IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 203,204 & 205 OF 2012

LABAN KIMEMIA MUTHONI……1ST APPELLANT

JORAM NJOROGE MBINDA……2ND APPELLANT

ANTHONY NJENGA NGINGA …….3RD APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 1456 of 2010 in the Chief Magistrate's Court at Kiambu – Mrs. C. Oluoch (PM) on 17th July 2012)

JUDGMENT

1. The appellants, **Laban Kimemia Muthoni, Joram Njoroge Mbinda** and **Anthony Njenga Nginga** were tried for the offences of attempted robbery with violence contrary to **Section 297(2)** of the **Penal Code** in count 1; and of being in possession of firearm contrary to **Section 4(2) 3(a)** of the **Firearm Act Cap 114 Laws of Kenya** in count II and III respectively. In addition, the first appellant was charged with one count of the offence of being in possession of public stores contrary to **Section 324(2)**, as read with **Section 36** of the **Penal Code** in count IV.

2. Brief particulars were that on the 17th day of September 2010 at around mid-day at Ndenderu-Limuru road in Kiambu, jointly with others not before the court, being armed with dangerous offensive weapons namely pistols, they attempted to robe John N. Mungai of his motor vehicle registration No. KBL 875Y make Mazda, red in colour, valued at Kshs.560,000/= and at or immediately or immediately after the time of such robbery threatened to use actual violence against the said John Mungai in count 1.

3. Further that on the same date and place, jointly with others they had in their possession a firearm namely, a ceska pistol No. 2071 and 8 live ammunitions of calibre 9mm, without holding a firearm certificate, while the first appellant had in his possession public stores namely, hand cuffs serial number 1058/91 of the Kenyan Prisons Service. The said property was reasonably suspected to have been stolen or unlawfully obtained.

4. The case presented before the trial court was that on 17th September 2010 at about 11.30 a.m,

PW1 was driving motor vehicle registration No. KBL 875Y along Ndenderu-Limuru road towards Nakuru accompanied by **PW2** his wife, when he noticed a car following closely behind and trying to overtake them. In the process of overtaking the car tried to push them off the road, as the driver whom he identified as the appellant, made gestures at them. The car cut in and stopped in front of their car. Three young men jumped out of the car two of whom carried guns. One of them positioned himself behind the intruder's car while the other two approached the complainant's car.

5. The intruders fired at the complainant and being a licenced gun holder the complainant fired back. The intruders ran back to their car as the exchange of fire continued. Eventually they gave up and drove off with the complainant in pursuit. In the high speed chase the intruders lost control of their motor vehicle and it rolled. Three of them came out and fled on foot but were apprehended with the help of members of the public and the police who arrived at the scene. They were subsequently charged as set out above.

6. When put on their defence the appellants opted to remain silent. The defence counsels asked and were allowed by the court to put in written submissions.

7. At the close of the trial they were all convicted in count I and sentenced to suffer death as prescribed by law. The first appellant was also convicted in count IV and the sentence thereto was held in abeyance.

8. The three appellants filed appeals as was their right, which appeals were consolidated when they came up for hearing. They raised various grounds which in sum were that:

a. ***Section 211 of the Criminal Procedure Code was not complied with;***
b. ***Identification was not positive;***
c. ***The trial court did not properly assess the evidence presented before it;***
d. ***Essential witnesses were not summoned;***
e. ***The death sentence imposed upon them was arbitrary and unconstitutional.***

9. Mr. Nyachoti learned counsel for the first appellant, Laban Kimemia Muthoni, submitted that **PW1** and **PW2** who were the victims of the robbery did not point out the appellants for purposes of arrest, while the members of the public who pointed them out did not testify. Mr. Nyachoti also urged that **PW3** should have been treated as an accomplice whose evidence required corroboration and further that the trial was a nullity for non-compliance with **Section 211** of the **Criminal Procedure Code**. He relied on the cases of **Charles O Maitanyi v Republic Cr. App No. 6/1989** and **Karanja & Anor v Republic Cr. App No. 193 & 195 of 2002** to advance his arguments.

10. The second appellant Joram Njoroge Mbinda, filed written submissions in which he urged that the several versions of the evidence pertaining to his arrest served to expose the confusion of the circumstances of his arrest. He contended further that the police were not given any description of the assailants or the said getaway car and in the circumstances the possibility of mistaken identity loomed large. He also argued that the court should have viewed the evidence of identification and of the recovery of exhibits as erroneous due to the contradictions said to exist on record. He relied on the following cases:

1. **Gidraph Thuo Ndola v Rep CA 12 & 13 of 2000 NYR**,

2. **Woolmington v DPP (1935) AC 462**,
3. **Moses Munyua Mochero v Rep Cra. No. 63 of 1987**,

4. **Anjononi & others v rep (1980) KLR 59**.

