REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 537 OF 2009

(An Appeal arising out of the conviction and sentence of K.MUNEENI - PM delivered on 18th November 2009 in Kiambu CMC. CR. Case No.1998 of 2008)

JOSEPHAT KARANJA MUTURI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Josephat Karanja Muturi was charged with two counts of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. In respect of the first count, the particulars of the offence were that on 22nd November 2008, along Kirigiti-Ruiru road in Kiambu District, the Appellant, while armed with a lethal weapon namely a pistol, jointly with others not before court robbed Moses Waweru Nyaga of motor vehicle registration No. KAW 531C Toyota Corolla, a mobile phone and Kshs.2,600/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Moses Waweru Nyaga. The second count was that on 17th November 2008 at Githurai 44 Kasarani, the Appellant, jointly with others not before court while armed with a lethal weapon namely a pistol robbed Emmanuel Ng'ethe Njau of motor vehicle registration No. KAW 531C Toyota Corolla, a mobile phone and two sweaters and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Emmanuel Ng'ethe Njau. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged on both counts. He was sentenced to death as is mandatorily provided by the law. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that his constitutional right to fair trial had been breached because the trial court did not give him an opportunity and time to defend himself. He faulted the trial magistrate for proceeding to convict him even when he had not been given an opportunity to cross examine any of the witnesses. He took issue with the fact that the trial magistrate proceeded with the hearing of the case even when he had notified the court that he had filed several constitutional applications before the High Court. In the premises, he asked the court to allow his appeal, quash his conviction and set aside his sentence.

In his submission before court, the Appellant told the court that his right to fair hearing was not considered by the trial court because he was not availed the statements of the witnesses and the OB report before the witnesses testified. He reiterated that he was not given an opportunity to defend himself. That was the reason why he did not participate in the trial. He accused the trial court of making oppressive orders against him that militated against him being tried fairly. He told the court that the judgment was

rendered before he had been given an opportunity to defend himself. In his written submission, the Appellant stated that his right to fair trial as enshrined in **Article 50** of the **Constitution** was breached because he was not availed witnesses' statements before the commencement of the trial. Further he was not given an opportunity to defend himself during trial.

Miss Matiru for the State opposed the appeal. She submitted that the Appellant posed as a fare paying passenger on two occasions in a motor vehicle that was being driven by the complainants. After negotiating the fare, the Appellant and his accomplices hijacked the complainants after which they were robbed of their valuables and the motor vehicle. The complainants were dumped by the roadside. In the first robbery, the motor vehicle was found vandalized. In the second instance, the police used a tracking device to trace the motor vehicle. The motor vehicle was recovered a few hours after the robbery. The Appellant was found inside the motor vehicle. She submitted that the prosecution therefore adduced sufficient evidence to connect the Appellant with both crimes. She urged the court not to interfere with the conviction and sentence of the Appellant because the Appellant was positively identified by the complainants during the robberies. As regard the claim by the Appellant that his constitutional right to fair trial had been breached, she submitted that when the trial commenced, the Appellant had an advocate. Later, the Appellant acted in person. It was the prosecution's case that the Appellant was given all the opportunity to defend himself. The Appellant opted not to ask questions some of the witnesses. He also opted to keep quiet when he was put on his defence. She urged the court to dismiss the appeal.

Before giving reasons for our decision, the following are the facts of this case:

According to PW1 Moses Waweru Nyaga (the 1st complainant), on 22nd November 2008 at about 1.00 a.m., he was approached by two men who requested him to take them to Rocky City, Kiambu. The 1st complainant was at the material time a taxi driver. He was driving motor vehicle registration No.KAW 531C Toyota Corolla. At the time of approach, he had parked the motor vehicle at the junction of Mfangano and Ronald Ngala Streets in Nairobi. He told the court that he negotiated the fare with the two men. The negotiations took about ten (10) minutes. During this period, he told the court that he was able to identify the Appellant. This is because they were negotiating while standing outside the car where there were street lights. After agreeing on the fare, the two men entered the car. He drove them towards Rocky City, Kiambu. While on the road, the two men robbed him of the motor vehicle, his mobile phone and Kshs.1,200/-. He told the court that he was threatened with a pistol before he was robbed. He was dumped in a coffee plantation in Kirigiti. He sought assistance from motorists and was able to call his colleague PW2 James Mwiru. He was advised to report the incident to the police.

PW2 reported the robbery incident to PW4 Joseph Kabucho, the Operation Manager of the taxi company that owned the motor vehicle. PW1 was able to trace his way back to Kiambu Police Station where he made a report to the police. The police circulated the registration number of the stolen motor vehicle to other members of the police force. The car was fitted with a car tracking device. PW4 Joseph Kivunge Kabucho told the court that he was the operations manager of a taxi service company that owned the motor vehicle. He recalled that on the night of 21st November 2008, he was informed by 1st complainant that he had been robbed of the motor vehicle. He advised the 1st complainant to report to the police. Meanwhile, he called the tracking company. He was informed that the motor vehicle had been traced at Ngara area. PW4 rushed to Pangani Police Station where he reported to the police. The police officer he reported to was PW7 PC Morrison Kithuku. PW4 was assisted to trace the motor vehicle by PW5 PC Shukri Mohamed and PW7 PC Morrison Kithuku. PW4 and PW5 testified that they were able to trace the motor vehicle along Pane Road in Nairobi. There were two occupants in the motor vehicle. When the occupants realized they were being followed by the police, one of them got out of the motor vehicle and managed to escape. The Appellant, who was driving the motor vehicle, was arrested inside the motor vehicle before he could make good his escape. PW8 IP Waitambe Wamocha, then based at Kiambu Police Station testified that on 22nd November 2008, he was assigned the duty to investigate the case. He learned that the motor vehicle which had been robbed from the 1st complainant had been recovered by police officers based at Pangani Police Station. He was informed that a suspect had been arrested. He went to the Pangani Police Station and took custody of the Appellant. He instructed PW6 Cpl Gerald Wasule, a Scenes of Crime Officer to photograph the motor vehicle for purposes of the trial. The

photographs were produced as prosecution's exhibits during trial.

As regard the second robbery incident, PW3 Emmanuel Ng'ethe Njau (2nd complainant), testified that on 17th November 2008 at about 4.00 a.m. he was at his place of business along Ronald Ngala Street. PW3 was at the material time a taxi driver. He was driving motor vehicle registration No. KAW 531C Toyota Corolla. He recalled that he was approached by a man, whom he identified as the Appellant, who asked him to take him to Githurai 44. They negotiated the fare while standing outside the motor vehicle. There was street light. PW3 told the court that he was able to clearly identify the Appellant. After agreeing on the fare, the Appellant and another man boarded the motor vehicle. While on the way, they threatened the 2nd complainant with a pistol after which they robbed him of the motor vehicle. They dumped him by the roadside. Before dumping him, they robbed him of his mobile phone, Kshs.5,000/- and a sweater. After the robbers had driven away the motor vehicle, he sought help from motorists who were passing by. He made a report to Kiambu Police Station. A day later, the motor vehicle was recovered by the police officers based at Pangani Flying Squad. The motor vehicle had a tracking device. The motor vehicle was found vandalized. It was missing its side mirrors, battery, radio cell and one light. The motor vehicle was photographed by the police before it was released to the owners. The 2nd complainant was emphatic that it was the Appellant who had robbed him because he was able to positively identify him before he boarded the motor vehicle.

When he was put on his defence, the Appellant opted to keep quiet.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the Appellant on the two charges of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

We have re-evaluated the evidence that was adduced before the trial court. We have also considered the grounds of appeal put forward by the Appellant. We have also considered the submission that was made before us by the Appellant and by Miss Matiru for the State. The Appellant was convicted on two pieces of evidence: that of identification and by the application of the doctrine of recent possession. As regard the evidence of identification, the complainants testified that they were able to positively identify the Appellant as being a member of the gang of two men that robbed them. They testified that they were able to positively identify the Appellant because they negotiated with him the fare before the Appellant and his accomplice boarded the motor vehicle. What is however interesting is that it was apparent that the two complainants did not give the description of their assailants in the first report that they made to the police. They did not describe the clothes that the assailants wore. They did not give the physical description of the Appellant. They had not known the Appellant prior to the robbery incident. Therefore they could not be said to have recognized the Appellant. Both complainants testified that they were positive that it was the Appellant who had robbed them because they had identified him while they were standing in close proximity while they were negotiating the fare. They were aided in this identification by the fact that there was sufficient light. The source of the light was the street lights. We find it difficult to uphold the conviction of the Appellant on the sole basis of the evidence of identification. The police should have done a better job by mounting a police identification parade immediately after the Appellant was arrested to enable the complainants confirm their identification of the Appellant as the person who robbed them.

