motor bike Bernard was riding. In the meanwhile the other two passengers carried by Davies had also attacked Davies, punched him, kicked him and stabbed him on the left shoulder above the breast. Davies was certain it was Andrew, the first appellant who had stabbed him with a knife. Davies ran away but the ignition key to his motor bike was taken as he left the motor bike at the scene though his motor bike was not taken. His money Ksh.3400/= and mobile phone were taken. Both of them raised an alarm for help. The second appellant thereafter took Bernard's motor bike, put the first appellant and the other passenger on to it and they rode away leaving Davies's motor bike at the scene but without ignition key. Bernard ran back to Nyankono and Davies, after trying to activate his motor bike by other means as the ignition key was not available, also went to Nyankono where he found Bernard and both were taken to Ekerengo Health Centre as both were seriously injured and were bleeding. They were treated at the centre and thereafter they were transferred to Nyamira District Hospital. Bernard was treated and discharged whereas Davies was admitted.

On 10th February, 2010, they made a report to Nyamira Police Station where, according to Sgt. ***Anderson Zuma (PW6)*** *(Anderson)*, they gave the names of both appellants to the police. They mentioned the names of Andrew and Eric. They were issued with P3 forms which they presented to ***Sophia Kenaru (PW1),*** a clinical officer attached to Nyamira District Hospital, who examined both and formed the opinion that they were injured with the injury incurred by Bernard being classified as maim whereas that of Davies was classified as harm.

On 10th February, 2010, as Davies was leaving Nyamira District Hospital, he saw the first appellant near Nyamira District Hospital. He informed the other motor bike riders who rushed to hold the first appellant, but first appellant, in fear of lynching, ran to Nyamira police station where he was arrested. Later, as a result of information received, the police arrested the second appellant at Tinga area. After his arrest, he led police to a place where they had hidden Bernard's motor bike at Migori town to a home where the motor bike had been sold and in a bush near that home the motor bike was recovered. Phares gave police the full particulars of the motor bike, its engine number, and its chassis number. He also gave a full description of the motor bike. These tallied with the motor bike that was recovered from the place to which the second appellant had led the police. ***PC Charles Kitur (PW5)*** attached to DCIO Central Kisii Police Station on general duties, took the photographs of the motor bike, which photographs were produced as exhibits at the trial.

After full investigation, the appellants were produced in court and charged with two counts of Robbery with Violence Contrary to ***Section 296 (2)*** of the Penal Code. The particulars of the first count read as follows:-

> *"On the 9th day of February, 2010 at Ikonge village in Nyamira North District within Nyanza Province, jointly with others not before court while armed with dangerous weapons namely knives, robbed Bernard Obiero of his Ksh.800/= and a motor cycle engine No.88945 and chassis No. MD2DDDMZZSWH 20722 make Bajaj valued at Ksh.78,000/= and immediately before such robbery used actual violence to the said Bernard Obiero."*

And, as to the second count in which Davies was the complainant, the particulars were that:-

> *"On the 9th day of February, 2010 at Ikonge village in Nyamira North District within Nyanza Province, jointly with others not before court while armed with dangerous weapons namely knives robbed Devis Miregwa of cash Ksh.3,400/= a grey jacket, a black jumper and mobile phone make Nokia 1110 all valued at ksh.11,900 and at the time of such robbery used actual violence to the said Devis Miregwa."*

Each of them pleaded not guilty to the charges and after the learned Principal Magistrate heard all the prosecution witnesses whose evidence we have summarized above, they were put on their defence. Both gave sworn statements in their defence. The first appellant's defence was, in summary, that he was a businessman selling eggs. On 10th February, 2010, he was at his place of business near Nyamira District Hospital, the person who supplied him with eggs approached him demanding his money which was Ksh.840/=. He told him to hold on as he had not sold the eggs. That man took two crates of eggs. His wife held one crate which fell and eggs got broken. The appellant ran to the police station to make a report. He was told to wait for the eggs supplier but as he was doing so, he was put into the cells and remained in police custody till 4th March, 2010, when he was taken to the court and charged with the offence he did not know. He denied the offence.

