REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO 63B OF 2017

PATRICK MBITHI NTHENGE ALIAS

MBICI OR JUNIOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(**From original conviction and sentence in Criminal Case Number 5000 of 2009 in the Chief Magistrate's Court at Thika delivered by Hon L. Gicheha (PM) on 2nd June 2010)**

JUDGMENT

INTRODUCTION

1. The Appellant herein, Patrick Mbithe Nthenge alias Mbici or Junior was jointly charged with Nicholas Muia Mutua alias Niko alias Blackie (hereinafter referred to as "his Co-Accused person") with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya).

2. The particulars of the charge were that on the 20th day of October 2009 at Harare bar in Thika District within Central province jointly with another not before court, while armed with a rifle and other crude weapons, they robbed Bethwell Chege Kiragu(hereinafter referred to as PW 1") of cash Kshs 27,000/=, mobile phone make Nokia 3110C, a radio make Sony Megabass, an amplifier, a DVD make Diamond, a mobile phone make Nokia 1100 and Safaricom scratch cards all valued at Kshs 89,500/= and immediately after the time of robbery wounded the said PW 1.

3. The Learned Trial Magistrate, Hon L. Gicheha, Principal Magistrate convicted both the Appellant and his Co-Accused person for the offence of robbery with violence and imposed on them, the death sentence as is prescribed under the law.

4. Being dissatisfied with the said judgment, on 10th June 2010, the Appellant filed a Petition of Appeal. He relied on four (4) Grounds of Appeal. On 21st March 2018, he filed fresh Grounds of Appeal and Written Submissions. This time he relied on nine (9) Grounds of Appeal.

5. When the matter came up for hearing on the said 21st March 2018, the State orally submitted in court whereupon this court reserved its judgment.

LEGAL ANALYSIS

6. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> "**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor".**

7. Having considered the Appellant's and State's Written Submissions, this court found the following issues to have been those that had placed before it for determination:-

> **1. Whether or not the charge sheet was defective; and**

2. Whether or not the Prosecution proved its case beyond reasonable doubt.

8. The court therefore dealt with the said issues under the distinct and separate heads shown herein below.

I CHARGE SHEET

9. Grounds of Appeal Nos (a) and (b) were dealt with under this head as they were related.

10. The Appellant submitted that the Charge Sheet was defective because it did not mention the type of weapon that was used at the time of the robbery. It referred to the cases of **Odhiambo & Another vs Republic [2005] 2 KLR 176**, **Juma vs Republic [2003] EA 471** amongst several other cases where the common thread was that a charge sheet is rendered defective if the type of weapon is not indicated in the Charge sheet. Notably, the State did not address itself to this issue.

11. This court carefully considered the Appellant's submission and noted that from the way Section 296 (2) of the Penal Code is drafted, it is not mandatory that during a robbery, an attacker be armed. It is sufficient if such an attacker is in the company of one or more persons or if such an attacker immediately before or immediately after the time of the robbery, he wounds, strikes or uses any other person violence to such person.

12. Under Section 296 (2) of the Penal Code, the ingredients for the offence of robbery with violence are that:-

a. the offender must be armed with any dangerous or offensive weapon or instrument; or

b. the offender must be in the company of one or more other person or persons or;

c. at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.

13. It is important to point out that as the use of the word "or" in Section 296(2) of the Penal Code is disjunctive and not conjunctive, any of the three (3) ingredients are sufficient to sustain a conviction in the offence of robbery with violence. It is therefore not mandatory that an offensive weapon be indicated in the Charge Sheet for the reason that an offence of robbery with violence can be sustained even without it.

14. Going further, the law stipulates that no finding or order or sentence shall be reversed merely because there is a defect in the Charge Sheet. Section 382 of the Criminal Procedure Code provides as follows:-

"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:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

15. Consequently, in the absence of any demonstration by the Appellant of what prejudice he suffered as a result of the weapon that had allegedly been used during the robbery not having been described in the Charge Sheet, this court was not persuaded to find that the Charge Sheet as drafted was defective.

16. In the circumstances foregoing, this court did not find merit in the Amended Grounds of Appeal No (a) and (b) is hereby dismissed.

II PROOF OF THE PROSECUTION'S CASE

17. Grounds of Appeal Nos (c), (d) and (e) were dealt with under this head as they were all related.

18. The Appellant's case was hinged on his identification. He argued that the First Report was not dated or stamped and that the name and signature of the police officer who recorded the First Report was missing. He added that the Prosecution did not certify the First Report as a true copy of the original thus rendering its authenticity questionable. In addition, he stated that the fact that Mary Nyambura Kiloo referred to "Accused 1" in the said First Report meant that the Occurrence Book (OB) extract was not from the original manuscript because by that time, his Co-Accused person had not been arrested and could therefore not have been referred to as "Accused 1".

19. He added that the fact that the said Mary Nyambura Kiloo did not testify rendered the OB of no probative value. He also said that a person in the OB referred to as "Milka Nyambura" did not testify as the person who gave evidence was "Milka Wamaitha Muriuki".

