REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL 376 OF 2010

PETER KIARIE NJOROGE…….…..……. APPELLANT

V E R S U S

REPUBLIC ……..…… RESPONDENT

(From original conviction and sentence in criminal case Number 4426 of 2008 in the Chief Magistrate's court at Thika – B.A OWINO (SRM) on 25/6/2010)

JUDGMENT

The appellant, Peter Kiarie Njoroge was jointly charged with others not before court with three counts of the offence of Robbery with Violence contrary to section 296 (2*)* of the Penal Code.

It was alleged that on the 9th October 2008 at Mutati Village in Gatundu District, within Central Province jointly with others not before the court, being armed with offensive weapons namely pangas they robbed Peter Kabue Muthama cash Kshs.2, 500/=, ID Card, Driving Licence, a pair of shoes, one jacket all valued at Kshs.4,500/= and during the time of such robbery used actual violence to the said Peter Kabue Muthama.

In count II the particulars of the offence were that on 9th October 2008 at Mutati Village in Gatundu District, within Central Province jointly with others not before the court, being armed with offensive weapons namely pangas they robbed Robbins Kabue Mbugua cash Kshs.4, 000/=, two mobile phones make Nokia 1110 and Samsung X200, ID card, voters card, CFC ATM Card, Driving licence, KCB ATM Card, all valued at Kshs 12,800/= and during the time of such robbery used actual violence to the said Robins Kabue Mbugua.

In count III the particulars of the offence were that on 9th October 2008 at Mutati Village in Gatundu District, within Central Province jointly with others not before the court, being armed with offensive weapons namely pangas they robbed David Ndungu Muchiri cash Kshs.550/=, National ID card, Family Finance ATM card, mobile phone make Motorola, a pair of safari boots shoes; jeans long trousers, all valued at Kshs 9,350/= and during the time of such robbery used actual violence to the said David Ndungu Muchiri.

After a full trial the appellant was convicted of all three counts of the said offence and sentenced to death.

Aggrieved by the said conviction and sentence, the appellant lodged this appeal and subsequently filed amended grounds of appeal where he advanced 7 grounds of appeal which we have summed to three. The

first ground dealt with the issue of Identification evidence of PW1, PW2, and PW4 whose circumstances were not favourable.

Secondly, the appellant argued that the prosecution evidence was not only incredible but also partly inadmissible, and finally that the learned trial magistrate not only failed to give reasons for her decision but also disregarded the appellant's defense.

Our duty as the first appellate court is to look at the evidence afresh, re-evaluate the same and come to independent conclusions.

The prosecution case against the appellant was that in the evening of 9th October 2008 PW1, PW2 and PW4 were separately attacked and robbed by a four man gang within the vicinity of Nembu Trading Centre. PW1 had taken a stroll that evening at about 7-7:30 pm to some shops near his home when he was accosted by four men, one of whom had a powerful torch which he flashed at him effectively disorienting him before they pounced on him with fist blows and kicks, felling him to the ground. He observed that one of them had a knife while another brandished a panga which he used to cut him. They stole from him his brown leather shoes, jacket, Kshs.2, 500/= and ID Cards. He never the less managed to save his phone by concealing it discretely as he lay on it. He then went and reported the ordeal to the area Assistant Chief who later informed PW1 of the arrest of one of the assailants by some AP's. He was found in possession of the brown pair of stolen shoes. PW1 was later referred to hospital where he received treatment and was issued with a P3 form.

The learned state counsel, Miss. Maina opposed the appeal on grounds that there was sufficient evidence to support both the conviction and sentence.

The first ground dealt with the issue of Identification evidence of PW1, PW2, and PW4 whose circumstances the appellant argued were not favourable.

We observe that PW1 was emphatic during cross examination by the appellant that he did not identify any of the robbers during the ordeal. He however asserted later that the appellant was one of his assailants after he was arrested and found with his shoes which he identified.

PW2 on his part was ambushed with a powerful torch that was being directed at his face. He was attacked by a group of four men who descended on him with slaps across his face and ransacked him for his property in the process. He identified one of the men's faces who uttered the words **"Leo tumekupata"** as the appellant.

When he went to Nembu police post the following day to record a statement, he identified him as his assailant. He described that during the ordeal he was wearing jeans and a red marvin. He had a goatee and wore a black leather jacket. At the police station, he was still wearing the same clothes, which he identified in court. This evidence was corroborated by that of PW3 who arrested the appellant. He described him as having worn a black jacket, and found in possession of a torch, a knife, a panga and a pair of brown shoes. These were the same shoes identified by PW1 as his.

PW4 who was also attacked on the fateful night also corroborated the evidence of PW2 and PW3. He took part in an identification parade where he picked out the appellant whose face he had seen at the scene of crime during the ordeal. He described him as wearing a black leather jacket at the time, and being in possession of a panga which he used to cut his left forearm. He was treated and issued with a P3 form.

PW8 conducted an Identification parade involving nine men who had similar features to that of the suspect. Having exercised due diligence as recorded, the appellant was identified by PW4. He expressed his reservation and objections to the parade which were noted in the parade form.

The trial court in its assessment of this evidence of identification found the evidence of PW1, PW2 and PW4 consistent in their description of the appellant. On our part having examined the record we are

inclined to agree with this assessment and finding of the trial court.

The second ground of appeal was the appellant's argument that the prosecution evidence was not only incredible but also partly inadmissible. He raised questions on the circumstances of the appellant's arrest as well as the veracity of the recovered items on the appellant.

PW1 reported his ordeal to the Sub-Chief who in turn had the appellant arrested by some AP's who also found him in possession of the stolen shoes. They then took him to Gatundu police station.

The appellant disputes the issue of the recovery of the black jacket on him and submits that PW1 did not identify it in the first instance, and therefore argues that the same was not found on him. We have looked at the record however and taken note that he indeed talked of a recovered jacket in his examination in chief contrary to the appellant's submission.

PW2 on his part went to the police post the following day on 10th October 2008, and found AP's who told him that they had arrested and taken one suspect to Gatundu Police Station. He was found in possession of a black leather jacket and was wearing a pair of jeans trousers and a red marvin. He also spotted a goatee. Other items recovered on him were a panga, a knife and a rechargeable torch.

PW3 an AP Sergent Stephen Hura was the one who arrested the appellant after a brief chase of about 200metres from the police post along a public road in the vicinity, after a tip off from the area chief. Three of the appellant's colleagues however managed to escape. He found the appellant in possession of similar items identified earlier by PW1 and PW2. He however did not make an inventory of the recovered items. We note that the appellant in cross examination did not question the mode of arrest.

PW4 on the other hand after being attacked ran to report and seek help at the Nembu police post but did not find any officer. On 14th October 2008, he participated in an identification parade at Gatundu police station and picked out the appellant. He was wearing a black leather jacket. He however did not recover any of his lost items.

PW6 the investigating officer in this case was based at CID Gatundu. He urged that the appellant was brought there on 9th October 2008 from Nembu AP Post by the AP's who arrested him on allegations of robbery of PW1. He took possession of a torch, panga, knife and a leather jacket from the appellant which items he kept securely as exhibits. He received other complaints at the station on 13th October 2008 from PW2 which he recorded and preferred charges against the appellant.

On the appellant's alleged different versions by PW6 and PW1 regarding his arrest, we have examined the record and indeed whereas PW1 testified of the suspect being brought to his house after arrest, PW6 did not allude to that sequence of movement after arrest to PW1's house. Instead he testified that PW1 told him that immediately after the ordeal he rushed to the AP's and reported. As to whether the AP's went back to his house after arresting the appellant is not part of his testimony.

Having looked at the mode of arrest and recovered items, we find no issue, omission or even contradiction in any of these two. The arrest was adequately proved and consistency in evidence was sustained all through by all the prosecution witnesses. The witnesses testified only of the recovered items and did not refer to other items that were not recovered such as the safari boots that were stolen from the third complainant David Ndungu Muchiri as appears in his testimony and that of PW6. It is true that P.W. 3 did not make any inventory of the recovered items. However this would not have added any value to the prosecution case in view of the evidence of P.W. 1 and P.W. 2 which was corroborative.

The appellant contended that the learned trial magistrate failed to give reasons for her decision and disregarded his defence. It is clear that the appellant did not dispute the manifest description given by the prosecution witnesses of him or even the items found in his possession. The trial magistrate alluded to the doctrine of recent possession and we agree it applied in the circumstances of this case. The appellant's unsworn defense was very scanty. It amounted to a mere denial. The trial magistrate in her judgment

noted that it did not challenge the prosecution evidence in any way leaving it intact, which position we agree with.

Finally, both PW1 and PW2 suffered injuries from cuts by the assailants and were examined by PW5 who produced their P3 forms as exhibits in court.

Section 296(2) of the Penal Code clearly sets out what constitutes robbery with violence as follows:

1. **If the offender is armed with any dangerous or offensive weapon or instrument, or**
2. **If he is in the company with one or more other person or persons, or**
3. **If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.**

Proof of any one of the above ingredients of robbery with violence is sufficient to found a conviction under section 296 (2) of the Penal Code. This proof was well discharged by the prosecution. We therefore find that the ingredients of the offence of robbery with violence contrary to Section 296(2) of the Penal Code were satisfied.

The learned trial magistrate convicted the appellant in respect of all the three counts of robbery with violence and ordered that he be sentenced to death on all the three counts. That is irregular. The learned trial magistrate should have pronounced sentence in respect of count 1 only and ordered that the sentences with respect to counts II and III be held in abeyance.

The upshot of the foregoing is that this appeal lacks merit and we accordingly dismiss it in its entirety.

SIGNED DATED and **DELIVERED** in court this **30th Day** of June **2014**.

A.MBOGHOLI MSAGHA **L.A. ACHODE**

JUDGE **JUDGE**