The second appellant stated that he was a motor bike operator. On 28th February, 2010, he was at Tinga market where he lived. He woke up and set out to go and get the motor bike from the owner. He went to the bus stage, and while there, somebody approached him and asked him to go and ride for him a motor bike to some place. He declined at first but after that person promised him cash returns he relaxed and rode the motor bike for him. He then left with that person to Kisii and from Kisii, he was led by that person towards Migori. As it was late, they slept in Migori. Next day at 7.30 am that person led him to Masailand to a place called Uwethi. There they found a motor bike black in colour, make Bajaj. That man talked with the owner and at about 11.00 am they went to Nyamira Police Station. That man then arrested him and that is when he came to know that man was a police officer. He was placed in the cells and later charged with the offence he knew nothing about. He denied the charge and denied knowing the first appellant.

The learned trial Magistrate *(L. Komingoi)* after full hearing, in a judgment dated 5th October, 2010, but delivered by Mr. J. N. Wanjala, the Senior Principal Magistrate on 14th October, 2010, found each appellant guilty of each of the two charges, convicted each on each charge and the learned Senior Principal Magistrate, J.N. Wanjala, after considering mitigating factors, sentenced each appellant to death as by law provided. In convicting the two, the learned Principal Magistrate (L. Komingoi) addressed herself thus:-

> *"The evidence against the accused is overwhelming they have been identified positively. The (sic) led the recovery of the motor bike failed (sic) to call the person who had bought the motor bike does not weaken the prosecution case.*
>
> *In his sworn statement the 1st accused claimed be (sic) ran the police station to make a report. I find that this confirms PW4's evidence that the (1st accused) was spotted near Nyamira District Hospital by the complainant and his fellow riders and that is why he ran to the police station to avoid being lynched.*
>
> *The 2nd accused led to recovery of the motor bike the 2nd accused's story of being requested by unknown person to help him ride a motor bike from Migori does not hold water.*
>
> *I believe he knew where the motor bike was and that is why he led to its recovery……*
>
> *The accused persons posed as customers in order to robe the complaints of the motor bike and other items. Their change of destination was part of the plan.*

I find that the prosecution have proved their case against each accused person beyond reasonable doubt."

The appellants felt dissatisfied with that conviction and sentence. They appealed to the High Court vide ***Criminal Appeal Numbers 158 of 2010*** and ***203 of 2010***. At the hearing in the High Court, the two appeals were consolidated and heard in file ***No. 203 of 2010***. Makhandia and Sitati JJ. heard the appeals and in a lengthy judgment dated and delivered on 20th May, 2011, dismissed the appeals and confirmed the learned Principal Magistrate's findings in law and on facts stating in doing so as follows:-

"In view of the foregoing we cannot fault the learned Magistrate in her holding. The evidence against the accused is overwhelming they have been identified positively. The (sic) led to the recovery of the bike failed (sick) to call the person who had bought the motor bike does not weaken the prosecution's case……..."

The appellants were still not satisfied with that judgment and hence this appeal anchored on four grounds of appeal filed by the appellants firm of advocates.

These are that:-

"1. The learned Judges erred in both law and fact by finding that the prosecution had proved its case against the appellant beyond reasonable doubt.

2. The learned Judges erred in both law and fact by failing to consider the sworn evidence tendered by the accused.

3. The learned Judges erred in both law and facts by upholding the conviction and sentence of the subordinate court yet the circumstances for recognition or identification were not favourable and there was need for an identification parade.

4. The learned Judges erred in both law and fact in failing to find that the appellant was sentenced by a different Magistrate from the one who had convicted them without assigning any reason for so doing thereby making the sentence illegal."

