REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 73 & 84 OF 2007

MICHAEL NORMAN MBACHU NJOROGE ……..…1ST APPELLANT

SAMUEL WAMUGIRI MWIHAKI ……..……..…2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 258 of 2006 in the Senior Resident Magistrate's Court at Githunguri – L. K. Mutai (SRM) on 4th February 2007)

JUDGMENT

1. The appellants, **Micheal Norman Mbachu Njoroge** and **Samuel Wamugiri Mwihaki** were tried by L. K. Mutai, Senior Resident Magistrate at Githunguri Senior Resident Magistrate's court on two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.

2. The particulars of the offence were that on the 13th day of February 2006 at Githiga village in Kiambu District within the Central Province, jointly with others not before court, being armed with dangerous weapons namely homemade AK-47, a toy pistol and a knife, they robbed Samuel Karebei Lakakeng of one motor vehicle registration no KAU 496U Isuzu Canter, cash Kshs.800/= and one mobile phone make Siemens C-25, all valued at Kshs.470,000/= in count I. They robbed Juma Ochieng Erickson of cash Kshs.12,900/= and one mobile phone make Motorola, all valued at Kshs.16,499/= in count II. It was further alleged that at, or immediately before, or immediately after the time of such robbery they used actual violence against the said Samuel Kerebei Lakakeng and Juma Ochieng Erickson.

3. The learned trial magistrate convicted both appellants as charged in count 1 and sentenced each of them to suffer death as by law prescribed. She convicted them of a lesser offence under Section **296(1)** of the **Penal Code** and sentenced them to five (5) years imprisonment in count II. They both filed appeals which were subsequently consolidated and proceeded as appeal **No. 73 of 2007**.

4. The appeal was argued before Khaminwa and Warsame JJ on 10th May 2010 but no judgment was rendered. When it came up before us on 20th May 2013 both appellants elected to let us write the judgment using the submissions already on record, without requiring them to re-argue the appeal. The respondent did not object. This is therefore, our judgment.

5. The brief summary of the prosecution case was that **PW1**, Mr. Lakakeng the 1st complainant

herein, was at the material time driving motor vehicle registration number KAU 496U Isuzu canter from Githiga market where he had delivered bread on behalf of his employer Nakuru Rift Valley Bakery. With him was **PW2** Mr. Erickson the salesman. When he slowed down to navigate a rough section of the road, four men who were walking on the road ahead of them suddenly attacked them.

6. One man smashed and shattered the motor vehicle windscreen using an AK 47 rifle, causing the driver to panic. In the process the motor vehicle stalled. His door was forced open and the man with the rifle pushed him off his seat as he hit him on the hand and head with the butt of the gun. One of the other three men was also armed with a pistol and a knife. The three men entered through the passenger door and sandwiched **PW1** and **PW2** under the dashboard.

7. They drove the motor vehicle for some distance at a high speed before coming to a halt. They dragged the two witnesses out of the motor vehicle and robbed them of their personal effects. **PW1** was relieved of his cell phone make Siemens C.25 and his wallet which had Kshs.8,000/=. **PW2** was also relieved of his valuables. They were taken to the rear of the canter and locked up.

8. Some farmers who had been watching the unfolding drama from a distance later rescued them, and they found that the safe which was within the cabin had been forced open and Kshs.12,900/= stolen from therein. The appellants were arrested with the help of members of the public and later charged.

9. Both appellants gave unsworn testimonies in their defence and maintained their denial of the charges against them. The 1st appellant testified that he is a small scale trader dealing in vegetables, and that on the date of infamy he was out and about looking for kales to sell when he ran into a group of people armed with clubs and machetes. The group set upon him without much ado and beat him up before they took him to a place where he found two other people who had suffered the same fate as his. Police officers from Githiga AP Post came and took them to Githunguri Police Station where he was subsequently charged.

10. The 2nd appellant testified that he was returning home from delivering milk on the morning in question when he came upon a group of armed people. A member of that group suggested that the 2nd appellant might be one of the people the group was looking for. The rest of group pounced upon him and beat and tied him up. He was escorted to a place where he found a man undergoing the same fate. Presently a third man arrived at the scene in the same circumstances. Police officers at the scene took away his proceeds from the sale of milk, and escorted the three men to Githunguri Police station where they were later charged.

11. The gist of the 1st appellant's grounds of appeal as amended was that essential witnesses such as those who arrested him did not testify to connect him to the recovered firearms, that the trial court misdirected itself on the question of corroboration and that his defence was not considered as required by law.

12. In sum, the 2nd appellant's grounds of appeal also amended, were that the charge sheet was defective, he was not arrested with any exhibit to connect him to the offence, essential witnesses were not summoned to testify and that material contradictions were not resolved. He further averred that the trial was not fair, and that the defence was not considered adequately. He also contended that the conviction and sentence were based on scanty evidence.