20. He submitted that although a witness may be honest and prepared to tell the truth, he could be mistaken and consequently visual identification of an accused person in difficult conditions such as night time ought to be corroborated to avoid a case of mistaken identity.

21. He further contended that he was arrested ten (10) days after the alleged incident but that the Prosecution did not adduce any evidence to show that he had gone "underground". He relied on the case of **Wamunga vs Republic [1989] KLR 424** and several other cases where the common thread was that caution must be exercised when accepting evidence of visual identification by recognition.

22. It was his further submission that PW 1 did not state in the First Report which of his attackers he identified. He also pointed out that the witnesses recorded their statements after he and his Co-Accused person had been arrested. He added that there was a material discrepancy regarding the number of attackers on the material date and the person who was holding the gun. He pointed out that whereas Mary Syombua (hereinafter referred to as "PW 2") stated that the "Accused" was the one who had a gun, none of the other witnesses alluded to this fact. He contended that it was strange that PW 1 did not visit the hospital after being hit with a bottle.

23. He further submitted that the security officers Ben Njau and Moses who had been mentioned in the First Report ought to have been called as witnesses and that failure to call them was fatal to the Prosecution's case. It was therefore his submission that his Appeal ought to be allowed as the Prosecution failed to prove its case against him, beyond reasonable doubt.

24. On its part, the State was categorical that the issue of a mistake regarding the Appellant's identification could not have arisen herein because his identification was through recognition as he was a regular customer in PW 1's Harare Bar. It pointed out that there was sufficient light for PW 1 and PW 3 to have positively identified him. It therefore urged this court to dismiss the Appeal herein.

25. According to PW 1, on the material date and time, he was at his Harare Bar when the Appellant, his Co-Accused person and another person stormed into the Bar and ordered everyone to lie down. At the time, one of the attackers was armed with an AK 47 rifle. He stated that the attackers hit him with a bottle while demanding for money, which he gave them. The attackers stole a DVD, Amplifier and Radio during the robbery. He referred to the Appellant herein as "Junior" and his Co-Accused person as "Blackie". He said that he did not know their real names. He also identified the sweater the Appellant's Co-Accused person had been wearing at the material time of the robbery.

26. He was emphatic that it was the Appellant's Co-Accused person herein who hit him with a bottle whereafter he gave him money. He was categorical that he knew the Appellant herein physically as he was his customer, which recognition subsequently led to his arrest Appellant and that of his Co-Accused person.

27. PW 2 testified that on the material date and time she was at home when she saw the Appellant who she knew as "Junior" and others climb a Motor Cycle carrying a radio cassette. She started screaming. Just then PW 1, who was bleeding, came out of the Bar accompanied by PW 3. She informed them that she had seen the Appellant coming out from the Bar. Upon being informed of his arrest, she went to Makongeni Police Station where she identified him (the Appellant herein).

28. On being cross-examined, she was emphatic that she knew the Appellant as "Junior" or "Mbici" and that she had known him since 2006. She was categorical that the Appellant was the one who was carrying the radio cassette and boarded the Motor Cycle last. It was her evidence that she was able to see him because there were security lights. She said that she did not recognise his accomplices.

29. PW 3 said that on the material date and time there was electricity she said that attackers came and ordered them to lie down which they all did. Her evidence was that the Appellant's Co-Accused was the one who carrying a gun. She said that he slapped her, took her to the Counter from where he took money, Kencell and Safaricom cards and two (2) radios. After the alarm in the counter rang, she said she saw one of the attackers hit PW 1 with a bottle. She said that she saw the Appellant's Co-Accused for the first time during the robbery and identified him when he was arrested.

30. No 79296 PC Stanley Muiruri (hereinafter referred to as "PW 4") testified that he went to the Bar on being informed of the robbery. He interrogated the patrons on what had transpired. They recorded details in the Occurrence Book (OB). The Appellant and his Co-Accused person were arrested on 29th October 2009 by security officers. They re-arrested them and took them to the police station. He stated that one of the workers at the Bar identified the Appellant as "Mbici" and stated that the sweater the Appellant's Co-Accused person was wearing on the material time of the robbery was found at the said Appellant Co-Accused person's house.

31. No 67860 PC Timothy Sereney (hereinafter referred to as "PW 5"), was the Investigating Officer. He tendered in evidence the sweater the Appellant's Co-Accused person had worn on the material night. The Appellant did not cross-examine him.

32. In his unsworn evidence, the Appellant stated that he went to work at 8.00 am and worked until 5.00 pm. He went with his Co-Accused person to Paradise Bar after 7.15 am where they stayed until 9.00 pm. He stated that as they were going home, two (2) security officers came and ordered them to sit down, which they did. He said that the security officers told them that they were drunkards who had insulted them and demanded an apology and beer. He said that they apologised but refused to buy beer. It was then that police officers were called and taken to the police station.

33. He stated that they were taken to their houses the following morning for a search of their houses but that the search yielded nothing. He denied ever having committed the offence herein. His evidence was corroborated by his Co-Accused person.

34. A careful perusal of the evidence that was adduced by the Appellant and his Co-Accused showed that both of them were together on 29th October 2009 when they were allegedly arrested by security officers. They both corroborated each other's evidence. Notably, both the Appellant and his Co-Accused did not adduce any evidence in respect of the night of the attack on 20th October 2009. Consequently, in the absence of any defence of alibi on the night of 20th October 2009, the evidence that was tendered by the Prosecution witnesses remained unrebutted and/or uncontroverted.

35. As the state rightly submitted, there was no possibility of there having been a mistaken identity of the Appellant herein. PW 1 and PW 2 were able to identify him which led to his arrest and that of his Co-Accused on 29th October 2009. PW 1 was emphatic that he recognised the Appellant clearly as was a customer at his Bar. He was able to identify the sweater his Co-Accused person was wearing on the material date of the attack. Indeed, PW 2 saw the Appellant leaving the Bar carrying a radio. PW 3 identified his Co-Accused person as the person who hit her and took money from the Counter. She also saw the Appellant herein, who was a customer, hit PW 1. She had known him for about a month.

36. It was clear that the First Report OB 37/20/10/2009 that the Appellant relied upon while submitting in the appellate stage showed that PW 1 stated that one of the attackers was physically known to him. In the First Report No OB 38/20/10/2009, PW 2 said that she identified the Appellant herein and actually gave his name as "Mbithi" alias "Junior".

37. Notably, all of the Prosecution witnesses were categorical that the scene of the robbery was properly lit and were therefore able to recognise their attackers. An Identification Parade was not necessary as PW 1, PW 2 and PW 3 identified the Appellant herein by recognition. They also identified him at the dock. It was irrespective that no stolen item was recovered in the Appellant's or his Co-Accused person's houses after searches were conducted in both houses.

38. It was also immaterial that the security officers who arrested the Appellant and his Co-Accused were not called as witnesses in this case. Indeed, under Section 143 of the Evidence Act Cap 80 (Laws of Kenya), the prosecution has the discretion to decide the number of witnesses to prove a fact. The fact that PW 1, PW 2 and PW 3 positively identified the Appellant and his Co-Accused rendered calling the security officers as witnesses inconsequential and was not fatal to the Prosecution's case.

39. Having analysed the evidence that was adduced by the Prosecution witnesses *vis- a- vis* the Appellant's unsworn evidence, this court came to the firm conclusion that the Appellant was positively identified as having been one of the attackers on the material date and time and that the Learned Trial Magistrate correctly convicted him of having committed the offence herein. This court found the Prosecution witnesses to have been truthful witnesses and their evidence was cogent, consistent and did not contradict each other.

40. Under Section 296 (2) of the Penal Code, the ingredients for the offence of robbery with violence are that:-

a. the offender must be armed with any dangerous or offensive weapon or instrument; or

b. the offender must be in the company of one or more other person or persons or;

c. at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.

41. In this particular case, all the ingredients of the offence of robbery with violence were present. The Appellant was in the company of other person and his Co-Accused person was armed with a gun. His Co-Accused hit PW 1 with a bottle and slapped PW 3. The Appellant herein also hit PW 1.Although there was no documentary evidence that was adduced to prove the injuries that were sustained by PW 1, PW 1's and PW 3's evidence that the Appellant and his Co-Accused person used personal violence on them by hitting PW 1 with a bottle, slapping him and also slapping PW 3 constituted the ingredients of the offence of robbery with violence under 296(2) of the Penal Code.

42. It is important to point out that as the use of the word "or" in Section 296(2) of the Penal Code is disjunctive and not conjunctive, any of the three (3) ingredients would have been sufficient to sustain a conviction of the offence of robbery with violence. Taking the circumstances of the case herein, this court therefore came to the firm conclusion that the Prosecution proved its case to the required standard, the standard for criminal case being, proof beyond reasonable doubt.

DISPOSITION

43. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 15th September 2016 was not merited and the same is hereby dismissed. Instead, this court hereby affirms the conviction as the same was lawful and fitting.

44. However, in view of the holding in the recent case of **Petition No 15 of 2015 Francis Muruatetu & Another vs Republic** where the Supreme Court that found that the mandatory sentence under Section 296 (2) of the Penal Code was unconstitutional, this court hereby directs that this matter be referred back to the Chief Magistrates Court at Thika Law Courts for re-sentencing, if need be. This matter shall be placed before the Chief Magistrate of Thika Law Courts on 10th August 2018 for his and/or her further orders and/or directions.

45. It is so ordered.

DATED at **NAIROBI** this **28th** day of **July** 2018

J. KAMAU

JUDGE

READ, DELIVERED and **SIGNED** at **KIAMBU** this **30th** day of **July** 2018

C.MEOLI

JUDGE