In his address to us in support of the above grounds of appeal, Mr. Onyango Jamsumba, the learned counsel for both appellants, submitted that the case was not proved as against the appellants beyond reasonable doubt as conditions obtaining at the time of the alleged robbery were not favourable for correct identification as it was at night and the complainants, being passengers, had the appellants, who were riders with their faces away from them, so that they could not identify the appellants properly particularly as it was at night. Further, in his view the complainants did not give the police the description of the appellants to show they could identify the appellants.

As to the second appellant, Mr. Jamsumbah felt that the failure to call the chief and whoever allegedly bought the subject motor bike from the appellant was fatal to the entire case and lastly, Mr. Jamsumba said that as the judgment was made by one Magistrate, another Magistrate should not have delivered it without recording reasons for doing so. Mr. Mongare, the learned Senior Prosecuting Counsel, on the other hand supported the conviction and sentence stating that both appellants were properly identified and there was no need for identification parade as the appellants were known to the complainants. He ended by saying the sentence was proper as the second Magistrate who read out the judgment had in law, jurisdiction to pass the sentence as well.

The main issue raised in this appeal is that of identification. This is a matter of law. The complainants, Bernard and Davies, both are certain that two of the three people who attached them, injured them and robbed them of Bernard's motor bike and money and of Davie's money and mobile phone, were the appellants before court. Whereas the appellants, though not raising alibi defences, specifically say in effect that they were not at the scene and were not aware of these allegations and thus they were charged of the offences in respect of what they knew nothing about. In short, they raise alibi defences. There are

several decisions of this Court making it clear that in cases where allegations are being made against an accused person as having been identified as the perpetrator of a crime when the accused is denying it and is saying the witnesses were mistaken, the court needs to exercise greatest care in considering such evidence before entering a conviction based on the same. In particular when the evidence demonstrated that conditions for proper identification were not conducive, such care is of even greater importance. This is also the requirement when the evidence on identification is that of a single witness. The concern as regards possibilities of convicting a wrong person on mistaken evidence of identification was expressed succinctly in the case of **Roria vs Republic (1967) EA 583** in which the predecessor to this Court stated:-

> **"A conviction resting entirely on identification invariably causes a degree of uneasiness and as Lord Gardner K. said recently in the House of Lords in the course of a debate on Section 4 of the Criminal Procedure Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts.**
>
> > **'There may be a case in which identity is in question and if any innocent people are convicted today I should think that nine out of ten if there are as many as ten – it is on a *question of identity.' "***

There is also the case of **R. vs Turnbull and Others (1976) 3 All ER 549** in which the English Court made it clear that even in cases of recognition, the courts still need to be extra careful before convicting an accused person on the evidence of visual identification for even friends and near relatives can be mistaken when it comes to identity of an accused.

However, in the case of recognition as in this case, the courts have stated that though still greatest care is required as stated in the case of Turnbull ***(supra),*** yet recognition is more assuring as the witness has reasons to rely on in cases of recognition as opposed to cases of identification of a stranger. In the case of **Anjononi and Others vs The Republic (1976 – 80) 1 KLR 1566** this Court stated:-

> **"The proper identification of robbers is always an important issue in a case of a capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification of the assailants, recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We draw attention to the distinction between recognition and identification in Siro Ole Giteya vs The Republic (unreported)."**

In this case before us, Davies was approached by a person he knew before, whose sister was married at his place. He knew his first name as Andrew. He had carried that man as his passenger several times before the incident. That person talked to him and told him he wanted him to take him to Sotik Highlands. They negotiated the fare and agreed that that person together with the other person with whom he was would each pay ksh.100/= for the journey. That person is the first appellant in this case. That person later told Davies, as Davies declined to carry a third passenger, to carry the said third passenger, and Davies obliged. All that communication could not have taken place with the two looking away from each other. Further it could not have been all done in a flash of time. Davies clearly had time to see the first appellant. Further, as he was being attacked, he had stopped the motor bike and they again engaged each other.