13. Opposing the appeal on behalf of the state Mr. Mulati the learned state counsel in his rejoinder stated that the appellants raised no objection when the charge sheet was substituted in court, further that the gun used in the robbery was recovered and that **PW2** had identified the attackers. He also submitted that the trial magistrate considered the evidence of the prosecution and that of the defence to arrive at the conviction. In his view the prosecution proved their case beyond reasonable doubt.

14. This being the first appeal we have considered those submissions and re-evaluated the evidence adduced by witnesses in the trial court to arrive at our own independent decision as to whether or not to uphold the conviction of the appellant. In drawing our own conclusions we have borne in mind that we neither saw nor heard the witnesses as they testified. ***(see Njoroge vs. Republic [1987] KLR 99)***

On identification, the 1st appellant submitted that the identification was not free from error and mistake as it was made under difficult circumstances. In his written submissions he enumerated the difficult circumstances as follows:

> **"The attack was sudden and violent from the earliest beginning to the end, the attackers were strangers and life threatening with guns according to the witnesses' mistaken belief. That the estimated observation time of between 15-20 minutes was apparently short and thus insufficient in the very harsh conditions. That in circumstances of shock and fear identification is difficult if not impossible."**

He invited us to find therefore, that the circumstances of identification were difficult due to the fear and shock prevailing at the time, and cited the cases of **Cleopas Otieno Wamunga vs Republic Cr. App no. 20 of 1989 KSM** and **Juma Nyongesa vs Republic Cr. App. No. 121 of 1981 NBI**.

15. The 2nd appellant submitted that he was not positively identified, since **PW1** did not specify what role he played during the robbery, if indeed he participated, and that **PW1** also introduced another weapon, a metal blade, which was not captured in the charge sheet. Lastly, that in his report to the police **PW2** did not describe their attackers.

16. In considering the evidence of identification we referred to the direction of the Court of Appeal in the case of **JOSEPH NGUMBAU NZALO VS. REPUBLIC (1991) 2KAR Pg 212** in which the court stated that:

> "***A careful direction regarding the condition prevailing at the time of identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error was essential."***

We analyzed the evidence of identification from the two identifying witnesses, **PW1** and **PWII** together with the evidence tendered in defence. We are aware that honest mistakes can be made even in identification. – see Court of Appeal decision in the case of ***Abdalla Bin Wendo Vrs Republic [1953] EACA 166,*** where the Court of Appeal of East Africa had this to say:-

> ***'…… but on identification issue a witness may be honest yet mistaken and may make erroneous assumption particularly if he believes that what he thinks is likely to be true ……'***

17. We are however persuaded that there was no error in the identification of the appellants since this was not a case of a single identifying witness, and the conditions under which the identification was done were favourable. The robbery occurred in broad day light, and lasted for about 20 minutes according to both **PW1** and **PW2**. In our view in the circumstances set out above the witnesses had ample time to see and identify their attackers as they were in close proximity with the appellants. There was no crowd milling around them which could have interfered with the observation of the assailants by the witnesses. The witnesses identified the appellants both by their appearances and by their clothing.

18. Both appellants would have the court believe that they were hapless victims of an armed gang that seemed to attack innocent passers-by at random. **PW1** and **PW2** on the other hand testified that there were some people labouring in their fields nearby who observed the robbery as it unfolded. It is some of these people who freed them from the back of the truck as others among them

pursued the robbers for a short distance and arrested them.

19. The appellants were under no burden to explain their innocence or to explain what they were doing at the scene, since in a criminal trial the burden of proof rests unshiftingly upon the prosecution. Each having elected to give a statement in their defence that evidence must be sifted and weighed in the context of all the evidence on record and not in isolation.

20. The 1st appellant stated that he left his house with sacks and Kshs.4,700/= to buy kales for sale. That he bought two sacks of kales at Kshs.2000/= each and paid two cyclists Kshs.100/= to transport the kales for him. There would therefore, appear to be an inexplicable multiplication of the balance of Kshs.600/= which should have been remaining in his pocket, because in his testimony, the police officers who came to the scene took Kshs.8600/= from him. This gave an impression of a person who was making up his story as he went along, and not one who was narrating true facts.

21. We note that the 1st appellant did not bring up this issue in his cross-examination of **PW5.** The 2nd appellant did question **PW5** about Kshs. 3,350/= allegedly taken from him by the police. **PW5** responded that there was no money to recover from the 2nd appellant since his pockets had been torn and he himself said that what he had, had been taken by the mob.

22. Both **PW1** and **PW2** testified that they positively identified the men as they carjacked them and as they removed them from the motor vehicle before relieving them of their valuables. The robbery occurred at about 10.00 a.m. and the four men had not covered their faces. **PW1** testified that they were together for about 15-20 minutes, while **PW2** stated that the robbery lasted some 20 minutes. In all that time the witnesses were not blind-folded. After the robbery three of the robbers were apprehended by members of the public a short distance from the scene and escorted back to the scene of the robbery within minutes. Both witnesses were able to identify them as those who had robbed them. They wore the same clothings and the weapons used in the robbery were recovered on them.

