REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION- MILIMANI COURT

CRIMINAL APPEAL NO. 25 OF 2020

KEFA MUGITA AVINA.....1ST APPELLANT

PETER GACHIE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal arising from the original conviction in Criminal Case No.1129 of 2017

at Chief Magistrates Court Makadara by Hon. E. K. SUTER –SRM

on 29h November 2019)

JUDGMENT

1. Kefa Mugita Avina (1st Appellant) and **Peter Gachie** (2nd Appellant) were jointly charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. **Particulars** of the offence were that on the 26th day of May 2017 at Kariobangi roundabout in Kariobangi North Estate within Nairobi County, jointly while armed with a dangerous weapon namely homemade pistol robbed **John Maina Mwangi** mobile phones make Huawei and X-Tigi 523 Mini all valued at Ksh. 20,000/- and at the time of such robbery threatened to use actual violence against the said **John Maina Mwangi.**

2. In the alternative the 1st Appellant faced a charge of handling stolen property contrary to **Section 332(1)** as read with **Section 322(2)** of the Penal Code. **Particulars** being that on the 26th day of May 2017 at Kariobangi roundabout in Kariobangi North Estate within Nairobi County, otherwise than in the course of stealing dishonestly received or retained cash Kshs. 4,550/-, two mobile phones Huawei and X-Tigi knowing or having reason to believe it to be stolen property.

3. The 2nd Appellant on the other hand faced two other counts :

Count II Being in possession of a firearm contrary to **Section 21(1)** as read with **Section 21(2)** of the Firearms Act chapter 114, laws of Kenya. Particulars being that on the 26th day of May 2017 at Kariobangi roundabout in Kariobangi North Estate within Nairobi County, was found armed with an imitation of firearm without a serial number.

Count III – Being in possession of ammunition without a certificate contrary to Section 4(2) (3) of the Firearms Act, chapter 114 laws of Kenya. Particulars being that on the 26th day of May 2017 at roundabout in Kariobangi North Estate within Nairobi County, was found in possession of ammunition to wit two (2) rounds of 9mm without ammunition certificate

4. Both appellants denied charges and having been taken through full trial both of them were convicted on the 1st count. Then the 2nd appellant was convicted on both Counts II and III. In the result they were sentenced as follows:

> ***"Count I: Accused 1 and 2…to serve 20 years imprisonment. Less the 2 years in custody and they shall therefore serve 18 years imprisonment.***

Count II: Accused 2 sentenced to 5 years imprisonment.

Count III: Accused 2 sentenced to 3 years imprisonment.

For Accused 2- Sentence in Count 1,2 and 3 to run concurrently ….”

5. Aggrieved by the conviction and sentence both appellants preferred this appeal. The 1st appellant set out grounds of appeal as follows:

> *1. **THAT**, the learned trial Magistrate erred in matters of law and fact when he convicted and passed the sentence in this case without considering that Section 200(3) of the CPC was not complied with;*
>
> *2. **THAT**, the learned trial Magistrate erred in matters of law and fact when he convicted yet failed to find that evidence adduced was contradictory;*
>
> *3. **THAT,** the learned trial magistrate erred in matters of law and fact when he convicted yet failed to find that evidence relied on was suspicious;*
>
> *4. **THAT,** the learned trial Magistrate erred in law and fact when he relied on unproven allegations to convict;*
>
> *5. **THAT,** the learned trial Magistrate erred in law and fact for failing to find that the appellant was a victim of circumstances;*
>
> *6. **THAT,** the trial Magistrate erred in law and fact by rejecting and dismissing the plausible defence.*

The 2nd appellant relied on amended grounds of appeal as follows:

> *1. **THAT**, the learned trial Magistrate erred in matters of law and facts by failing to find that the charge against the appellant was fatally defective;*
>
> *2. **THAT**, the learned trial Magistrate erred in matters of law and facts and overlooked the issue of identification of the appellant;*
>
> *3. **THAT,** the learned trial magistrate erred in matters of law and facts by failing to find that the appellants mode of arrest was questionable;*
>
> *4. **THAT,** the learned trial Magistrate erred in law and fact for failing to find that no independent witnesses testified in this case;*
>
> *5. **THAT,** the learned trial Magistrate erred in law and facts by drawing inferences from evidence which did not flow logically and reasonably.*
>
> *6. **THAT,** the trial Magistrate erred in law by failing to note that the burden and standard of proof by the Prosecution was not discharged and thus the Prosecution case was not proved beyond reasonable doubt as provided for under the law, thus the guilty verdict was unsafe and could not be supported having regard to the evidence and that on any ground; it was a miscarriage of justice.*