Equally, Bernard saw the second appellant that day when Davies took him to Bernard. Davies asked Bernard to accept to carry one passenger and also told him what would be his cut if he did so. At that time Bernard was not yet riding the motor bike and he said he saw his would be passenger and knew him well. He knew him as Eric, and knew that Eric also used to ride motor bikes, an allegation Eric confirmed in his sworn statement in defence. Bernard had been his passenger when Eric was riding different motor bikes. According to Bernard, though it was getting dark, there was still enough light and

he saw the second appellant very well. All this was strengthened by the evidence of Sgt. Anderson which was clearly to the effect that the said appellant knew where the motor bike stolen from Bernard was, and through his help, the same motor bike which answered all the descriptions such as Chassis number and Engine number as demonstrated by Phares, the owner thereof, was recovered.

To cap is all, as concerns the first appellant, it is Davies who identified him near Nyamira District Hospital and that is when he ran for his life to police station.

There was, in our view, overwhelming evidence on identification. Mr. Jamsumbah felt an identification parade should have been conducted to test the allegations of the complainants on identification. With respect, we do not see what purpose the identification parade would have served. What, for example, would the parade have helped in the case of first Appellant who was arrested at the instance of Davies who pointed him out outside the hospital? Would Davies be called upon to identify the person he himself had pointed out and whom he pointed out because he knew him. And in any case, the record shows and the complainants and Sgt Anderson confirm it that the complainants gave the names of the appellants to police immediately after the attack.

We repeat that in our view the appeal on grounds of lack of identification of the appellants cannot stand.

Mr. Jamsumbah says the sentence should not have been pronounced by the Magistrate who did not prepare the judgment without him giving any reasons for doing so. He thus says the sentence was a nullity. We do not think so with respect. Where a Magistrate after hearing/and recording the whole or part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate, who has and exercises that jurisdiction, the succeeding magistrate may deliver a judgment that has been written and signed but not delivered by his predecessor or may take over the file where judgment has not been written and signed by the predecessor, act on the evidence on record or resummon the witnesses and recommence the trial. All that is spelt out in **Section 200 (1) (a)** and **(b**). But **Section 200 (2)** says:-

> **"Where a Magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a Magistrate who has and exercise that jurisdiction – the succeeding Magistrate may pass sentence or make any order that he could have made if he had delivered the judgment."**

It will be readily seen that under **Section 200 (1) (a)** the succeeding Magistrate can take over and deliver a judgment that had been written by his predecessor. Under ***Section 200 (2)*** he can pass a sentence where a judgment had been delivered and no sentence passed.

In this case the former Magistrate Komingoi had written and signed the judgment. The successor J.N. Wanjala delivered it. Under ***Section 200 (2)*** we see no reason why he could not pass the sentence. Mr. Jamsumbah says he needed to give reasons for doing so. In our view, it is only when the Magistrate is acting pursuant to ***Section 200 (1) (b)*** that he needs to explain to the accused his rights for in that case the Magistrate is enjoined to inform the accused that he can resummon the witnesses or can seek that the hearing recommences *de novo.* Other than that Provision, no provision was shown to us by Mr. Jamsumbah and we have seen none that requires the succeeding Magistrate to record his reasons for passing sentence in respect of a judgment written by his predecessor. We see no merit in this ground.

Mr. Jamsumbah did not address us on ground 3 of the Memorandum of Appeal and rightly too because, on our own perusal of the judgment of both the Magistrate and the first appellate court, nothing turns on that allegation.

The sum total of the above is that, we see no reason to interfere with the decisions of both the Subordinate Court and the High Court.

The appeal lacks merit and is hereby dismissed.

Dated and delivered at Kisumu this 26th day of July, 2013

J.W. ONYANGO OTIENO

……

JUDGE OF APPEAL

F. AZANGALALA

……..

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR