REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL APPEAL NO. 164 OF 2013

(Appeal from the original conviction and sentence in the Chief Magistrate's Court at Nairobi.

Criminal Case No. 1210 of 2011 delivered by K.W Kiarie on 27th June, 2013)

DAVID WILLIAM TETT…..……...……..APPELLANT

VERSUS

REPUBLIC ……...…RESPONDENT

JUDGMENT

INTRODUCTION

1. The Appellant **DAVID WILLIAM TETT** alias **BILLY** was charged with three (3) counts of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code the particulars of which were that on the 6th day of September, 2011 at House No. 100 Warai South Road Karen Area in Langata within Nairobi County jointly with others not before the court while armed with dangerous weapons namely a revolver and a knife robbed (I) TETT WILLIAM MULREADY (II) CHRISTINE NYAMBURA and (III) DAVID ONDENGO ROMERA various items and at or immediately before or after such robbery used actual violence against the said people.
2. He pleaded not guilty to the three counts, was tried, convicted on all three counts and sentenced to death on the first count as by law required. Being aggrieved by the said conviction and sentence he filed this appeal and raised the following grounds of appeal:-

1. ***The learned trial magistrate erred in fact and in law by failing to take in account the defence of the accused.***
2. ***The learned trial magistrate erred in fact and in law by convicting the Appellant upon inconsistent and contradictory evidence.***
3. ***The learned trial magistrate erred in law and fact by failing to appreciate that the evidence adduced was at variance with the charge with the particulars of the charge sheet.***
4. ***The learned trial magistrate erred in fact and in law by convicting the Appellant upon a defective charge sheet.***
5. ***The learned trial magistrate erred in law and fact by finding that the offence charged had not been proved beyond reasonable doubt against the appellant.***
6. ***The learned trial magistrate erred in fact and law in upholding the testimonies of the prosecution witnesses which were not credible prima facie and disregarded the evidence of the***

defence which was admissible and verifiable.

3. On 30th October, 2015 the Appellant filed an Amended Petition of Appeal in which he raised the following grounds:-

1. ***THAT the learned trial magistrate erred in fact and law by failing to note that the initial 1st report to the police vide OB No.29/6/2011 never linked the Appellant to the commission of the offence.***
2. ***THAT the learned trial magistrate erred in fact and law by failing to note that there was no initial 1st report to the police by PW1, PW2 and PW3 to the police.***
3. ***THAT the learned trial magistrate erred in fact and in law by failing to note that there was no proper identification of the appellant.***
4. ***THAT the learned trial magistrate erred in fact and in law in failing to note that there were gaps, inconsistencies and material contradiction in the prosecution case.***
5. ***THAT the learned trial magistrate erred in fact and in law in failing to note that the prosecution never established that was a common intention between the Appellant and the alleged gunned down robbers.***
6. ***THAT the learned trial magistrate erred in fact and in law in failing to find that Section 200 of the Criminal Procedure Act was not complied with.***
7. ***THAT the learned trial magistrate erred in fact and in law in failing to note that prosecution witnesses were not credible and trustworthy.***
8. ***THAT the learned trial magistrate erred in fact and in law in failing to note the ingredients of the offence of robbery with violence were not proved.***
9. ***THAT the learned trial magistrate erred in fact and in law by shifting the burden of proof on the appellant.***
10. ***THAT the learned trial magistrate erred in fact and in law in failing to find that the evidence presented to court was at variance with the charges preferred against the appellant.***
11. ***THAT the learned trial magistrate erred in fact and in law in failing to find that material witnesses were never called to testify.***
12. ***THAT the learned trial magistrate erred in fact and in law in convicting the Appellant while the prosecution had not proved its case beyond reasonable doubt as required in criminal law.***

4. This appeal came up for hearing before us on 3/11/2015 when Mr. Amutalla appeared for the Appellant while Mr. Muriithi appeared for the State and opposed the appeal. We reserved our judgment for the 24/11/2015 when the Appellant appeared in person and indicated that he had filed a constitutional petition No. 507 of 2015 in the Constitutional Division of this court which he wanted heard before the judgment herein was delivered in which he sought an order that one of us Justice G. Ngenye Macharia disqualifies herself from the matter at the judgment stage.
5. In the interest of justice we deferred the delivery of this judgment to enable the Appellant pursue his Constitutional Petition before the Constitutional Division of this court and on 29th February, 2016 Justice Onguto struck out the Petition for want of jurisdiction and found it an abuse of the court process and also vexing.
6. On 8th March, 2016 Justice Kimaru fixed the matter for mention before us for purposes of giving direction on the delivery of judgment in view of the judgment by Justice Onguto aforesaid at which the Appellant indicated that he still wanted to pursue his application for Justice Ngenye to recuse herself before us and we set a date for the said Application for 14.4.2016 and asked the Appellant to file a formal application and serve. On the said date the Appellant who was now acting in person appeared before Justice Wakiaga and indicated that he was now ready for the judgment to be delivered as he did not wish to pursue his earlier application. This explains the delay in delivery of this judgment.

SUBMISSIONS

7. At the hearing of this appeal, it was submitted by Mr. Amutalla for the Appellant that there was no indication that the Apellant was involved in the alleged robbery with violence as per the report

made to the police in the Occurrence Book at Langata Police Station which they stated that there were three thugs. It was submitted further that there was no report of a complaint being lodged by PW1, PW2 and PW3 all who were named as the victims. In support thereof the following cases were submitted.

1. Republic v PATNI – Criminal Case No.229/03
2. Francis Muchiri Joseph v Republic - Criminal Case No. 56/2015

8. It was further submitted that there was no proper identification of the Appellant and that PW1 did not give the name of the Appellant to the police and further since there were guns and weapons at the scene the conditions were therefore not favourable for positive identification of the Appellant by PW2. He submitted that the prosecution case was full of gaps and contradictions which should have created doubt in the mind of the court. In support of this submission the case **of CHOGE V R Criminal Appeal No. 6912/1984** was submitted.
9. It was submitted that there was no common intention established between the Appellant and the thugs who were shot dead and that the elements of robbery with violence were not established since the items allegedly stolen were never found with the Appellant. It was stated that the trial court shifted the burden of proof to the Appellant and that witnesses who included the arresting officer were never called.
10. On behalf of the state it was submitted that there was enough evidence tendered before the trial court to support conviction and that all the witnesses who were called sufficiently corroborated the prosecution's case. On common intention it was submitted that the Appellant did not raise any signal to the guard at the gate that he had been carjacked neither did he raise any signal to PW2.

EVIDENCE

11. This being a first appeal we are under duty to re-evaluate the evidence tendered before the trial court and to come to our own conclusion though taking into account the fact that we did not have the advantage of seeing and hearing witnesses.
12. The prosecution's case was that on 6/9/2011 **PW2 CHRISTINE NYAMBURA** who was a house-help to PW1 and PW6 saw a car parked in the compound and when she went to check PW4 told her that PW1 had visitors and therefore should open for them the door upon which the appellant, whom she had not seen, pointed to her a picture on the wall and stated that he was the last born of the family. She therefore allowed them into the sitting room to wait for PW1. They were subsequently bundled together in the sitting-room where the Appellant stopped the two men from stabbing her with a knife.
13. **PW1 WILLIAM MULREADY TETT's** evidence was that he was called and told that the Appellant wanted to see him and when he went to the sitting room he found the Appellant standing while the two men whom he said were his friends were sitting. He therefore suggested that they move to the front of the house to talk upon which he asked the Appellant for his Kshs.70,000/- he had loaned to him and the Appellant who was tense said nothing about it. Upon returning to the house he was attacked by the two men, one who had an AK 47 rifle while the other had a knife who demanded that he gives them money failure of which they would kill him. It was his evidence that when he asked the Appellant why he was doing that to him, he said that it was because he had not been given land. Thereafter the Appellant and his group brought in other workers whom they also tied.
14. **PW3 DAVID ONDEGO KOBERA** corroborated the evidence of PW1 and stated that he had known the Appellant for seven years and that on the material day he received a telephone call from PW6 to go and check on what was happening at the house since the people thereat were not answering their cell phones calls. When he rang the door bell the Appellant came to the door and asked him to get into the house which he declined and asked for PW1. The Appellant then held him by the neck and pushed him into the house and ordered him to join the rest while asking PW1 where their bedroom and the safe keys were while demanding for money.
15. **PW4 CYRUS MULITSA SHIKONTE** testified that he had known the Appellant for five years and on the material day the Appellant came in with two men and asked for PW1. He introduced them to PW2 and at 1.20 p.m. PW6 asked him to press the security alarm upon which PW3 said

to him that there was danger. He then met two people going out of the room running and heard one calling the Appellant's name. At that time he heard gunshots outside.

16. **PW5 DANIEL LESHUA MSUNDU** corroborated PW4's evidence on how they went to the house of PW1 and when they asked the Appellant why PW1 could not be seen he stated that they were discussing something with him and at this stage he pressed the alarm switch which was in his pocket after the Appellant had shut the door. He entered into the house and saw his employer in the sitting room with his mouth, hands and legs strapped. He was then ordered by the man who had a gun to join the rest. At that time he heard a sound of vehicles and thereafter gunshots.
17. **PW6 HON. BETTY TETT** confirmed having called his workers to check on PW1 who was not answering his cell phones while **PW7 PC MARTIN CHUKWE** responded to the alarm and upon reaching the gate met a motor vehicle with Ugandan Registration numbers driving out at high speed with one male occupant. When they got to the house, they met two men coming out with one pointing a gun at them whom they shot dead. **PW8 PC PASCALIA KATUNGE** confirmed having received a report from the Appellant of having been carjacked by three armed thugs who ordered him to take them to his father's house at Karen and demanded for money. When he noticed that the thugs were distracted he decided to escape but was seen by one who ordered him into the car before abandoning him at the by-pass at 6 p.m. having robbed him of cash, phone and two ATM cards and that after the incident the Appellant decided to go home and sleep before he was advised to report to the police.
18. **PW9 SGT PETER MWANGI** confirmed having taken the photographs of Motor vehicle registration No. KBK 705R and UAK 348M while **PW10 PC RICHARD RUTO** recovered the motor vehicle from the scene. **PW12 CPL BENSON INGOSI** documented the scene and recovered the pistol and ammunitions. **PW13 PC HILARY KYALO** recovered from the Appellant upon his arrest a wallet, two mobile phones, ID card in the name of William David Tett, Equity ATM card, Uchumi club card and further proceeded to Karen home of PW1 and recovered a photograph of the Appellant from the wall which enabled PW2 to allow the Appellant into the house. He stated that he interrogated all the witnesses and that there was no friction between the Appellant and his foster parents. **PW 14 DR ZEPHANIA KAMAU** examined PW1 and PW2 respectively and confirmed their degree of injury as harm
19. When put on his defence the Appellant's evidence was that he was car jacked on 6/9/2011 near Burma market on his way to Ngara by three people who called him by name at gun point and asked him to take them to his parents' home where the house-help allowed them in and offered them drinks; When PW1 came into the house and started to shout at him asking for his money one of the thugs removed a pistol and asked him to lie down. He was subsequently frog-

    marched to where the vehicle was and put in the boot of his car. He then heard gun shots before the motor vehicle started to move and then came to a stop. He was rescued there-from by good Samaritans.
20. From the submissions and proceedings herein we have identified the following issues for determination in this appeal:-

a. Whether the Appellant was positively identified at the scene
b. Whether the Appellant had common intention with the dead thugs
c. Whether the prosecution case against the Appellant was proved beyond reasonable doubt.

21. On the issue of identification:- The Appellant was known personally to PW1 his foster father, PW3 David Ondego who had known him as the son of PW1 for three years. PW4 also knew the Appellant as the son of the complainant for the five years he had worked at the home. He stated in his evidence in chief that on 6th September, 2011 he saw the Appellant with two men through the window of the kitchen and it is him who introduced the Appellant to PW2 as a son of PW1 before leaving them in the house to go and call the complainant. PW5 Daniel Leshua Sundu also confirmed having known the Appellant before the said date. The only witness at the home who did not know the Appellant was PW2 but was able to recognize him as part of the family through his photo which was on the wall. The incidence also took place in broad daylight and therefore there could not have been mistaken identification of the Appellant.
22. The Appellant in his evidence in chief confirmed that he was at the home of the complainant on

the material day. On the strength of the case of **ANJONONI & OTHERS v REPUBLIC (1980) KLR** we find that the Appellant was positively identified by recognition which is more satisfactory, more assuring and more reliable than identification of a stranger since both the Appellant and the prosecution witnesses placed him at the scene. The Appellant did not deny being in the complainant's home at the material time. We have also noted that the report on the OB was not made by Mr. Tett (PW1) but by the police upon their return to the station and therefore failure to mention the Appellant by name in the said report was not fatal to the prosecution's case.

23. On the issue as to whether the Appellant had common intention with the dead thugs; the definition of common intention as stated in Section 21 of the penal code is:-

"When two or more persons form common intention to prosecute an unlawful purpose in conjunction with one another and in prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

24. The section has been explained by the then East African Court of Appeal in **SOLOMON MUNGAI & ANOR v REPUBLIC CRIMINAL APPEAL NO. 13 of 1963** reported in **EALR 1965 PG 782** in which the court at page 786 quoted **WANJIRU WAMIERU v REPUBLIC (2) (1955) 22 EALR** at page 223 thus:-

> ***"In order to make the section applicable it must be shown that the accused had shared with the actual perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged. Common intention generally implies a pre-arranged plan but this does not rule out the possibility of a common intention developing in the course of event though it might not have been present to start with……"***

25. In criminal cases culpability does not visit only the person who committed the act in question, equal culpability lies with any person or persons who aided and abetted or were in any way compliant in the alleged act or omission and therefore as per the provision of Section 21 of the Penal Code (supra) every person who actually does the act or makes the omission which constitutes the offence, every person who does or omits to do any act for the purposes of enabling or aiding another person to commit the offence, and every person who aids or abets another person in committing the offence and a person who counsels or procures other person to commit the offence under Section 22 of the Penal Code can be liable for the commission of an offence.

26. We have looked at the evidence tendered by the prosecution and the conduct of the Appellant herein and in particular the evidence of PW1 WILLIAM M. TETT when he came to the house after being called by PW4 CYRUS MULITSA SHIKONTE on the request of the Appellant. The Appellant introduced the two thugs who died as his friends. Both the Appellant and PW1 left the house to go and talk outside the house giving the Appellant an opportunity to warn the complainant of the danger they faced if he had been carjacked as he stated in his defence but the Appellant did not do so. This we have contrasted with the conduct of PW3 who warned and signaled to PW4 using his hand that there was danger. It was further PW1's evidence that when he asked the Appellant why he was doing that to him, he responded that it was because the complainant had not given him land. The Appellant also told PW1 to give them money and he will not be harmed. The Appellant in his defence under cross examination corroborated the evidence of the prosecution witness and we find that his contention that the robbers had carjacked him to gain access to his parent's home was an afterthought.

27. It was the evidence of PW2 that it was the Appellant who stopped the man with the knife from stabbing her showing that he was in control of the group. The Appellant did not even warn **PW3 DAVID ONDEGO ROBERA** that there was danger in the house and according to the evidence of PW3 it is him who pushed him into the house and ordered him to sit down while demanding the bedroom keys for PW1. It was his evidence that it was the Appellant who was demanding money from PW1. There is further evidence that as the Appellant was running away from the scene, the dead thugs called him "Billy, Billy." We have also noted that when the Appellant

reported his alleged carjacking to PW8 he reported that he was robbed of various items which items were found in his possession when he was subsequently arrested by PW13. His conduct of giving false information to the police as regards the items stolen from him shows a guilty mind.

28. We therefore find that the Appellant had a common intention with the two thugs who were shot dead and are not persuaded by the submission by Mr. Amutalla that the Appellant should have only been charged with the offence of giving false statement or information. The appellant's conduct at the scene and his subsequent conduct thereafter pointed to his participation jointly with the others not before the court in the commission of the offence he was charged with.
29. On whether the prosecution's case was proved beyond reasonable doubt for the offence of robbery with violence, upon evaluation of the evidence tendered we agree with the trial court's finding that all the elements of the offence of robbery with violence were proved by the prosecution in that the Appellant was in the company of one or more persons, who were armed with offensive or dangerous weapons and in the course of the commission of the offence actual violence was used against PW1 PW2 and PW3 and that the alleged inconsistency in the prosecution case were not material but of minor nature.
30. There is also the evidence on record that there was no bad blood between the Appellant and his foster parents and therefore agree with the trial court's finding on fact that **"his parents had no reason therefore to falsely implicate him in such a heinous crime."** And therefore the appellant's defence was properly rejected by the trial court.
31. In the final analysis we find that the prosecution case against the Appellant was proved beyond reasonable doubt and therefore his conviction was safe. We therefore find no merit on the appeal herein which we hereby dismiss the appeal both on conviction and sentence.

SIGNED, DATED and DELIVERED at Nairobi this 26th day of April, 2016

J. WAKIAGA

JUDGE

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:-

Mr. Mwenda for the State

Mr. Omari for the Appellant

Appellant present

Tabitha court clerk