6. Both appellants canvassed the appeal through written submissions. The 1st appellant who was represented by learned counsel, Mr. Ogeto, urged that the charge sheet was defective which should have been amended prior to the case proceeding. That the alleged robbery having been committed at 7.30 pm, the question of mistaken identity should have arisen; some items having been recovered at the time of arrest, they should have been dusted to associate them with the 1st appellant. That the court should have visited the scene of crime to establish the lighting system to confirm if the lighting system could have assisted the complainant to identify the appellants.

7. The 2nd appellant argued that the charge sheet was fatally defective. On the 1st count he argues that the date of arrest was indicated as 29/3/2017 and the date he was arraigned in court as 30/3/2017 but according to evidence tendered they were arrested on the same day the offence was alleged to have been committed; that the charge sheet did not disclose that money was stolen from the complainant an allegation that came up in evidence; that phones received by the Investigating Officer differed from those mentioned on the charge sheet and no knife was mentioned in the charge sheet.

8. On the issue of identification he argued that it was at night therefore the identification could not have been correct.

9. The Respondent/State opposed the appeal. It urged that the prosecution proved the offence of robbery with violence to the required standard of proof, namely, beyond reasonable doubt as evidence adduced by prosecution witnesses was consistent and clear that the complainant was robbed of his mobile phones and money; his assailants were two (2) and were armed with a dangerous weapon namely homemade pistol. That the appellants were positively identified as the assailants of PW1.

And the doctrine of recent possession was applicable as property belonging to PW1 was found in possession of the 1st appellant minutes after it was stolen. The 2nd appellant on the other hand was armed with a homemade pistol and when the police started shooting

he fled, conduct that was inconsistent with that of an innocent person. That the 2nd appellant also possessed two (2) rounds of ammunition.

10. On sentence meted out it was urged that it was lenient. The fact of the jurisprudence in ***Francis Karioko Muruatetu & Another Vs. Republic (2017) eKLR*** having been applicable was appreciated; On count II and III this court was called upon to correct the error on record as sentences passed were contrary to the minimum term provided by law.

11. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. This was well explained in the case of ***Kiilu & Another Vs. Republic (2005) 1KLR 174*** where the Court of Appeal stated that:

> ***(i) "An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***(ii) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

12. The case presented by the prosecution was that **PW1 John Maina** was passing through the pedestrian Bridge (at the Kariobangi roundabout) at 7.00 pm when he was accosted by two (2) people. One of them removed a gun from his jacket and flaunted it as his mate demanded from him a phone, watch and cash. They took his two (2) phones and cash Ksh.4,500/- then gave him Ksh. 100/- for fare and ordered him to leave. As he walked towards the bus stage he encountered Police Officers and reported the incident. Since it had taken less than 4 minutes he could identify the individuals. He went back to the scene with Police Officers and managed to identify the assailants who were arrested. A search on one of them resulted into the recovery of three phones, two (2) of them belonged to the complainant. Also recovered during the search of the two (2) individuals was some eight dollars, Ksh. 600/- and a homemade pistol. Guns were fired during the incident. One of the suspects was injured and taken to hospital for treatment. Investigations were carried out and the appellants were charged.

13. Upon being placed on their defence, both appellants opted to make unsworn statements. The 1st appellant testified that on the material date he was from town where he had engaged in casual labour. As he walked towards the area he was to get means of transport he heard a gunshot, froze and he was arrested. It was alleged that he was involved in a robbery where cash and a phone had been stolen. Although he denied the allegations he was taken to the Police Station and charged.

14. The 2nd appellant stated that on the fateful date he was carrying on his touting work when he was arrested. That upon hearing gunshots he fainted. He was surrounded by people who took him to Mama Lucy Hospital and later to Kenyatta National Hospital as he had been shot. It was alleged that he had a gun. That P.C Wambugu took his phone and cash Ksh. 600/-. He concluded by pointing out what he deemed to be apparent contradictions in the matter.

15. I have carefully considered the submissions, and a myriad of authorities cited. It is argued that the charge sheet was defective, as the Occurrence Book number was indicted on the charge sheet as OB No. 45/26/5/17 when the date of arraignment was 25/08/2017; the date of arrest was 29/03/2017. Then the date of arraignment was also indicated as 30th March 2017, dates that were at variance with the particulars of the the offence.

16. ***Section 134*** of the Criminal Procedure Code (CPC) which is in regard to what should be specified in a charge provides as follows:

> ***Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence*** **charged.**

17. In the case of ***Sigilani Vs. Republic (2004) 2KLR 480*** the court held that:

> ***"The principle of the law governing charge sheets is that an accused should be charged with the offence known in law. The offence which such an accused is charged with should be disclosed and stated in clear an unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable and accused person prepare his defence to the charge…"***

18. Ingredients of the charge of robbery with violence are provided in **Section 296 (2)** of the Penal Code. There should be proof of the number of assailants who must be more than one person; or the individual(s) must be armed with dangerous weapons; and actual violence or threat of such violence must be occasioned on the person of the complainant as the act of theft is committed.

19. This was summed up in the case of ***Oluoch Vs. Republic (1985) KLR*** where it was held that:

> ***"Robbery with violence is committed in any of the following circumstances;***
>
> ***1. The offender is armed with any dangerous or offensive weapon or instrument.***
>
> ***2. The offender is in company with 1 or more person or persons, or,***

3. At or immediately before or immediately after the time of the robbery, the offender wounds, beat strikes or uses other personal violence to any person"

20. The appellants herein were charged with an offence that is known in law. The particulars of the offence captured disclosed the charge of robbery with violence. It was clear and unequivocal which enabled the appellants to plead to it and prepare for the defence. Looking at the record of the trial court they took part in the proceedings cross examined witnesses and ultimately put up a strong defence. This was proof that what the appellants were being accused of was accurately communicated to them.

21. The gravamen of the appellants' complaint is the question of discrepancies that were apparent on the charge sheet in respect of dates of arrest and arraignment. The offence is indicated as having been committed on 26th May 2017. Evidence adduced confirms that fact and it was stated that the arrest was effected on the same date. The 1st appellant was arraigned in court on 29th May 2017. However, the charge sheet has the date 29/5/2017 as the date of arrest and 30/3/2017 as the date of arraignment. An error that came about following consolidation of the two matters.

22. On the question of the charge sheet having not disclosed that money was stolen, at the outset in the initial charge sheet it was stated that cash, in the sum of Ksh.4550/- was stolen, that was included in the sum of Kshs 20,000/- that was part of the value of the phones that were stolen. However, in the amended charge sheet the sum of money was omitted, however, that per se would not void a charge sheet. The question of which make of cellphone the Investigating Officer received was raised but clarified following evidence adduced.

23. Therefore, the question the court must ponder is to whether the discrepancies alluded to were prejudicial to the appellants.

24. In the case of ***Peter Sabem Leitu Vs. R. CR. Appeal No. 482 of 2007 (UR)*** the court held that:-

"The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded..."

25. The accused persons were arrested soon after the act, but one of them had to be taken to Hospital following the injury sustained at the time. The 1st appellant was arraigned at the outset on the 29th May 2017 having been arrested on 26/5/2017 dates that are clearly indicated on the initial charge sheet that was cancelled following the consolidation of the cases that had been registered separately, that was done on 28th August 2017 where he was jointly charged with the 2nd appellant. The discrepancies do not go to the root of the charges.

26. **Section 382** of the CPC provides thus:

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice

These discrepancies, variance between the dates on the charge sheet is curable under **Section 382** of the CPC. It cannot vitiate the conviction.

27. This was also stated in the case of ***JMA Vs. Republic (2009) KLR 671*** where it was held interalia that :-

"It was not in all cases in which a defect detected in the charge would render a conviction invalid. Section 382 of the Criminal Procedure Code was meant to cure such an irregularity, where prejudice to the appellant is not discernible."

28. It is alleged that **Section 200(3**) of the **CPC** was not complied with. The alluded to provision of law provides thus:

Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

29. The trial court presided over by Hon. E. Suter heard the matter from when the charges were consolidated to the end. Compliance with **Section 200(3)** of the CPC was not applicable. This therefore explains why the appellants did not pursue that particular ground of appeal.

30. On the question of identification, the complainant testified to have been attacked at or about 7.00 pm and there were street lights and vehicles were passing by. There was no eye witness therefore it was evidence of a single witness and the question begging is whether it was a question of mistaken identity as alleged by the appellants.

31. **Section 143** of the evidence Act provides thus:

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

32. In the case of ***Abdalla Wendo Vs. Republic (1953) 20 EACA 166*** it was held that:

"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

33. ***In the case of Wamunga Vs. Republic (1989) KLR 424*** it was held that:

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction

34. The trial court was not specific as to whether it cautioned Itself of the dangers of relying on single witness identification evidence but its judgment it was guided by the case of ***Francis Njiru & 7 Others Vs. Republic CR. Appeal No. 6 of 2001 (UR)*** where the Court of Appeal stated that

"The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. v. Turnbull [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all."

35. The court noted that witnesses were consistent that it was at night, there were people walking, there were street lights and the scene was also lit by light from passing vehicles. It considered the testimony of the complainant as to how he described the 1st appellant and his manner of dressing and the colour of the clothes, facts not challenged in cross examination. It found that the appellants took time with the complainant as they engaged in conversation. And after he reported the matter to the police, he returned with them and identified the individuals. The fact of the source of lighting was corroborated by arresting officers who were at the scene, and this was not disputed by the appellants at trial. The complainant herein who was engaged by the appellants in a conversation identified his assailants and some recovery was made. He identified the 2nd appellant as the one who pointed a gun at him as the 1st appellant removed his phones and money from his pocket. There was close contact between them such that he could not be mistaken as to their identity.

36. On the question as to whether the offence was proved to the required standard. I have afore pointed out the ingredients of the offence of robbery with violence. The complainant testified that as he walked along the footbridge he was accosted by the two (2) appellants. The 1st Appellant took his phones and money as the 2nd Appellant threatened him with a gun. He positively identified the cellphones as Huawei GR3 and Xtigi S.23 mini and proved ownership by Production of receipts that were issued at the point of purchase. Cash Ksh. 4,550 was also recovered. These items were in possession of the 1st Appellant.

37. The prosecution relied on the doctrine of recent possession. It was urged that the property belonging to the complainant was found in possession of the 1st appellant a few minutes after being stolen. In the case of ***Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR,*** the court stated as follows:

"In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

38. Evidence adduced proved the fact of the cellphones having been found in possession of the 1st appellant; phones that were positively identified by the complainant and they had been stolen from him within a short duration estimated to be 4 minutes or thereabout. The 1st appellant bore evidential burden to explain how he came to possess the phones, an explanation that was not rendered. The doctrine of recent possession as indeed applicable.

39. It was the contention of the 2nd appellant that the Investigation Officer received three phones Infinix, Huawei and Itel which was contradictory to the phones that were indicated in the charge sheet. Evidence adduced by **PW5 No. 227408 Corporal Charles Warui Wambugu** was clear. Upon being searched the 1st appellant was found in possession the two (2) phones, Huawei and Xtigi that were mentioned in the particulars of the offence while the 2nd appellant was found in possession of the Itel phone which did not belong to the complainant.

40. The prosecution proved the fact of one of the assailants having been armed with an offensive weapon; they were more than one individual and the offender threatened to shoot the complainant prior to his property being taken. This was robbery with violence.

41. On the count II, the 2nd Appellant is stated to have been armed with an imitation of a firearm. **Section 21 (1) (2)** of the **Firearms Act, Cap 114 (K)** provide thus:

(1) No person other than a registered firearms dealer shall convert into a firearm anything which, though having the appearance of being a firearm, is so constructed as to be incapable of discharging any missile through the barrel thereof.

(2) Any person who contravenes the provisions of this section shall be guilty of an offence and liable to imprisonment for a term of not less than seven, but not exceeding fifteen, years.

42. The exhibit recovered was submitted to the Ballistic expert, **PW4, No. 235225 Inspector Kennedy Chomba.** What he found was a double barreled homemade gun that measured 196mm in length. It was constructed by use of metallic tubes, metal rods, metal strips, bolts and wood. The item had a muzzle, chamber, two cocking handles cum striker and a wooden hand grip, parts that assumed a conventional firearm. The gun that was designed to fire 9X19 rounds of ammunition was tested and it did fire the ammunition. In the result he concluded that it was a firearm as per the Firearm Act.

43. A gun was pointed at PW1. He did identify the individual who had the gun as the 2nd appellant. **PW2 No. 104919 P.C Onesmus Rotich** grabbed the 2nd appellant in an endeavor to arrest him and they fell down. It was his testimony that the 2nd appellant was holding the firearm. **PW3. No 67351 P.C Kusee Abdi** testified to have seen the 2nd appellant holding the pistol at the outset and that he fired at them. As a result he fired back and the bullet hit his knee. PW5 who participated in arresting the appellants confirmed in material particulars testimonies of PW2 and PW5 as to how they recovered the homemade gun.

44. The object the 2nd appellant had was designed, constructed and converted into a firearm and it was proved beyond doubt that it was capable of discharging the ammunition. This was an imitation of a firearm.

45. On court III, the 2nd appellant was stated to have contravened

Section 4(2) (3) of the Firearms Act that provides thus:

(2) If any person—

(a) Purchases, acquires or has in his possession any firearm or ammunition without holding a firearm certificate in force at the time, or otherwise than as authorized by a certificate, or, in the case of ammunition, in quantities in excess of those so authorized; or

(b) Fails to comply with any condition subject to which a firearm certificate is held by him, he shall, subject to this Act, be guilty of an offence.

(3) Any person who is convicted of an offence under subsection (2) shall—

(a) If the firearm concerned is a prohibited weapon of a type specified in paragraph (b) of the definition of that term contained in section 2 or the ammunition is ammunition for use in any such firearm be liable to imprisonment for a term of not less than seven years and not more than fifteen years; or

(b) If the firearm is any other type or the ammunition for any weapon not being a prohibited weapon be liable to imprisonment for a term of not less than five, but not exceeding ten years:

Provided that, when the offence for which the person is convicted (not being an offence in relation to a prohibited weapon or to any ammunition therefor) is failure by neglect to renew a firearms certificate such person shall be liable to pay a fine at the rate of five hundred shillings per day for every day or part hereof during which his default continues but so that no person shall be liable to pay a fine greater than the maximum provided by this subsection and if such fine is not paid then to imprisonment for a term not exceeding two years

46. The two (2) rounds of ammunition submitted to the Ballistic expert were stated to have been in possession of the 2nd appellant. In the course of the examination PW4 testifired the ammunition and formed the opinion that both ammunition were capable of being fired and were therefore ammunition per the Firearms Act. According to the law, a person who is in possession of the ammunition must hold a certificate. The 2nd appellant did not have such a certificate therefore he contravened the law.

47. Although the appellants put up a spirited defence of mistaken identity, the prosecution proved the case against them on the 1st, 2nd and 3rd counts as charged.

48. On the question of the sentence imposed, I have been called upon to correct the error on record in respect of the lenient sentence imposed by the trial court. It is argued that in meting out the sentence the trial court did not give reasons why it passed sentences that were below the minimum prescribed sentence. In the case of ***Sammy Omboke & Another Vs. Republic (2019) eKLR*** the Court of Appeal stated that:

"In the instant appeal, there was no cross-appeal by the prosecution for enhancement of sentence before the High Court nor was there a warning to the appellants by court that the sentence meted upon then could be enhanced; and there was no notice of enhancement. Guided by the judicial pronouncements of this Court above, we find that the learned judge erred in enhancing the sentence meted out on the appellants. In the absence of a cross-appeal and notice and or warning the judge had no jurisdiction to enhance the sentence."

49. Other than a notice of enhancement of sentence having not been put in, learned counsel for the State Ms. Kibathi did appreciate that the appellants were convicted and sentenced following the then jurisprudence in the case of ***Francis Karioko Muruatetu & Another Vs. Republic (2017) eKLR*** and as such the appellants benefited from the reduced custodial sentence. Following the jurisprudence courts

interpreted it to mean that they were seized of discretion to impose sentences lesser than what was prescribed as a minimum sentence.

50. From the foregoing, I would have no reason to interfere with the sentences imposed in respect of both appellants.

51. The upshot of the above is that the appeals fail in their entirety. Accordingly, both appeals stand dismissed.

52. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF MARCH, 2022.

L. N. MUTENDE

JUDGE:

IN THE PRESENCE OF:

Mr. Kiragu for ODPP

Appellants

Court Assistant – Mutai