REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 86 OF 2011

FRANCIS WAINAINA MUNGAI.....1ST APPELLANT

PETER IRUNGU MWANGI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the original conviction and sentence in the Chief Magistrates' Court at Milimani Cr. Case No. 118 of 2010 delivered by the P. Ndwiga, SRM. on 2011*).

JUDGMENT

1. The Appellants were jointly charged with the offence robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars were that on the 14th January, 2010 along Utawala Road in Nairobi within Nairobi Area jointly being armed with a dangerous weapon namely a pistol robbed Samuel Mureithi Ngunyi a motor vehicle registration numbered KBA 502M Toyota 110 grey valued at Kshs. 500 000/- and at or immediately before or immediately after the time of such robbery used actual violence on the said Samuel Mureithi Ngunyi.

2. The Appellants were convicted accordingly and each sentenced to suffer death. Aggrieved by both the conviction and sentence, they preferred appeals to this court. The 1st Appellant filed appeal No. 83 of 2011 whilst 2nd appellant filed Appeal No. 86 of 2011. Both appeals were consolidated for purposes of hearing the appeal. The first appeal in this court was heard by Monicah Baru and James Rika, J.J. Both judges upheld the conviction and sentence. The Appellants further appealed to the Court of Appeal. The appeal in that Court was not heard and the Appellants were referred back to the High Court for the rehearing of the appeal on the ground that the two judges who heard the first appeal were not seized of jurisdiction because they were both appointed as judges of Employment and Labour Relations Court.

3. The 1st ppellant was in person. He relied on Amended Grounds of Appeal and Written submissions filed on 26th February, 2019. The 2nd Appellant was represented by Mr. Nyauchi Advocate. He relied on Amended Grounds of Appel dated 12th June, 2019 and Supplementary Grounds of appeal dated 26th November, 2018. A look at the record of proceedings however shows that the 2nd Appellant filed in person Amended Supplementary grounds of Appeal on 28th November, 2018 and not on 12th June, 2019 as submitted by his counsel.

4. The 1st Appellant raised seven grounds of Appeal which I summarize as follows; he was aggrieved that the charge sheet was defective on account that the evidence adduced was at variance with the charge as drafted. He complained that **Section 214(1) and 169(1)** of the **Criminal Procedure Code** were not complied with. He faulted the prosecution evidence for failing to meet the threshold of a positive identification and the learned magistrate for failing to properly apply the doctrine of recent possession. Finally, he was aggrieved that the evidence adduced was not credible and was inconsistent.

5. On the part of the 2nd Appellant, I have condensed both sets of Grounds of Appeal which were that the charge sheet was defective, that there was an error in failing to conduct an identification parade, that the Appellant was not properly identified, that failure to conduct an identification parade was fatal to the prosecution case, that there was failure to call a crucial witness, namely, the investigation officer, that the offence was not proved beyond a reasonable doubt, that the Appellants mitigation was not taken into account and that his defence was not considered.

Summary of evidence

6. This being the court of first appeal, I am required to reevaluate the evidence afresh and to come up with independent conclusions. (**see OKENO V REPUBLIC**)

7. **PW1, Samuel Mureithi Ngunyi,** who operated a taxi business was approached by a prospective client while stationed at Cabanas Hotel taxi bay. After a brief exchange, the two left and headed for a nearby supermarket namely Nakumatt. The **1st Appellant** had asked the **PW1** to go and pick a second client who would also pay for the taxi. After the pick-up, **PW1** headed to refuel the car. He arrived at the filling station and requested the **2nd Appellant** for money to pay for the fuel. The 2nd Appellant obliged and gave him Ksh.300/-. In the meantime, the 1st Appellant complained of thirst. He then left and came back with a soda namely Krest. They then drove to Utawala A.P. Camp which was the intended destination. The 2nd Appellant thereafter asked PW1 to stop the car as he needed to relieve himself. Then, again the 2nd Appellant requested PW1 to turn the vehicle around because he had left his gate pass. They headed towards Utawala Estate to pick the pass.

8. On their way back, the 1st Appellant who was visibly drunk requested PW1 to stop the car as he needed to relieve himself. At this point as he drove off the 1st Appellant hit PW1 with a glass soda bottle causing it to shatter. The broken glass bottle was produced into evidence P.Exh1. Then PW1 switched off the vehicle and was forcefully made to lie in the back between the seats as the 1st Appellant stepped on him to keep him down.

9. The 2nd Appellant tried to start the vehicle but was unsuccessful due to a history of battery issues. The 2nd Appellant then hailed passersby who assisted him to start the vehicle. PW1 was then forced to take some pills. The assailants started conversing about guns and bullets while pointing an item resembling a gun at **PW1. PW1** then blacked out and only came to when GSU officers got to him. They gave him his jacket, P. Exhibit 2, to cover himself which was stained with blood. The stains were from the glass bottle attack He then called his manager to corroborate his story. As he was let out of the car he saw the Appellants lying on the ground. He reported the matter to the embakasi Police Station.

10. **PW3, CPL Peter Kyalo and PW4, Nixon Kiprotich sambach** of Embakasi GSU Training School found the vehicle having stalled outside GSU training camp. On approaching it they found three occupants. The Appellants were identified. As well, they observed that PW1 was also present in the vehicle and was on the floor of the vehicle. Further that PW1 was bleeding. They also found a toy pistol, P.Exhibit 6, wrapped in black elastic band and a green broken bottle for Krest soda P.Exhibit1. They also observed that the 2nd Appellant was in the driver's seat of motor vehicle registration number KBA 502M. It was **PW2's(Michael Omwanda Ojwang)** testimony that the vehicle belonged to him and had hired **PW1** to provide taxi services using it. He established this using a log book P.Exhibit 4, sale agreement, P.Exh 3, and transfer of ownership, P.Exhibit 5. The Investigating Officer, **CPL Magiti Mbaabu of** CID Special Crime Pevention Unit confirmed arresting the Appellants and charging them in court.

11. The Appellants were put on their defence. The 1st Appellant gave a sworn defence he testified that he was walking past the vehicle when police officers arrived and arrested him. The 2nd Appellant too gave a sworn defence and stated he was stopped by police officers who accused him of the offence and arrested him

Analysis and determination

12. I have considered the evidence on record and the respective rival submissions. Suffice it to state, the Respondent opposed the appeal through Ms. Sigei who made oral submissions. I have concluded that the issues arising for determination are whether the charge sheet was defective, whether the Appellants were properly identified, whether the offence was proved and whether the Appellant's defence was considered.

13. On the issue of defective charge sheet, both Appellants submitted that the charge was at variance with the evidence adduced. They cited the fact that the charge sheet indicated that a pistol was used to threaten the complainant but the evidence adduced disclosed that what was recovered was a toy pistol. The 1st appellant additionally argued that in the charge sheet, a white motor vehicle was cited but evidence disclosed that the colour of the motor vehicle recovered was grey in colour.

14. According to Ms. Sigei, the charge sheet was not defective as it disclosed all the particulars of the offence and was supported by the evidence adduced.

15. It is true that the charge sheet as drawn was indicated that the Appellants at the time of the robbery were armed with a pistol. It is not disputed that PW3 and 4 who were the arresting officers recovered a toy pistol in the possession of the Appellants. The test therefore is whether this discrepancy fatally prejudiced the trial or the Appellants altogether. It is trite to state that the particulars of the charge ought to be supported by the evidence adduced. It is also important to state that minor discrepancies will always arise in a trial but for any discrepancy to occasion to a fatal defect, it must substantially affect the evidence adduced.

16. In this case, what is paramount is to determine whether the fact of recovery of a toy pistol lessened the proof of the offence of robbery with violence. The offence under Section 296(2) of the Penal Code contains three key elements; namely,

> ***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.***

17. A reading of Section 296(2) of the Penal Code clearly shows that a proof of any of the three elements sufficiently establishes the offence of robbery with violence. In this case, the pistol was named as having been used to execute the use of force which is just but one of the elements. Therefore, even if force was used without threat by use of force of a pistol, the act of use of force would be sufficient to establish the offence of robbery with violence. This is in view that a proof of any one elements of the offence can establish the offence. I am unable to

hold that the charge sheet was defective.

18. As regards the colour of the motor vehicle, the original charge sheet clearly shows that the colour of the vehicle was amended by a pen to delete the word white and replace it with the word grey. Although it is difficult to know who amended because it is not countersigned, my view is that the identity of the motor vehicle could well be established by its registration number as no two vehicles bear similar registration numbers in the country. The make of the motor vehicle would also be crucial and as I will hear after observe, this was not in dispute. Consequently, I hold that the charge sheet was not defective for want of the minor discrepancies.

Whether the Appellants were properly identified

19. According to the Appellants, their identification could not have been free from errors because according to them, PW1 who was the complainant was unconscious and could not tell what happened after he was hired to ferry his passengers. PW1 faulted his identification more so because after they were accosted by PW3 and 4 who were GSU officers, he was made to lie down for two hours and when he was asked to rise up, was exposed to PW1. For this reason, it was his view that an identification parade ought to have been conducted to erase any doubt that the person PW1 saw after he regained consciousness was himself. It was his view that the failure to conduct an identification parade was fatal to his positive identification. In the same spirit, he argued that the assertion of any recoveries was not supported by any evidence as no inventory was prepared and adduced by PW3 and 4. Additionally, no dusting of finger prints was done to establish that he had handled the recovered motor vehicle.

20. On behalf of the 2nd Appellant, Mr. Nyauchi submitted that the trial court erred in holding that an identification parade was not necessary. This was in view of the evidence of PW1 that he had just met the 2nd Appellant. Accordingly, his identification was not by recognition. He further submitted that PW1 testified that he passed out after he was given a drink by the assailants and was woken up by the GSU officers. According to the counsel, it was after he regained consciousness and was dressed up by GSU officers that he was able to see the 2nd Appellant. According to the counsel, the events disclosed a break of the link between the time of the robbery and time of identification which ought to have called in for an identification parade. Furthermore, the circumstances under which PW1 saw the 2nd Appellant were prejudicial because it was after his arrest by the GSU officers.

21. On her part, Ms. Sigei submitted that the identification of both appellants was full proof as PW1 had sufficient time to see and chart with the Appellants. She cited that the first encounter was during day light when they hired him to ferry them somewhere along Ruaraka before they drugged him causing him to become unconscious. In addition, after the appellant turned against PW1 as he ferried them, he tried to escape from the vehicle and the 1st Appellant strangled him on the neck and pulled him to the back seat. He then stepped on his back. The 2nd Appellant then moved to the driver's seat when he attempted to drive away the vehicle when it stalled. It was at this point that the appellants drugged PW1. According to Ms. Sigei, PW1 had sufficient time to identify and clearly see who he was dealing with. Therefore an identification parade would not have yielded any positive consequence.

22. On this submission, I entirely agree with Ms. Sigei. In brief, it was the 1st Appellant who initially approached PW1 at around 6.00 pm. requesting him to drive him to AP Camp in Ruaraka. On their way, they would pick another passenger at Nakumatt Supermarket in Embakasi and this second person was responsible for paying fare. They picked up the second passenger who is the 2nd Appellant. The 1st Appellant sat in front and the 2nd on the back seat. On their way, the 1st Appellant asked PW1 to stop and buy a soda. Meanwhile the 2nd Appellant stepped out of the car to relieve himself. When they returned the 2nd Appellant sat on the front seat and the 1st Appellant on the back seat. When they approached the AP Camp the 2nd Appellant said he had forgotten the gate pass to the AP Camp and asked to be driven back to his house in Utawala. PW1 requested the Appellants to increase fare to cover for the long distance covered. His instinct also told him that things were not right. It was then that he was hit with a soda bottle on the head which broke into pieces. He tried to escape but was strangled on the neck by the 1st Appellant and pulled to the back seat. Suddenly, the 2nd Appellant moved to the driver's seat and attempted to ignite the car and drive away. Unfortunately, the car stalled. In the confusion, PW1 was forced to drink a liquid after which he became unconscious.

23. From the chronology of the above events, there is no doubt that PW1 had sufficient time not only to see the Appellants but to converse with them. It was still at daylight when both Appellants hired PW1. The 1st Appellant boarded the vehicle and in a short distance, was joined by the 2nd appellant before they went to a gas station where the 2nd Appellant paid for the fuel. He also had sufficient time to talk with them when they requested to stop to buy a soda and even asked they return to the 2nd Appellant's home to pick the gate pass. It is a robbery that took place in circumstances that were conducive for a positive identification. Having in mind firstly, that the first encounter of PW1 with the Appellants was during the day, and secondly, the length of time that PW1 had with the Appellants an identification parade would have been of no consequence. Although it was the first day that PW1 was encountering the appellants, owing to the circumstances of the encounter, my view is that although he was subsequently drugged and became unconscious, he had not lost in his mind the persons he was with for hours prior to this incidence. The issue of mistaken identity after he was woken up by GSU officers could not therefore arise.

24. The Appellants faulted the failure to properly apply the doctrine of recent possession. The submission was premised on the account of recovery of a toy pistol and a jacket belonging to PW1 and the motor vehicle. My view is that the doctrine of recent possession in incriminating an accused person would apply when direct evidence of identification is lacking. In the instant case, the identification of the Appellants was direct and positive. At the point of their arrest, PW1 was present and all the recovered goods were collected by the arresting officers in their presence. Having held that there existed a positive identification there was no need to apply the doctrine of recent possession. Suffice it to state, the same would still have implicated both Appellants. Notwithstanding that no inventory was prepared for the recovered goods, the evidence clearly established that the Appellants were found red-handed in possession of the motor vehicle and the toy pistol. There was also no doubt that the motor vehicle prior to the recovery was in the possession of PW1 as a driver employed as such by PW2.

25. As regards the submission by the 1st Appellant that the evidence of the prosecution was inconsistency, contradictory and uncorroborated, the same is ousted by the strong prosecution evidence that the Appellants were caught red-handed having drugged PW1, used physical violence against him and taken possession of his motor vehicle. In that regard, it is clear that the prosecution tendered cogent evidence that

linked them to the offence. In this respect, the alibi defence that they offered did not in any way dislodge the strong prosecution evidence.

26. The Appellants faulted the manner in which investigations were conducted citing that not only did the investigating officer not testify but that he did not also visit the scene. Nothing can be further than what the record attests. The prosecution called PW5, CPL. Magiri Mbaabu of Nairobi Area as the investigating officer.

27. Although in his evidence, the witness did not introduce himself as the investigating officer earlier, the prosecutor had informed the court that PW5 was in court as the investigating officer. It is true from his evidence that he did not visit the scene. He only invited the court to view the recovered motor vehicle. My take is that it is not in all cases where goods are recovered that dusting of finger prints or visit a scene is necessary. It all depends on the circumstance of the case and what investigators are looking for. In the instant case, I would not fault the investigator for not dusting the finger prints. It is a case in which the Appellants were arrested in the actual possession of the stolen motor vehicle. I n the presence of the complainant, the arresting officers recounted the state in which they found him. He was still lying unconscious after being drugged by the Appellants. The complainant in turn gave a clear and cogent account of what had transpired before he was rescued by the officers. Consequently, dusting of finger prints would not have added any value to the prosecution's case.

28. Finally, as regard to the proof of the offence itself, I have already set out early in the judgment the ingredients constituting the office of robbery with violence. This is a case in which the Appellants disguised themselves as passengers and PW1 honestly offered to transport them to their destination. As it turned out, they turned against him whereby they beat him up, injured him and robbed him of his motor vehicle. Although no medical report was adduced in court. It is not in all cases where violence is used that it must be supported by medical evidence. The robbers were more than one in number and a proof of any of the three elements of the offence is sufficient to warrant a conviction. I have no difficulties in concluding that the prosecution discharged its burden by proving the case beyond all reasonable doubt that the Appellants were culpable. Their alibi defence was mere afterthought and an escapist move which I dismiss in its entirety. I consequently hold that their conviction was safe and I uphold it.

29. As regards sentence, it is now trite that the mandatory death sentence under Section 296(2) of the Penal Code is no longer constitutional. The court has the discretion to impose the appropriate sentence based on the circumstances of the case and the mitigation that an accused person offers. At the trial, both Appellants offered no mitigation. Before this court, the 1st Appellant submitted that he was a first offender and a young man aged only 29 years. He stated that he had gained life support skills in prison which would help him engage in gainful employment and avoid engaging in crime. He urged the court to give him a second chance in life and to further consider that prior to his conviction, he was in remand custody for six months. On behalf of the 2nd Appellant, Mr. Nyauchi submitted that his client had undergone rehabilitation in prison and that he was remorseful and urged for an appropriate sentence.

30. This is a case where the Appellants used aggression against the complainant by not only beating him up but also drugging him with a view to robbing him of his motor vehicle. Save that he was rescued by GSU offices, their intention remain unknown. Although they submit that they are remorseful and would be more helpful to the society if released, my view that a punishment commensurate to the offence should be imposed. Having regard to all these circumstances, I set aside the death sentence and substitute it with a ten year jail term for each one of the Appellants commencing the date of arrest which is 14th January, 2010. It is so ordered.

DATED AND DELIVERED THIS 29TH DAY OF JULY, 2019.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. 1st Appellant in person.

2. Mr. Nyauchi for the 2nd Appellant

3. *Mr. Momanyi for the Respondent.*