11. The third appellant Anthony Njenga Nginga, also filed written submissions in which he averred that the circumstances obtaining during the attempted robbery, were such that the identifying

witnesses were not in a position to make positive identification, especially in view of there being no first report made to the police. In his opinion the evidence of the witnesses appeared rehearsed and disjointed and the court should have been cautious in accepting it. The appellant also faulted the court for allowing written submissions, stating that there was no provision therefor in law. He cited the cases of:

1. ***Robert Final Akhoya v Republic Cr. App No. 42 of 2002 CA KLR,***

2. ***Abdalla Kitengo Otieno v Republic Cr. No. 175 of 2002,***

3. ***Pravin Singh Dhalay vs Republic Cr. App No. 10 of 1997***

4. ***Teper v Queen (1952) AC 480 pg 489***

5. ***John Njagi Kadogo & others v Rep Cr. App No. 64 of 2004 NBI***

6. ***Ibrahim Lekartelo and Target Lokonyokie v Rep Cr. App No. 52 of 1999.***

7. ***James Muchene Kambo v Rep Cr. App No. 63 of 2003.***

12. Miss Maina learned stated counsel argued the case on behalf of the respondent. On the ground that the mode of arrest was riddled with doubts and could not sustain a conviction, she submitted that the arrest of the suspects was very clear as they were followed by **PW1** who never lost sight of them, as **PW2** called for help form police officers and members of the public. That the police arrested the appellants within a few meters from where their motor vehicle had overturned and the arresting officer testified to that fact.

13. On the ground that the court erred by allowing parties to put in written submissions, Miss Maina contended that none of the parties objected to putting in written submissions and it cannot be brought up now. That in any case no prejudice was occasioned to the appellants by the advocate's representing them putting in written submissions.

14. On the ground that the court failed to comply with **Section 211** of the **Criminal Procedure Code** she submitted that it was complied with and the appellants elected to remain silent. That the court of appeal has held that even if **Section 211** of the **Criminal Procedure Code** was not expressly complied with and the appellants elect how they will defend themselves it is not fatal and not prejudicial on this basis. Miss Maina relied on **Cra. 391 of 2006 Benson Kamau v Rep**.

15. We considered the question of identification and the manner in which the trial court assessed the relevant evidence. In our analysis this case rests largely on the evidence of visual identification by **PW1** and **PW2** who were the eye witnesses and were considered to have been honest witnesses, by the learned trial magistrate. We were however circumspect in considering their evidence in view of the fact that errors of identification can occur even where witnesses are honest. See- **Kamau v Republic [1975] E.A. pg 139**, in which the court said **"The most honest of witnesses can be mistaken when it comes to identification."**

16. To ensure that no person is convicted of an offence on the basis of the untested evidence of visual identification by a witness, the Court of Appeal set out certain guidelines to ensure that a person is convicted only when it is beyond *per adventure* that he was properly identified. Those guidelines may be found in the case of **Cleophas Otieno Wamunga vs. Republic [1989] KLR 424**, in which the court stated as follows:

> ***"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 <u>Republic vs. Turnbull [1976] 3 ALL ER 549 at page 552</u> **where he said:**

17. The offence herein occurred in broad daylight in the forenoon. **PW1** said he was able to see the assailants clearly, and was able to identify their clothing in court. He identified a black jacket worn by the man who accosted him at the driver's window and a T-shirt worn by the man who was on the side of **PW2**'s window. He testified that the third man had a sweater and was the driver who gestured at him to stop. All these items of clothing were produced in evidence.

18. We note that the three appellants were arrested in close proximity of the overturned vehicle from which both **PW1** and **PW2** saw them escape. **PW1** chased and stood guard over the second appellant till the police arrived and arrested him while the third appellant appears to have been dazed by the accident and fell near the overturned motor vehicle.

19. The first appellant was arrested following identification by members of the public who saw him flee from the scene. This evidence on its own would not suffice since these members of the public who identified him did not testify to state why they connected him to the offence. There was however evidence from **PW3** his cousin which linked him to the offence, although Mr. Nyatochi invited us to treat the said evidence as that of an accomplice requiring corroboration.

20. **PW3** testified that the first appellant hired the motor vehicle registration No. KBE 648R from him on 16th September 2010, stating that he needed it to drive his friends to a funeral in Naivasha. He did not return the vehicle on that day as agreed. **PW3** went to get his motor vehicle early on 17th June 2010 and found that the first appellant had left. At about noon on the same day **PW3** was called by the DCIO Kiambu and locked up, for reasons that the said motor vehicle had been used in an armed robbery.

21. This lends credence to the evidence of **PW1** and **PW2** that the first appellant was one of the robbers and that it was he who was driving motor vehicle registration No. KBE 648R at the time of the attack. There is no evidence that he was being held against his will or that he had been robbed of the said motor vehicle prior to the robbery in question, and there is no evidence that **PW3** was party to his nefarious plans. We therefore find no reason to hold that **PW3** was an accomplice.

22. There was a bit of confusion as to whether any of the appellants was arrested in possession of the gun and hand cuffs as stated by **PW7** or these exhibits were found on the ground near the car as stated by **PW1**. Whatever the case, there is no doubt that the appellants were armed because both **PW1** and **PW2** testified that the appellants shot at them even as **PW1** shot back. The bullet holes and cracks in both motor vehicles as attested to by **PW6,** the scenes of Crime Officer, is testimony to this fact.

23. We find therefore that these appellants were together and had formed the common intention of robbing the witnesses. They acted in concert to further their common intention and the acts of each are therefore deemed to be the acts of all. It matters not who among them held the gun, who had the hand cuffs and who drove the get way car.

24. On count No. IV in respect of which the first appellant was convicted it is our view that the government stores, that is the handcuffs found in his possession were intended to further their plans in count No. 1. In the first place it was not necessary to charge him separately in count IV. Considering the confusion adverted to in paragraph 22 above we find that the conviction of this count was not safe. For purposes of clarity however, if the court had properly convicted him it ought to have pronounced the sentence in this count before ordering that it would be held in abeyance.

25. **In Cra. 391 of 2006 Benson Kamau v Rep** relied upon by Miss Maina the Court of Appeal found that:

> **"Failure to specifically record that section 211(1) of the Criminal Procedure Code was complied with is in the circumstances of this case, an irregularity in the proceedings which is cured by section 382 of the Criminal Procedure Code as it has not been shown that the irregularity has occasioned a failure of justice and the constitution which states that procedural technicalities should not be a bar to justice".**

We note that the first appellant was represented during the trial in the lower court by Mr. Gachoka Advocate while Mr. Njau Advocate represented the second and third appellants. On the date set down for the defence hearing Mr. Gachoka addressed the court as follows:

> **"After consultation with my learned friend and accused persons, they have opted to keep quiet. I requested for a date for submissions."**

In our view therefore, the appellants signified their election through their representation to remain silent. It was also their wish to put in written submissions which the court allowed. On that basis it cannot be said that **Section 211** of the **Criminal Procedure Code** was not complied with.

26. On the sentence, the appellants submitted that the death sentence imposed upon them was arbitrary and unconstitutional. Miss Maina submitted that it is now settled by the Court of Appeal that for the offence of attempted robbery with violence the sentence is death as opposed to 7 years as alleged. In **CRA 123 of 2010 Charles Mulandi Mbula v Rep**, to which Miss Maina referred us, the court stated that it was clear from the plain reading of **Section 389** of the **Penal Code** that it only applies where no other punishment is expressly prescribed in the penal statute.

27. The Appellants were charged with the offence of attempted robbery under **Section 297 (2)** of the **Penal Code** which provides a specific penalty as hereunder.

> *"**If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

Section 389 of the **Penal Code** reads as follows:

> ***"Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years."***

Section 389 of the **Penal Code** therefore applies ***"if no other punishment is provided"*** whereas **Section 297(2)** provides a specific sentence.

28. Having carefully re-assessed the evidence and all the circumstances of this case, we are satisfied that the prosecution called the witnesses whom they deemed necessary to prove their case and the learned Principal Magistrate properly assessed the evidence and convicted the appellants, in count I based on sound evidence.

We allow the first appellant's appeal in count IV and dismiss the appeals and confirm the conviction in all three counts and the sentences imposed on the appellants by the trial Magistrate.

SIGNED DATED and **DELIVERED** in open court this **16th** day of **June 2014**.

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

JUDGE **JUDGE**