REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

LESIIT, KIMARU JJ

CRIMINAL APPEAL NO.164 OF 2010

(An Appeal arising out of the conviction and sentence of K. MUNEENI - PM delivered on 16th March 2010 in Kiambu CM. CR. Case No.192 of 2009)

WILSON NJOROGE MUTURI………………………1ST APPELLANT

DANIEL KANGURIA MWANGI………………..…..2ND APPELLANT

VERSUS

REPUBLIC……………………........RESPONDENT

JUDGMENT

1. Wilson Njoroge Muturi (1st Appellant) and Daniel Kunguria Mwangi (2nd Appellant) were charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 1st October 2006 at Wangige market in Kiambu County, the Appellants, while armed with a dangerous weapon, namely a toy pistol, robbed John Thimba Njoroge (the complainant) of a mobile phone make Motorola C113 and Kshs.3,000/- and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said John Thimba Njoroge. They were both charged with being in possession of an **imitation of a firearm** contrary to **Section 34(1) & (3)** of the **Firearm Act**. The particulars of the offence were that on the same day and in the same place, with intent to commit a felony, they were found in possession of an object resembling a firearm. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, both Appellants were convicted as charged. In respect of the 1st count, they were sentenced to death as is mandatorily provided by the law. In respect of the 2nd count, each Appellant was sentenced to serve five (5) years imprisonment. The Appellants were aggrieved by their conviction and sentence. Each Appellant filed a separate appeal challenging his conviction and sentence.

2. In their petitions of appeal, the Appellant raised more or less similar grounds of appeal. They were aggrieved that they were convicted on the basis of the evidence of identification that was not free of mistakes or errors. They were aggrieved that they had been convicted on the basis of evidence of prosecution witnesses that did not establish their guilt to the required standard of proof beyond any reasonable doubt. The 1st Appellant contended that his constitutional right to fair trial had been infringed because he was not provided with witnesses' statements before the

commencement of the trial. He also took issue with the fact that the trial magistrate held that he was found in possession of the stolen mobile phone yet the evidence on the issue was contradictory and conflicting. They were both aggrieved that their respective defences had not been taken into consideration before the trial court reached the determination finding them guilty as charged. They were aggrieved that the trial magistrate had shifted the burden of proof hence wrongly convicted them of the offences. For the above reasons, the Appellants urged the court to allow their respective appeals, quash their conviction and set aside their respective sentences.

3. At the hearing of the appeal, the two separate appeals filed by the Appellants were consolidated and heard together as one. The Appellants presented to the court written submission in support of their respective positions. The Appellants urged the court to allow the appeal. Ms. Ngetich for the State made oral submission urging the court to dismiss the appeals. In her view, the prosecution had established its case on the charges brought against the Appellants to the required standard of proof beyond any reasonable doubt. We shall revert to the arguments made after briefly setting out the facts of this case.

4. On 1st October 2006 at about 7.00 p.m., while the complainant was walking home from Wangige Trading Centre, he was accosted by two men. They ordered him to sit down and surrender his mobile phone and the money that was in his possession. He surrendered his Motorola C113 phone and Kshs.3,000/-. The two men were able to subdue him because they threatened him with guns. The complainant testified that he recognized the two men who had robbed him. He used to see the 1st Appellant at Wangige Trading Centre prior to the robbery incident. As regard the 2nd Appellant, he referred to him as Dan. They grew up together at Wangige. After the robbers had left, the complainant took a taxi and went to report the incident at the Chief's Camp. He was accompanied back to the Shopping Centre by Administration Police Officers, PW2 Abdi Kala Golicha and PW3 IP Ephantus Ndirangu. They met with the 1st Appellant. He was arrested. On being searched, he was found with a Motorola C113 mobile phone. The complainant positively identified the mobile phone as the one that was robbed from him a few moments earlier. He produced a receipt which indicated that indeed the particular phone with its serial number was his mobile phone. The complainant, PW2 and PW3 recalled that after his arrest, the 1st Appellant led them to some bushes where two toy pistols were recovered. The two (2) toy pistols were produced into evidence. The 1st Appellant led the two police officers to where the 2nd Appellant was. He was also arrested. The complainant was emphatic that he was able to positively identify the Appellants because at the place that he was robbed there was sufficient electric lights. He denied the suggestion by the 2nd Appellant that there existed a grudge between them.

5. PW2 and PW3 corroborated the testimony of the complainant in relation to the circumstances of the arrest of the Appellants. They both testified that after the complainant had made a report to the Chief's Camp, they escorted him back to Wangige Trading Centre. They found the 1st Appellant. They arrested him. They searched him. Inside the socks on his left leg, they found the mobile phone which was positivly identified by the complainant. After arresting the 2nd Appellant, they were escorted by both Appellants to some bushes behind a petrol station where two toy guns had been buried. They recovered the two toy guns. They escorted the Appellants to Kikuyu Police Station where they were re-arrested and later charged with the offences. The two toy pistols were taken for examination by a ballistic expert PW5 SP Lawrence Nthiwa. After examining the two toy pistols, he formed the opinion that they were imitation of firearms within the meaning ascribed to it in the **Firearms Act**. He produced the ballistic report into evidence. The case was investigated by PW4 SGT Francis Novauna. After conclusion of his investigations, he established that a case had been made for the Appellants to be charged with the offences for which they were convicted.

6. When the Appellants were put on their defence, the 1st Appellant gave an *alibi* defence. He testified that on the material day, he was at his sister's place at Ndenderu. In the evening, he went

to a club. He was surprised when he saw the complainant with police officers arrest him on the claim that he had robbed the complainant. He denied committing the offences. On his part, the 2nd Appellant exercised his constitutional right to say nothing in his defence.

7. This being a first appeal, it is the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent conclusion whether or not to uphold the conviction of the Appellants. In doing so, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any comment regarding the demeanour of the witnesses (see **Njoroge vs Republic [1987] KLR 19)**. The issue for determination by this court is whether the prosecution proved its case on the charges of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** and being found **in possession of imitation of a firearm** to the required standard of proof beyond any reasonable doubt.

8. We have carefully re-evaluated the evidence adduced before the trial court. We have also considered the submission made before us by the Appellants and by Ms. Ngetich on behalf of the State. The Appellants were convicted on the basis of the evidence of identification and the evidence of recovery of a stolen item. As regard the evidence of identification, it was clear that the evidence was that of a single identifying witness. As was held in **Maitanyi –Vs- Republic [1986] KLR 198 at P.200**:

"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

> ***"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".***

9. The Court of Appeal in **Peter Gatiku Kariuki –vs- Republic [2014]** eKLR cited with approval the case of **Michael Kimani Kungu –vs- Republic CA CR. Appeal No.686 of 2010** where it was held:

"Evidence of visual identification in criminal cases can bring about 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 identification of the accused which he alleges 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. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well-known case of R VS TURNBULL (1976) 3 ALL ER 549 at page 552 where he said-

> ***"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

10. In the present appeal, the complainant testified that he was robbed by two men whom he identified as the Appellants. He told the court that he had previously seen the 1st Appellant at Wangige Trading Centre before the robbery incident. As regard the 2nd Appellant, it was his testimony that he grew up with him. He even referred to him by name. He testified that he was

able to identify the two because there was sufficient electric light which illuminated the scene of the robbery. Immediately after the robbery, the complainant reported the incident to the Administration Police at the nearby Wangige Chief's Camp. The Administration Police (PW2 and PW3) accompanied the complainant back to the Trading Centre. The complainant pointed out the 1st Appellant. On being searched, the mobile phone that had been robbed from the complainant was recovered from the 1st Appellant. The 1st Appellant led the Administration Police to the arrest of the 2nd Appellant. The two Appellants led the police to a place in the bush behind a petrol station where two imitation pistols were recovered buried in the ground. It was clear from the evidence adduced by the complainant, that he properly identified both Appellants during the robbery incident. The complainant's identification of the Appellants was not that of a stranger identifying another. The Appellants were known to the complainant prior to the robbery incident. The evidence of the complainant was that of recognition. There was sufficient light that enabled the complainant to be certain that he had identified the Appellants as the persons who robbed him. The Court of Appeal in **Anjononi –Vs- Republic [1980] KLR 54 at P.60** held thus:

> ***"Being night time the conditions for identification of robbers in this case were not favourable. This was however a case of recognition not identification of assailants; recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because he depends upon personal knowledge of the assailant in some form or other."***

11. In the present appeal, if there was any doubt that the complainant had recognized the 1st Appellant, that doubt was removed when the mobile phone robbed from the complainant was recovered from the 1st Appellant. The complainant positively identified the mobile phone as the one that had been robbed from him. The time between the robbery and the recovery of the mobile phone was less than two hours. The doctrine of recent possession applied in the case of the 1st Appellant. The complainant testified that he was threatened by what he saw as pistols at the time of the robbery. He made the report to the police. Two imitation pistols were recovered. It was the two Appellants who led the police to the recovery of the imitation pistols. The two imitation pistols were recovered buried in a bush behind a petrol station. It was clear to this court that the Appellants had special knowledge of the whereabouts of the two imitation pistols. This corroborates the evidence of the complainant that he had been threatened with what he considered to be pistols. We hold that the prosecution adduced evidence that connected the 1st Appellant to the robbery to the required standard of proof beyond any reasonable doubt.

12. As regard the 2nd Appellant, he was known to the complainant. The complainant even referred to him in his evidence by name. Our evaluation of the evidence adduced leads us to the irresistible conclusion that indeed the complainant identified the 2nd Appellant during the robbery incident. There was no reason why the complainant would implicate the 2nd Appellant in the robbery. He had no grudge against him. The 2nd Appellant led the police to the recovery of the imitation pistols. He had special knowledge of the whereabouts of the said imitation pistols. In the case of the 2nd Appellant, we do hold that the prosecution did establish, to the required standard of proof beyond any reasonable doubt that he participated in the robbery.

13. The defence put forward by the Appellants did not dent the otherwise strong culpatory evidence that was adduced against them by the prosecution witnesses. Their constitutional right to be availed witness' statements was not infringed. The record of the trial court does not indicate that the Appellants made the request for the witness statements and they were denied.

14 The upshot of the above reasons is that the respective appeals filed by the Appellants lack merit and is hereby dismissed. The conviction and the sentence of the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF JUNE 2015

J. LESIIT

JUDGE

L. KIMARU

JUDGE