We are therefore of the view that the second count of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** that the Appellant was charged with cannot stand because the evidence of identification by the 2nd complainant did not prove the charge to the required standard of proof beyond any reasonable doubt. The evidence of identification alone was not sufficient to secure the conviction of the Appellant. In that regard, the Appellant's appeal in respect of the second count is allowed. The Appellant is acquitted of the charge.

As regard the first count, the 1st complainant testified that he was able to positively identify the Appellant. As correctly observed by the trial court, the evidence of the 1st complainant in that regard was that of a single identifying witness made in difficult circumstances. The 1st complainant testified that he was able to be positive that he had identified the Appellant as one of the persons who robbed him because he was in close proximity with him for about ten (10) minutes as they negotiated the fare. He was able to see him clearly because there were security lights. Although the trial court warned itself of the danger of convicting the Appellant on the sole basis of the evidence of identification, we are of the view that that evidence alone was not sufficient to convict the Appellant. In that regard we rely on the decision of **Maitanyi –Vs- Republic [1986] KLR 198** at P.200 where it was held thus:

> ***"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:-***
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> > ***"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".***

In respect of the 1st count, other than the evidence of identification by the 1st complainant, the prosecution adduced addition evidence of recent possession. The prosecution witnesses testified that after the 1st complainant was robbed of the motor vehicle, a report was made to the police. The motor vehicle was fitted with a tracking device. The tracking company was called. They activated the tracking device. The motor vehicle was traced to Ngara area in Nairobi. The police based at Pangani Police Station were able to trace the motor vehicle a few hours after it had been robbed from the 1st complainant. The police saw two occupants in the motor vehicle. The Appellant was the one who was driving the motor vehicle. He was arrested inside the motor vehicle. His accomplice managed to escape. The Appellant did not give an explanation in regard to how he was found inside a motor vehicle that had just been robbed from the 1st complainant. We are of the considered view that although the evidence of identification was tenuous, that evidence coupled with the evidence of the recovery of the motor vehicle in possession of the Appellant, established the first count of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

As regard the question whether the Appellant's constitutional right was breached during the hearing of the case, upon perusal of the proceedings before the trial magistrate's court, we are satisfied that his constitutional right to fair trial was not breached. The Appellant asked to be supplied with the statements of the witnesses. He was supplied with the same after the court had directed the prosecution to do so. The case was adjourned on several occasions to allow the Appellant get the said witness statements. The Appellant applied to recall two of the prosecution witnesses who had already testified. His application was allowed by the court. When the two witnesses appeared in court, the Appellant told the court that he did not have any questions to ask them. On several occasions, the Appellant sought adjournments because he claimed he was sick. The adjournments were allowed. In one instance, he even asked to be excused from the proceedings. His request was granted. We ask ourselves what more would have the trial court

done to secure the right fair trial of the Appellant. We are of the view that the trial court gave the Appellant every opportunity to defend himself. It gave the Appellant sufficient time to prepare his case. However, it was clear from the proceedings that the Appellant wanted to stall the hearing and determination of the case. When the opportunity came for the Appellant to defend himself, he opted to keep quiet. That is his constitutional right. He cannot be forced to testify in his defence in his trial. Keeping quiet is one of the options given by the **Criminal Procedure Code** for an accused person who is put on his defence. We therefore find no merit with the claim by the Appellant that his constitutional right to fair trial was breached by the trial court.

The upshot of the above reasons is that the appeal lodged by the Appellant has partially succeeded. He is acquitted of the second count of the offence of **Robbery with Violence** because the prosecution did not adduce sufficient evidence to support the charge. His appeal against the first count of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** however lacks merit and is hereby dismissed. The prosecution established to the required standard of proof beyond any reasonable doubt that it was the Appellant who robbed the 1st complainant of the motor vehicle that is the subject of the case. In the course of robbing him (the Appellant), he threatened him using a dangerous weapon, namely a pistol. The motor vehicle was recovered in the Appellant's possession a few hours after it had been robbed from the 1st complainant. The conviction of the Appellant by the trial court on the first count is therefore upheld. The sentence too is upheld. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF NOVEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE