REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 51 OF 2014

MULE MBALUTO……...…...…….....…….....APPELLANT

VERSUS

REPUBLIC …….…….....…….RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's court at Kibera Cr. Case 1337 of 2012 delivered by Hon. B. Ochoi, Ag. SPM on 18th March 2014).

JUDGMENT

Background

Mule Mbaluto, herein the Appellant, was charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the charge were that on 10th March, 2012 within Ongata Rongai in Kajiado County, jointly with another not before the court, while armed with a dangerous weapon, to wit; a pistol, robbed one Simon Mburu Ngugi of a motor vehicle, a Toyota Fielder, registration number KBM 988T and Kshs. 2,000/- in cash all valued at Kshs. 859,000/-, and immediately after the time of such robbery threatened to shoot the said Simon Mburu Ngugi.

The Appellant was found guilty, convicted and sentenced to death. He was dissatisfied with the sentence and preferred the current appeal. In his Amended Grounds of Appeal filed on 7th June, 2017, he appealed on the grounds that the identification was unsatisfactory, the doctrine of recent possession was not properly applied, the charge sheet was defective, crucial evidence was not called and that the defence was not considered.

Submissions.

The Appellant relied on written submissions filed on 7th June, 2017. On identification, he submitted that the complainant who testified as PW1 gave contradictory evidence on how he identified him. He submitted that he initially testified that he knew him but it was clear that he identified him in court. This amounted to dock identification which was not reliable. Further, PW1 was unable to positively identify the stolen motor vehicle which then implied that the doctrine of recent possession was inapplicable. It was also his submission that he could not be linked to the robbery because the recovered motor vehicle was not dusted for fingerprints so as to establish that he had handled it.

The Appellant in addition submitted that the charge sheet was defective because it was drafted both under **Sections 295 and 296 of the Penal Code** which made it duplex. He was also contesting the fact that his

right to a fair trial was infringed because the trial court failed to promptly inform him of his right to legal representation as provided under **Article 25(c) and 50(2)(g) & (h).** Finally, the Appellant challenged the fact that the trial magistrate failed to consider his defence which if it had been adequately considered, the trial court would have arrived at a different verdict.

Learned State Counsel, Miss Kimiri opposed the appeal. She made oral submissions. She countered the submission that the charge sheet was defective because clearly, it was drawn under **Section 296(2) of the Penal Code**. In addition, she submitted that although there was proper identification of the Appellant, the doctrine of recent possession was properly applied by the trial court because the Appellant was caught red handed driving the stolen motor vehicle. The ownership of the motor vehicle was established by PW1 through documentation. The prosecution also established that it was recovered just a few hours after it was stolen. Furthermore, the Appellant had not given a proper explanation on how he had come by the possession of the motor vehicle. Accordingly, the conviction of the Appellant was safe and counsel urged that the appeal be dismissed.

In rejoinder, the Appellant referred the court to the OB entry of 3/3/2012 which was recorded immediately after his arrest. This date, according to the Appellant, implied that he was arrested even before the offence had been committed. It was then that on 10th March, 2012 he was transferred to Ngong Police Station. He reiterated that there was no evidence adduced that he had been arrested in possession of the stolen motor vehicle. In any case, the prosecution failed to call any of the occupants of the Land Cruiser motor vehicle that blocked PW1's car in corroborating the evidence that he is the one who was driving PW1s car. He concluded that on the whole, the evidence adduced did not support the elements of the robbery with violence.

PW1, Simon Mburu Ngugi the complainant was a taxi operator. He recalled that on 10th March, 2010 he was at Bellevue along Mombasa Road operating vehicle registration number KBM 998T when a customer approached him and informed him that he had a sick mother at Masai Lodge in Ongata Rongai who he wished to take to Kenyatta Hospital. He informed the customer that this would cost him Kshs. 2,000/- and he replied that he had to go look for the money. The customer requested his mobile phone number which he gave him. The customer left and after 15 minutes he received a call from the customer who asked if he was amenable to getting paid in Rongai as he had not found the money. The witness acquiesced to the request.

He testified that the customer came back with another man. He sat in the passenger seat and his colleague in the back. He recalled that he followed the man's instructions until the end of a rough road where he was asked to stop and wait as they got the ailing person. The customer left but returned whereas his colleague was in the vehicle throughout where they waited for about 15 minutes before the person in the back seat suddenly threw a rope around his neck and started strangling him. The man in the front seat asked him to be quiet or they will shoot him before tying his hands. He identified the man on the back seat as the Appellant who then took over driving duties while the man in the front passenger seat ransacked the witness' pockets. He lost a Nokia X201 phone valued at Kshs. 7,000/- and Kshs. 2,500/- he had in his pockets.

He testified that they then drove him to a thicket where he was asked to get out of the vehicle. They asked whether the vehicle had a cut off and after he showed it to them and explained how to disengage it he was tied onto a tree. He was asked not to scream as the area was riddled with wildlife before they left. He testified that he struggled to get free and after a while succeeded. He then walked around the road before meeting three men who assisted him with their phone which he used to call his brother and informed him of what had transpired. He recalled that these men also informed the local area chief whom they asked to inform the police.

He recalled that he was directed to Ole Kasasi Police Post and that on the way there, in the company of the men, the police called them and informed them that the vehicle had been recovered at PCEA area with one person driving it. They went to the Police Post where they reported the matter before heading towards PCEA area. He testified that on their way there, they came across the vehicle that was being driven towards them. It was being driven by police officers who were with the Appellant who was on the back

seat.

He testified that he identified himself to the officers and they then went to Ole Kasasi Police Post before heading to Ongata Rongai Police Station. He testified that he was driving the vehicle which belonged to Francis Mbugua Benson.

In cross examination, he stated that the Appellant was arrested the same day the vehicle was recovered and that the police officers had informed him that they had found the Appellant driving the vehicle. He identified the Appellant as the man who strangled him with a rope.

PW2, No. 93496 PC Lazarus Njuguna was then attached to Ole Kasasi Police Post in Ongata Rongai. His testimony was that on 10th March, 2012, at about 2100 hrs, he was on patrol with Corporal Chibue. They received a call from the local chief that someone had been robbed of his motor vehicle a Toyota Fielder Reg. No. KBN 998T. Thereafter they came across a Toyota Land Cruiser Prado with two occupants. The occupants stopped where they were and informed them that they had spotted a suspicious car which was driving towards Kadisi area. They boarded the Toyota Prado. On approaching a school inside the PCEA Church, they came across the Toyota Fielder. They asked the driver of the Prado to block the Toyota Fielder. When the latter car stopped, PW2 and his colleague alighted from the Prado while wielding their guns. The fielder car had only one occupant who was the driver. After he surrendered to the police, a quick search was done on him and he was unarmed. The person was the Appellant. He contacted his superior who asked him to escort the suspect to the police station. They first reported the incidence at Ole Kasasi Police Post. At one point, the fielder car stopped and PW2 asked the Appellant how he had driven it. He then informed PW2 that the owner of the car had showed him how to operate the cut-out. He handed over the Appellant to CID Ongata Rongai. It was while on their way to the police Station that they came across PW1 who was informed of what had transpired. The recovered car was handed over to the CID Ongata Rongai. Its photographs were also taken and produced in court as exhibits.

PW3, Francis Mbugua Benson was a brother to PW1. He was the lawful owner of the Toyota Fielder KBB 998T which he had given to PW1 to operate it as a Taxi. He testified that he had bought it from Stephen Muchiri Mungai although the actual transfer on the logbook had not been effected. He produced the sale agreement between him and the seller as well as the cars logbook and identify card of the seller.

PW4, Sergeant James Kamau was the investigating officer in the matter. He recalled that on 10th March, 2012 at around 10.00 p.m. at Ongata Rongai the Appellant was escorted to the station by PW2 and Corporal Chemboi of Ole Kasasi Police Post. He summed up the evidence of PW1 to 3. He confirmed that photographs of the recovered motor vehicle were taken which he produced as exhibits without objection from the Appellant. He also preferred the charges against the Appellant.

After the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave an unsworn statement of defence and testified as DW1. He stated that he resided in Rongai and that on 10th March, 2012 he woke up early in the morning and left for his work place near Nazarene University. He worked until 2000hrs. He walked along the road as he looked for a boda boda motorcycle. He said that he came across two vehicles on the road that were facing each other and whose lights were on. As he went past the cars he had someone ask him to stop which he did. He was then handcuffed by two officers who were standing between both cars. His tools were then thrown into one of the vehicles, a Prado, after which he was taken to the smaller saloon car. He was then taken to Ongata Rongai Police Station where he was booked until the following morning when, alongside fellow prisoners, they were taken to the report office where the OCS asked them to pay Kshs. 2,000/- each for their freedom. He was not released because he did not have the money. He was thereafter charged accordingly. He denied he committed the offence.

Determination

This is the first appellate court whose duty is to re-evaluate the evidence on record and come with its own conclusions. **See Okeno v Republic. (1972) E.A32.**

I have accordingly considered the evidence on record and the rival submissions. I have arrived at the issues for determination to be; whether the charge sheet was defective, whether the Appellant's right to a fair trial was violated, whether crucial evidence was withheld by the prosecution, whether the Appellant was properly identified, whether the doctrine of recent possession was properly applied and whether the Appellant's defence was considered.

On the issue of defective charge sheet, the Appellant submitted that the charge was drafted both under **Section295 as read with Section 296(2) of the Penal Code** which rendered it duplex**.** His submission lacks merit because it is clear that the charge was only drafted under **Section 296(2) of the penal Code** which provision spells out the elements of, and the penalty for, the offence of robbery with violence.

The Appellant was also of the view that his right to a fair trial was violated as he was not informed of his right to legal representation and to have an advocate assigned to him by the State. He cited contravention of **Article 50(2)(g) and (h)**. The provision provides as follows:

> ***" (2) Every accused person has the right to a fair trial, which includes the right-***
>
> ***(g) to choose, and be represented by an advocate, and to be informed of his right promptly;***
>
> ***(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;***

Under (g) above, the accused is given the option to choose to be represented by an advocate or to represent himself. The court is mandated to inform him of this right. The record does not indicate that the court informed him of the requirements under this head. Further, under (h) above, an accused person is entitled to an advocate at the State's expense only if substantial injustice would result. It is also required that he be informed of this requirement promptly. It is important to note that our current Constitution of 2010 preceded the Legal Aid Act of 2016 which was enacted to give effect to Article 50(2)(h). Therefore, the appellant having been tried before enactment of Legal Aid Act was not entitled to an advocate at the State's expense. Be that as it may, although he was not informed of his right to choose to be represented by an advocate or not, in my view, he was not prejudiced because he ably cross-examined all the prosecution witnesses without bringing to the attention of the court that he had a hitch. That submission then fails.

I will consider the third and fourth issues for determination simultaneously as their gist relate to the weight of the evidence. On identification the Appellant submitted that his identification was dock identification which could not be relied upon. He submitted that the police should have conducted an identification parade to ensure that the identification was full proof. He submitted that there was also a failure to produce the initial report made by the Appellant which should indicate a description of the complainant's assailants. The complainant, who was a taxi driver, was hailed by customers, two in number, who required his services to take them to Ongata Rongai. When they arrived at the proposed destination one of the men alighted to go get a lady whom they were supposed to take to the hospital. Soon thereafter the man who was left in the vehicle suddenly started strangling him using a rope. This man was identified as the Appellant. After PW1 was strangled the men tied him up in a nearby thicket before taking off with his vehicle. He struggled before finally untying himself whereupon he got back onto the road and ran into three good Samaritans who assisted him with their phone and allowed him to contact his kin. The men in question also informed the local chief who called the police and informed them of the robbery.

In these circumstances it is clear that the first report made to the police was made by a proxy and does not appear to be detailed only indicating information about the vehicle, namely; its make and registration number, which can be gleaned from the evidence of one of the arresting officers, a PC Njuguna. He received the information relating to the vehicle make and model while out on patrol. PW1 testified that the good Samaritans also escorted him to Ole Kasasi Police Post where he made a report on the matter. Further that before they got to the police post they were informed that the vehicle had been recovered and was around the PCEA area.

An initial report was submitted in court during the course of the appeal. It was Occurrence Book entry 105/10/3/2012 and is the same number set out in the charge sheet. The entry in question is titled "Prisoner In" and inter alia states that the Appellant was to be charged of committing the offence of robbery of a motor vehicle registration number KBM 988T, a white Toyota Fielder. It also stated details that mirrored the evidence of the PW1 that the vehicle was shortly intercepted by CPL Cheboi and PC Njuguna before the reportee, PW1, could make a report at the police post and that the Appellant was identified by the reportee as one of the carjackers. This clearly shows that the Appellant was identified by the complainant before he arrived at the police station and before the making of this report which is clearly the initial report. In the circumstances, it was not then prudent for an identification parade to be carried out as it had already been overtaken by events given that PW1 had already seen the Appellant.

My analysis of the above chronology of events leading to the arrest of the appellant makes me conclude that the appellant's identification was direct and even in the absence of an eye witness, it suffices to hold that having been caught red handed with the stolen motor vehicle, the doctrine of recent possession was sufficient to convict him. The learned trial magistrate in upholding the doctrine of recent possession relied on the case of **Arum vs Republic**, **Court of Appeal sitting at Kisumu Cr. Appeal No. 85 of 2005** which set out the circumstances under which the doctrine is applicable, thus:

> ***"Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, that is, there must be positive prove, first, that the property was found with the suspect, secondly, that the property was stolen from the complainant and lastly, the property was recently stolen from the complainant…"***

As I have stated, the appellant was caught red-handed with PW1's vehicle. Its ownership was sufficiently established by PW3. The witness further gave a candid account of how the appellant and another hired him to take a patient to hospital. They hoodwinked him into a deserted area where they turned robbers and subsequently robbed him of the motor vehicle. The said motor vehicle was recovered only a few hours after the theft. The appellant's defence that he was arrested on his way from work was sufficiently dislodged by the strong prosecution's case. And in my view, he concocted the defence as a belated effort to salvage his situation. Unfortunately, the case for the prosecution was water-tight against him.

Intertwined with the weight of the evidence was the appellant's submission that the prosecution withheld vital evidence. He referred to the failure to produce in court the results of the fingerprint dusted on the motor vehicle. He was candid that fingerprints were taken in the presence of a third party. It was however adequately explained by the prosecution that the third party he was referring to was the complainant. I agree that the investigators having undertaken the process of dusting for fingerprints they were enjoined to adduce it in court. The obvious rationale is so as to avoid an inference that had such evidence been adduced, the same would be adverse to the prosecution case. Be that as it may, it is glaringly clear that even in the absence of this piece of evidence, other evidence adduced by the prosecution did sufficiently place the appellant at the scene of crime and proved that he participated in the robbery. Accordingly, I hold that the failure to call the officer who dusted the motor vehicle did not vitiate the already strong prosecution evidence.

I would also wish to comment on the appellant's submission that he was arrested before the date of the offence, thus casting a doubt that he was involved in the robbery. A closer look at his defence and submission implies that he was contesting the fact that he was arrested at 2000 hours as he left his job which assertion contrasted the initial report that he was booked at 2313 hours. Thus, the police could not account for the intermediate three hours between his arrest and booking. However, all the prosecution witnesses were clear that he was transported to the police station soon after his arrest and therefore hold that his arrest most likely occurred around the time of arrest. The varied timings too, in my view, do not dent the fact that the appellant committed the offence.

Finally, it was the appellant's submission that the learned trial magistrate did not consider his defence. At page 47, last line, running though to page 48, the learned magistrate in brief delivered himself as follows:

> ***"I find the defence by the accused unreasonable and unbelievable and do hereby dismiss it."***

Although the learned magistrate did not comprehensively analyze the appellant's defence, it was apparent that he had gone through it and he was not convinced that it was credible and was right in dismissing it. This court too has arrived at a similar conclusion.

The upshot of my findings is that the prosecution proved its case beyond a reasonable doubt. I find the appellant's appeal without merit and I dismiss it accordingly. I uphold both the conviction and sentence. It is so ordered.

Dated and Delivered at Nairobi This 25th Day of July, 2017

G. W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. Miss Sigei h/b for Aluda for the Respondent.