23. On the weight of the evidence the 1st appellant contended that the trial court erred in finding that the evidence of **PW3, PW4, PW5** and **PW7** was corroborative when none of them witnessed the robbery or the arrest. Further, that she also erred in finding corroboration in the hearsay evidence of one Martin (Mathu) the third suspect who died in custody. The second appellant argued that the prosecution evidence was riddled with contradictions which were never resolved. Both appellants opined that those witnesses who were essential to the trial were not summoned.

24. As stated elsewhere in this judgment the primary evidence on identification and what transpired during the robbery came from **PW1** and **PW2** who were at the scene and who were the complainants. The evidence of **PW3**, **PW4**, **PW5** and **PW7** corroborated the fact that the appellants were arrested in close proximity to the stolen motor vehicle, were badly beaten by members of the public, and had with them offensive weapons when these witnesses found them.

25. **PW4** was the shop keeper who had just received a delivery of loaves of bread from the complainants' and whom **PW2** came running back to, a short while later to ask for assistance to reach the police, stating that they had been carjacked. He also recalled that one of the three men he found under arrest at the scene of the robbery (who had since demised) had gone to his shop in the morning posing as a customer who had a large order for bread and was told that the bread would be delivered at about 11.00 a.m. that morning.

26. In considering this evidence therefore, the learned trial magistrate cannot be said to have been relying on hearsay evidence from the deceased since **PW4** was testifying as to what he perceived with his own senses when the deceased visited him earlier in the day. We found no contradiction either in the evidence of the two eye witnesses or the other witnesses who came to the scene later. Both the eye witnesses testified that the four men had an AK 47 rifle, a pistol and a knife between

them during the robbery. The witnesses who came to the scene later, found the appellants and the weapons. We opined that the fourth item said to be a blade may not have found its way into the charge sheet because it was said to be a chisel and was not used as a weapon. This would have been a material omission if this implement was said to have been wielded as the main offensive instrument.

27. In another of his grounds the 2nd appellant averred that the charge sheet was defective because the motor vehicle which was the main subject matter of the robbery was described as an Isuzu canter bearing registration number 479U, while the witnesses referred to it variously as bearing registration number 496U or 496Y. The original record from the trial court however, shows that both **PW1** and the substituted charge sheet which is to be found at the back of the file reflect the registration number of the subject motor vehicle to be 496U. It is not clear where the charge sheet accompanying the typed proceedings and describing the subject motor vehicle as bearing registration no. 479U emanated from.

28. The number given in the testimony of **PW2** may have been an error which cannot be said to have prejudiced the appellants in any way since the evidence reflects that they took control of the motor vehicle from **PW1** and drove it for a short distance before they abandoned it and tried to flee on foot. The police found both the appellants and motor vehicle still within the vicinity of the scene of robbery, just minutes later. There is no question of a different motor vehicle having been recovered elsewhere.

29. We are satisfied that the two appellants were part of the gang of four which set upon the witnesses, and robbed them of their properties together with other property in their custody. We also find that the robbers attacked the two witnesses with the common intention of robbing them and were acting, in concert. It is therefore immaterial which of the witnesses wielded which of the offensive weapons or committed which act as contended by the second appellant. The acts of each became the acts of all, and each became culpable as if they committed the act which was carried out by any member of the gang in furtherance of the robbery.

30. We further find that by virtue of **Section 34(2)** of the **Firearm Act** the fake pistol and homemade AK 47 rifle carried by the attackers were offensive weapons, since they were employed in the circumstances of committing offences contained in the Penal Code.

Section 34(2) of the **Firearm Act, Cap 114** Laws of Kenya provides that:

> ***"A firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any shot, bullet or other missile, be deemed to be a dangerous weapon or instrument for the purposes of the Penal Code."***

31. From the foregoing reasons we are of the view that the two appellants should have been convicted under **Section 296(2)** of the **Penal Code** in both counts. The robbers numbered four and were armed with dangerous and offensive weapons by the definition of **Section 34(2)** of **Cap 114** laws of Kenya. They also used violence and actually beat and struck **PW1** who was driving the canter. The violence referred to under **Section 296(2)** of the **Penal Code** need not be directed towards the person who is actually being robbed as long as it is meted out during the robbery.

32. The use of, or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing is only one of the ingredients prescribed in **Section 296(2)** of the **Penal Code** which provides 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."

Any one of the ingredients above if proved will constitute the offence under **Section 296(2)** of the **Penal Code**.

33. Since however no notice of intention to enhance the sentence in count II was served upon the appellants we shall not interfere with the sentence in the said count.

34. We have therefore scrutinised and reassessed the evidence and find that, the prosecution witnesses proved the case against the appellants even without the evidence of the members of the public who assisted in the arrest of the appellants.

For the foregoing reasons we uphold the convictions entered against each appellant in each of the counts. We order that each appellant shall serve the sentence imposed in count I, while the sentence imposed in count II will remain in abeyance against each appellant.

We dismiss the appeals.

SIGNED DATED and **DELIVERED** in open court this **24th** day of July **2013**.

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

JUDGE **JUDGE**