REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 122 OF 2018

CONSOLIDATED WITH

CRIMINAL APPEAL NUMBER 130 OF 2018

BETWEEN

DANIEL MUTIE WILLY.....1ST APPELLANT

FREDRICK MUTUA MUENI.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera in Cr. Case No. 2442 of 2015 delivered by Hon. Mutuku (SRM) on 30th May 2018).

JUDGMENT

1. The Appellants **Daniel Mutie Willy** and **Fredrick Mutua Mueni** were charged with four counts of offences. In counts 1 and II, they were charged with of robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code**. The particulars of Count I were that on the 9th day of May 2015 along Ayany Drive in Kibera within Nairobi County, jointly with others not before court, while armed with dangerous weapons namely pistols robbed **Kelvin Omondi Ochara** of cash in the sum of Kshs. 12,800/=, two mobile phones make Samsung Galaxy Trend and Tecno P5 both valued at Kshs. 21,000/=, Equity bank ATM card, wallet, gold ring and a leather jacket, and at the time of such robbery, used actual violence to the said **Kelvin Omondi Ochara.**

2. The particulars of Count II were that on the 9th day of May 2015 along Ayany Drive in Kibera within Nairobi County, jointly with others not before court, while armed with dangerous weapons namely pistols robbed **Rashid Gwadi Oywa** of cash in the sum of Kshs. 5,000/= and a leather jacket, and at the time of such robbery, used actual violence to the said **Rashid Gwadi Oywa**.

3. In count III and IV, they were charged with being in possession of firearm and ammunition respectively contrary to **Section 89(1)** of the **Penal Code.** In count III it was alleged that on the 17th day of June 2015 along Ayany Drive in Kibera within Nairobi County in the Republic of Kenya, were found in possession of a firearm namely homemade gun without a firearm certificate in circumstances which raised reasonable presumption that the said firearm had recently been used in a manner prejudicial to public order.

4. In count IV, it was alleged that on the 17th day of June 2015 along Ayany Drive in Kibera within Nairobi County in the Republic of Kenya, they were found in possession of one round of ammunition without a firearm certificate in circumstances which raised reasonable presumption that the said firearm had recently been used in a manner prejudicial to public order.

5. The Appellants pleaded not guilty to all the four counts. Upon conclusion of the trial, they were both found guilty of counts 1 and II The 1st Appellant was convicted of counts III and IV. In counts 1 and II, they were both sentenced to suffer death whislt in counts III and IV, the 1st Appellant was sentenced to serve seven (7) years imprisonment for each count. The sentences in counts II, III and IV were held in abeyance. Aggrieved by both their convictions and sentences, the Appellants preferred separate appeals to this court. The appeals have now been consolidated for purposes of this judgment.

6. The 1st Appellant's appeal is based on five (5) grounds contained in his amended Grounds of Appeal filed on 21st May 2019. He is aggrieved that the learned trial magistrate erred in law and facts by relying on identification evidence that was not free from error or mistake.

He complained that the trial magistrate relied on conflicting evidence to convict him. He faulted the investigations conducted in the case for being shoddy and that Sections 213 and 310 of the Criminal Procedure Code were complied with. Finally, he was displeased that the trial magistrate dismissed his plausible defence.

7. On his part, the 2nd Appellant raised twenty six (26) grounds of Appeal in his Petition of Appeal filed on 23rd July, 2018. He condensed them into five grounds in his written submissions filed on 8th April 2019. These are that: he was not positively identified; the state witnesses gave inconsistent testiminies; the conviction was without key evidence; the trial court misconstrued demeanour evidence; and that the prosecution did not prove their case beyond reasonable doubt.

Summary of Evidence

8. This being the first appellate court its duty is to re-evaluate the evidence adduced by the witnesses and arrive at its own independent conclusion. (See **Okeno v Republic (1972) EA 32).**

9. The Prosecution's case can be summarized as follows: On 9th May, 2015, **PW3, Kelvin Omondi Ochero** was in his shop at Olympic stage in Kibera when he received a call from a friend who wanted him to attend a party in Westlands. He requested his neighbour **PW5, Rashid Gwadi Oywa** to assist him with his vehicle. PW5 gave him motor vehicle registration number KAY 756G Toyota NZE silver in colour and told him that he would accompany him. At around 9.00 pm, they went to pick PW3's friend Nancy at Ayany. PW3 was the one driving the vehicle while PW5 sat in the co-driver's seat. As they were approaching PW3 friend's gate, PW3 saw a man in a hooded jumper looking confused. Another man moved to PW5's side and pointed a gun at him as another one known as 'Mbash' pointed at PW3's head with a gun from the driver's side.

10. The men ordered PW3 and PW5 to move to the backseat which they did. A third man jumped to the driver's seat as two more boarded the vehicle making them five in total. Two of the men sat in the front seat while the Appellants and one other sat on PW3 and PW5 in the backseat. They hit them on the head and told them to face downwards. PW5 tried to look up and was hit on his head with an iron. There were street lights at the place where they had been car-jacked and the vehicle light was also on. PW3 looked up and saw that all the five men were armed. He identified them as Mbash, Mapengo, a Gor fan and the Appellants whom he knew well as he used to see them in Olympic.

11. The men searched their pockets and took away PW3's wallet which had Kshs. 12,800/=. They also took away his silver chain, rings, jacket, two phones make Samsung Galaxy and Techno P5 and withdrew money from his MPESA after demanding for his PIN number which he gave them. Further, they took his bank ATM cards and withdrew about Kshs. 20,000/= from his bank account. As for PW5, they took away his Nokia phone, a leather jacket and Kshs. 5,000/=. When he informed them that he did not have any money in his MPESA, they hit his head with guns causing him to sustain injuries. The men stopped at a petrol station where they fuelled the vehicle then drove to South C. After a while, they stopped and ordered PW3 and PW5 to alight and move to the car boot. Both PW3 and PW5 saw them very well in the process as their faces were not concealed.

12. Thereafter, they kept driving while robbing other people along the way until the vehicle halted for lack fuel. The men abandoned the vehicle near T-Mall area and boarded motorcycles leaving PW3 and PW5 in the boot. PW3 and PW5 stayed in the boot for about thirty minutes before they managed to open it and jump out at about 3.00 am. PW3 and PW5 requested some security guards to assist them jumpstart the vehicle. Thereafter, PW5 drove the vehicle to Kilimani police station where they reported the incident. They also made a report at Kibera police post.

13. On 17th June, 2015 at around 7.30 pm, PW3's brother one Waziri spotted Mbanu and the Appellants. Waziri informed PW3 who in turn called **PW1, Senior Sergeant Alfred Chesire** of Olympic Administration Police Post, Kibera seeking assistance in arresting the suspects. PW1 and his colleague **PW2, APC Michael Mokaya Ndemo** took a vehicle and left the AP Camp immediately. They picked PW3's brother Waziri at Olympic stage and followed the suspects to Ayany drive which had street lights while PW3 followed them on foot. Waziri assisted them to identify the suspects who were four in number. Two of the suspects escaped but they managed to arrest the Appellants herein. Upon searching them, the 1st Appellant was found with a black homemade pistol tucked on the right side of his trouser. It had one round of ammunition suspected to be capable of firing. PW1 and PW2 handed over the Appellants together with the pistol and ammunition to an officer at Kilimani police station.

14. PW4, Chief Inspector James Onyango, a forensic firearm examiner from DCI examined the exhibits recovered from the 1st Appellant. He concluded that the homemade pistol was a firearm under the Firearms Act as it had the features of a conventional firearm. The ammunition also fired successfully hence it was capable of being fired. PW4 prepared a report dated 10th November 2015 in respect thereof and produced it in court. **PW6, CPL Osuri Otieno** investigated the case. He summed up the evidence of the prosecution witnesses and produced all the exhibits in evidence.

15. The Appellants gave sworn testimonies in defence. **DW1, t**he 1st Appellant testified that on 17th June, 2015 while going to the mosque at Ayany drive, he was arrested by two police officers in plain clothes. They asked him where he was coming from. He told them that he was a hawker and was on his way home. He stood there for around thirty minutes then heard gunshots. The officer told him to accompany them and they went to a place where they found a person being attacked by members of the public. He was taken to the police station for charges he was not aware of. He denied any involvement in the robbery incident and also being found with a pistol. He stated that it was the police officers who had the pistol.

16. DW2, the 2nd Appellant testified that on 17th June 2015 at around 8.00 pm, he was at Ayany in a café called Aunt Irene. He walked out while talking on his phone then met a man carrying a gun. The man fired in the air. He dropped his phone and lay down and after two minutes, there were gunshots all over. The man kicked him and asked him to stand then pushed him. Another police in full uniform came and pushed him causing him to fall on the road. He kicked him and told him that he was the one who had caused the robbers to escape. He was beaten up and the officer came and asked him why he committed a robbery within his jurisdiction on 9th May, 2015. He slapped him, searched him and took his phone and personal documents. A few minutes later, he saw two other officers who had arrested one person. They

went to the café and the person was asked to sit beside him. One officer said he should be released as they confirmed that he was an employee of Associated Steal Limited along Mombasa Road but PW1 declined. Officers from CID Kilimani came and they were both handed over to them and charged with the offences before court which he knew nothing about. He claimed that he was framed.

17. In the judgment delivered by the trial court, it was held that the ingredients of all the offences were established. The trial court also found that there was sufficient evidence linking the Appellants to the offences for which they were convicted.

Analysis and determination

18. The appeal was canvassed by both written and oral submissions. Both Appellants filed respective written submissions on 21st May, 2019 whilst the Respondent tendered oral submissions. When parties came to court for highlighting of the submissions, the 1st Appellant appeared in person, the 2nd Appellant was represented by learned counsel, Mr. Odhiambo whilst the Respondent was represented by the learned State Counsel, Ms. Nyauncho.

19. Upon a careful reevaluation of the evidence on record and consideration of the parties' respective submissions, I find that there are only two issues for determination namely; whether **Sections 213** and **310** of the **Criminal Procedure Code** were complied with and whether the offences were proved beyond a reasonable doubt.

Whether Sections 213 and 310 of the Criminal Procedure Code were complied with.

20. The 1st Appellant contended that the trial court violated the provisions of **Sections 213** and **310** of the **Criminal Procedure Code** by allowing parties to file written submissions instead of calling upon them to address the court orally.

21. Section 213 of the **Criminal Procedure Code** provides as follows:

> ***"The prosecutor or his advocate and the accused and his advocate shall be entitled to address the court in the same manner and order as in a trial under this Code before the High Court."***

22. From the trial court's proceedings, it is evident upon the close of the prosecution case, that the 1st Appellant elected to file written submissions on no case to answer. After the close of the defence case, neither the prosecution nor the Appellant offered to make any final submissions. As such, the trial court reserved the judgment for delivery on 30th April 2018. In the circumstances, I am unable to appreciate the basis for this ground of appeal and the Appellant's submissions on the same. In any event, there is no requirement that the court must only be addressed orally. This ground of appeal therefore fails.

23. Section 310 of the **Criminal Procedure Code** provides as follows:-

> ***"If the accused person, or any one of several accused persons, adduces any evidence, the advocate for the prosecution shall subject to the provision of Section 161 be entitled to reply."***

24. According to the said provision, the right to reply after the defence case only accrues to the prosecutor and not the accused. The prosecution has not complained that it was denied this right. As such, this ground of appeal lacks merit.

Whether the offence of robbery with violence was proved.

25. The offence of robbery with violence is established where any of the ingredients prescribed under **Section 296 (2)** of the **Penal Code** are proved. These are that:

> ***a) The offender is armed with a dangerous or offensive weapon or instrument; or***
>
> ***b) The offender is in the company of one or more person or persons; or***
>
> ***c) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.***

26. In the present case, PW3 and PW5 testified that they were attacked by a group of five men. The attackers were armed with dangerous and offensive weapons namely guns. They allegedly used the guns to hit PW3 and PW5 on the head during the robbery thus injuring them. Further, PW3 and PW5 stated that they were robbed of cash, phones, jackets, ATM Cards among other goods. From the foregoing therefore, it is clear that two of the three elements of the offence were established.

27. AS to the Appellants' involvement in the robbery, the court must most importantly interrogate if they were identified. The 1st Appellant submitted that the evidence of purported visual identification by PW3 did not place him at the scene of crime. He argued that the prevailing conditions at the time of the incident did not favour a positive identification. He faulted PW3 for failing to give a description of his assailants in his initial report to the police.

28. The 2nd Appellant also submitted that he was not positively identified. He took issue with the fact that the specifics of the strength of the light which enabled PW3 and PW5 to see the Appellants was not given and neither was it disclosed whether the light was shone on the faces

of the attackers. He argued that the trial court's finding that PW3 and PW5 stayed with the attackers long enough to be able to identify them cannot stand in the absence of a proper description of the intensity of the light which enabled them to see the attackers. He also faulted PW3 and PW5 for failing to give a prior description of their attackers in their initial report to the police and/or informing the police that the attackers were known to them.

29. Ms. Nyauncho for the Respondent opposed the appeal. She submitted that the identification of the Appellants was based on evidence of recognition since PW3 knew the Appellants.

30. It is trite that a conviction based on identification particularly under difficult circumstances can occasion a miscarriage of justice. As such, it is incumbent upon the court to examine such evidence carefully so as to satisfy itself that is free from any possibility of error. In the case of **Karanja & Another v Republic (2004) 2 KLR 140** the Court of Appeal stated as follows:

> ***"The law as regards identification under difficult conditions is now well settled. In the case of Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989 at Kisumu, this Court stated as follows:-***
>
> ***"We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them…… What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."***

31. According to the evidence on record, the robbery incident is alleged to have occurred at night between 8/9.00 pm to about 3.30 am. PW3 testified that at the time when they were hijacked, there were street lights and the vehicle lights were also on which allegedly enabled him to see the Appellants. However, PW5 did not mention anything about the existence of street lights and vehicle lights at the place where they were first attacked. Both PW3 and PW5 also informed the trial court that they were able to see the Appellants inside the vehicle at different points when they were being driven around but did not reveal the source of the light. Further, both PW3 and PW5 stated that they saw the Appellants well when they were being moved to the boot. This according to PW5 was with the help of street lights nearby.

32. Notably however, there was no description of the intensity of the street lights or their distance from the scene of the incident so as to enable this court gauge whether the lighting was sufficient to enable PW3 and PW5 positively identify the Appellants. Further, neither PW3 nor PW5 stated the source of the light in the vehicle which enabled them to see the Appellants who allegedly sat on them while armed with dangerous weapons which must have armed caused fear and panic. In the premises, I am satisfied that the circumstances obtaining did not favour the positive and accurate identification of the Appellants. It was therefore an error for the trial court to find that PW3 and PW5 stayed with the attackers long enough to be able to identify the Appellants without addressing its mind to the above.

33. Additionally, despite PW3 claiming that the Appellants were known to him prior to the incident, there was no other supportive evidence in the form of a first report to the police in which he described them or stated that they were known to him. It is also on record that PW5 indicated in his statement to the police that he did not identify any of the gangsters as they could not allow him to see them face to face. This was contradictory to his testimony that he was able to identify the 2nd Appellant while being escorted to the boot. Indeed, such inconsistency should have been resolved in favour of the Appellants as they are material to the main issue in question which is the identification of the Appellants.

34. Both Appellants also took issue with the purported identification made by PW3's brother during their arrest. The 1st Appellant argued that it was not possible for PW3's brother Waziri who was not a victim of the robbery to positively identify him during the arrest. The 2nd Appellant on his part faulted the prosecution for failing to call PW3's brother Waziri as a witness. It is not borne out from the evidence on record how PW3's brother was able to identify the Appellants or whether they were known to him since he was not a victim of the alleged robbery. Indeed, it would have been proper for the prosecution to call him as a witness to enlighten the court on the circumstances surrounding the Appellants arrest and how he was able to identify the Appellants. In the absence of such crucial evidence, this court is left in doubt as to whether the Appellants were arrested in connection with the robbery incident involving PW3 and PW5. This doubt can only be resolved in favour of the Appellants.

35. The 2nd Appellant also submitted that the trial court misconstrued demeanour evidence. He argued that it was improper for the trial court to base its decision on the frightened demeanour exhibited by the complainants since looking scared in court did not necessarily mean that a witness is telling the truth. I underscore that the decision of the trial court was not hinged upon the demeanour of PW3 and PW5. This court did not have the benefit of seeing the demeanour of the said witnesses and cannot therefore fault the learned trial magistrate for what she made out of the witnesses demeanour.

36. In totality, I find that the prosecution did not prove the offence of robbery with violence in counts 1 and II beyond a reasonable doubt. The Appellants' respective appeals on the charges of robbery with violence contrary to **Section 296(2)** of the **Penal Code** are allowed. I quash their conviction and set aside the death sentences. The death sentences imposed upon them are also set aside. The 2ndAppellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held.

Whether the offences of being in possession of firearm and ammunition were proved.

37. On this issue, PW1 and PW2 who were the arresting officers testified that upon giving chase to the 1st Appellant, they managed to arrest him, searched him and recovered a black homemade pistol with one round of ammunition tucked on the right side of his trouser. Both PW1

and PW2 identified the 1st Appellant in court as the person found in possession of the homemade pistol. The pistol was subjected to forensic examination by PW4 who confirmed that it was a firearm under the Firearms Act as it had the features of a conventional firearm. The ammunition was also examined and fired successfully hence PW4 concluded that it was capable of being fired under the Firearms Act. The expert opinion of PW4 was not controverted. The report prepared by PW4 in this regard was also admitted in evidence without being challenged. Both exhibits were produced in evidence by PW6.

38. In his defence, the 1st Appellant vehemently denied being found in possession of the firearms. He claimed that the pistol was planted on him by the arresting officers. He also faulted PW6, the investigating officer for failing to produce before court the investigation diary, inventory form or dusting report to determine whose finger prints were on the pistol and ammunition. However, his defence did not water down the clear and consistent evidence tendered by PW1 and PW2 regarding the recovery made upon his arrest. In view of the same, I am satisfied that the failure to have the investigation diary, inventory form and dusting report did not in any way prejudice him.

39. In the circumstances, I am satisfied that prosecution proved the two offences against the 1st Appellant beyond a reasonable doubt. The 1st Appellant was therefore properly convicted of counts III and IV. His appeal on conviction in respect of the same lacks merit and is hereby dismissed.

40. As regards the sentence **section 89 (1)** of the **Penal Code**provides for a minimum sentence of seven (7) years imprisonment for each offence. Having regard to the Supreme Court decision of **Francis Karioko Muruatetu Another V Republic (2017) e KLR**, a mandatory minimum sentence is no longer constitutional. I therefore set aside the seven years imprisonment and substitute it with five years jail term for each of the counts. The sentences shall run concurrently. The time the 1st Appellant was in custody prior to the sentence from 17th June, 2015 shall be taken to constitute part of the sentence.

DATED AND DELIVERED THIS 31ST JULY, 2019.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. 1st Appellant in person.

2. Mr. Ondari h/b for Mr. Odhiambo for the 2nd Appellant.

3. Miss Akunja for the Respondent.