REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NUMBER 673 OF 2010

(From original conviction and sentence in Thika Chief Magistrate's Court Criminal Case No. 500 of 2010, B A Owino, SRM on 18th November 2010)

JAPHETH CHEGE MWANGI……..……APPELLANT

VERSUS

REPUBLIC……..……..….RESPONDENT

JUDGEMENT

The appellant in this appeal, **Japheth Chege Mwangi**, was charged in the Chief Magistrate's Court at Thika in Criminal Case No. 500 of 2010 with Robbery with Violence contrary to section 296(2) of the ***Penal Code*** and he was convicted accordingly and sentence to suffer death. The particulars were that the appellant on the 23rd day of January 2010 at Twiga Village, Ruiru in Thika District within Central Province with another one not before court robbed **Joseph Mwangi** of his motor cycle KMCF 174Q make captain valued at Kshs.78,500/= and at the time of robbery used actual violence to the said **Jospeh Mureithi Mwangi**.

The evidence against the appellant was as follows: On 23rd January 2010 at about 4pm, PW2, **Joseph Mureithi Mwangi**, a motor cyclist operator, was plying his said business at Wakii Stage when he was approached the appellant who was the unknown to him and requested him to take him to Kimbo area to collect some eggs a request which after bargaining he acceded to for the payment of fare in the sum of Kshs 100/-. On reaching Kimbo, the appellant called someone on phone and shortly thereafter another man joined them and the appellant informed PW2 that he was the person they were going to pick the eggs from and they then set off for Kiganjo area. Suddenly PW1's helmet was pulled off his head and he was grabbed on the neck from behind and he fell down and a struggle ensued between PW2 and the man holding him. A dog then appeared at the scene and started barking. In the meantime the appellant jumped onto the motorcycle and tried to jump-start the motor cycle. According to PW2, a boy came to the scene and the two men attempted to flee but the passersby who had been alerted by the commotion surrounded the motor cycle, beat the two senselessly and one of the said members of the public called the police who came to the scene and they were taken to the Police Station after which the two men were taken to the Hospital. PW2 was similarly advised to go to the Hospital and he went to Ruiru Catholic Clinic and later to Ruiru Health Centre. He was given a P3 form which was filled in and which he returned to the police. According to him the 2 men only robbed him of the motor cycle and nothing else. In cross-examination PW2 said he was not aware that the appellant was robbed at the scene. According to him the young boy came after the dog had started barking. He however could not tell whether it was the young boy who raised the alarm as he was busy struggling with the other man who according to him died in hospital.

According to PW2, the appellant's intention was to rob him of the motor cycle. PW1, **Jean Munene**, was the Clinical Officer attached to Ruiru Sub-district Hospital who on 2nd February 2010 filled the P3 form for PW2 and he assessed the injury as "harm". PW3, **Cpl Erick Mugendi** was the police officer who took the photographs of the motor cycle while PW4, **PC Josephat Wafula** was on 23rd January 2010 dispatched to the scene of crime where he found the crowd surrounding and beating 2 young men who were on the ground and there was a motor cycle nearby. After dispersing the crowd a man identified himself as the complainant and informed the police that he had been robbed of the motor cycle by the two suspects. As a result of the beating one of the two suspects succumbed to the injuries and the appellant survived.

In his unsworn statement the appellant stated that he used to be a butcher and also used to supply eggs. On 23rd January 2010 one his customers called him and asked for eggs and as he did not have any he decided to go and look for the same at Kimbo area. He also called a friend of his to help him in doing so and at about 11am his friend, **Kamau**, informed him that he knew of a seller at Kimbo. He then hired a motor cyclist at about 4pm to take him to meet the said **Kamau** and they went up to Kimbo where they picked **Kamau** and they all boarded the motor cycle. Although the motor cyclist was hesitant to go where they wanted to go they convinced him and they proceeded and as the motor cyclist was driving very fast they had an accident and rolled. The appellant lost consciousness and when he came to, he found himself surrounded by members of the public and despite one of them suggesting that he be taken to hospital the public descended on him with weapons and lost consciousness again. He regained consciousness at Thika District Hospital while undergoing treatment. The next day he was picked up by police and taken to Ruiru Police Station where he was informed that he had robbed the motor cyclist and placed in the cells. On 26th he was taken to an identification parade but he declined after which he was brought to court. He was informed that **Kamau** had been lynched by the members of public. According to him, 3 days before he was arraigned in Court the complainant joined him in the cells and informed him that he was to be charged with murder. He was however charged with the offence of stealing but was acquitted.

In her judgement the learned trial magistrate held that the complainant's evidence on how he was attacked was not shaken despite being cross-examined in detail. According to the learned trial magistrate the 2 attackers had planned the attack and took the complainant to a secluded place and though the attackers did not succeed to rob the complainant their intentions to do so was clear and it was the members of the public who subdued them. Despite the fact no evidence was adduced by the members of the public the court found that the unshaken evidence of the complainant described an unbroken chain of events ending up with the arrest of the appellant by he members of the public and re-arrest by the police. In her view, the incident happened in such a manner that there was sufficient opportunity for PW2 to identify his attackers hence the circumstances favoured positive identification. The learned trial magistrate found the evidence of the complainant believable and held that it displaced the appellant's evidence and dismissed the appellant's defence as untenable. She accordingly convicted the appellant and sentenced him to suffer death.

Being dissatisfied with the conviction and sentence, the appellant has appealed against the same on the following grounds:

1. **That, the learned trial magistrate gravely erred in points of law and facts when she convicted me in this case while relying on identification that was made by the complainant without her considering that the same was just mistaken identity.**
2. **That the learned trial magistrate gravely erred in points of law and facts when she convicted me in this case while relying on a defective charge sheet.**
3. **That the learned trial magistrate gravely erred in points of law and facts when she convicted me in this case and hence failed to note out the prosecution side failed to prove its case beyond reasonable doubts.**
4. **That the learned trial magistrate gravely erred in points of law and facts when she convicted me in this case while being so much impressed with my mode of arrest without her considering that in this crime I was just the victim of the circumstances.**
5. **That further, the learned trial magistrate gravely erred in points of law and facts when she convicted me in this case without her considering that the prosecution side failed to**

summons the crucial vital witnesses before the court to testify.

6. **That, finally the learned trial magistrate gravely erred in points of law and facts when she rejected my defence without her not properly explaining good reasons for its rejection and thus violated the law provision under sec. 169(1) of the CPC.**

Before dealing with the grounds of appeal it is important to restate the duty of the first appellate Court. "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (**Pandya v. R., [1957] E.A. 336**) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (**Shantilal M. Ruwala v. R., [1957] E.A. 570**). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see **Peters v. Sunday Post, [1958] E.A. 424**."

The appellant contends that the learned trial magistrate gravely erred in points of law and facts when she convicted him based on mistaken identity. However in this case the facts were and the appellant admitted that he had hired PW2 to take him to Kimbo area to collect eggs. The versions of the appellant and PW2 were basically the same including PW2's expression of misgivings about where they were going up to the time of the "accident". The only point of departure was what the cause of the accident. According to the appellant it was caused by PW2's over-speeding while according to PW2 it was caused by an attempt by the appellant and co-passenger to rob him of his motor cycle. There was no contention that after the incident PW2 left the scene. The appellant was therefore arrested from the scene. In those circumstances the issue of mistaken identity cannot arise.

In **Aloise Onyango Odhiambo vs. Republic [2006] eKLR,** the Court expressed itself as follows:

> **"The Appellant was arrested at the scene of crime in the course of the robbery itself. He did not leave the scene at any one time so that there was no need for a subsequent identification in an identification parade. The evidence of identification was watertight and could not be faulted. We do not agree….that it was necessary to mount identification parades for the identification of the Appellant in this case."**

That ground must therefore fail.

The appellant contended that the members of the public ought to have been called to give evidence and that the failure to call them ought to have been determined in favour of the appellant. Whereas the Court appreciates that the failure to call a person who ought to have been called to give evidence may lead the Court to make an adverse inference that had such a person been called his evidence would have been adverse to the person who ought to have called him, whether an adverse inference should be drawn from the fact that a particular witness has not been called is a matter, which must depend upon particular circumstances of each case since there is no number of witnesses in law required to prove any fact unless provided so by law and there is no rule that all material or all eye witnesses must be called otherwise adverse inference is to be drawn. As was held in Benjamin Mbugua Gitau vs. Republic [2011] eKLR:

> **"It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see *section 143* Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys."**

According to PW2, the appellant in this case jumped onto the motor cycle and tried to jump start it. Assuming that the incident was as a result of an accident the question would be why would the appellant

try to jump start the motor cycle? The appellant's defence was that he lost consciousness after the motor cycle rolled and when he came to the members of the public descended on him with weapons. He did not however explain why the members of the public would all of a sudden without provocation or prompting descend on the two of them and leave out PW2. In our view we believe PW2's evidence that the appellant was in the process of taking off with the motor cycle when the members of the public descended upon him.

We have on our part re-evaluated the evidence and subjected the same to a fresh scrutiny and we are of the view that the findings by the learned trial magistrate that the appellant was one of the persons who attacked PW2 was based on sound evidence.

It is clear from the record that nothing was stolen from the appellant since the attempt to steal the motor cycle did not materialise after it was thwarted by the members of the public. We agree with the learned trial magistrate that the facts of this case could not support the offence of robbery with violence under section 296(2) of the ***Penal Code***. Section 296 of the ***Penal Code*** provides as follows:

> ***(1) Any person who commits the felony of robbery is liable***
>
> ***to imprisonment for fourteen years.***
>
> ***(2) 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 robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.***

The definition of robbery however appears in section 295 thereof as follows:

> ***Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***

In this case the appellant was in company of another person. In **Masaku vs. Republic [2008] KLR 604**, the Court reiterated that:

> **"It is now well settled that any one of the following need be proved to establish the offence:**
>
> 1. **If the offender is armed with any dangerous or offensive weapon or instrument or**
> 2. **If the offender is in the company of one or more offenders or**
> 3. **If at or immediately before or immediately after the time of the robbery he wounds, strikes or uses any other violence to any person.**
>
> **In this case, the particulars of the charge stated that the appellant was with another at the time of the robbery and further that at or immediately before or immediately after the time of such robbery wounded the deceased. It is plain therefore that two of the three ingredients of the offence of robbery with violence under section 296(2) of the Penal Code were given. It should be remembered that a single ingredient is sufficient."**

In this case the act of stealing was not accomplished and therefore section 297(2) ought to have been the relevant section. That section provides:

> ***(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.***

> ***(2) 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.***

However, whether or not the appellant was charged under section 296(2) or 297(2) aforesaid both offences carry mandatory death sentence. As was held on 18th October 2013 by five Judge bench of the Court of Appeal in Criminal Appeal No. 5 of 2008 – **Joseph Njuguna Mwaura & 2 Others vs. Republic**:

> **"In our view, to say that there are other alternative sentences to the mandatory imposition or application of the death sentence is a pedantic and preposterous interpretation of the spirit and the letter of the Penal Code and the Constitution of Kenya, 2010. If the people of Kenya intended in their wisdom, and their collective will to outlaw the deaths sentence, then nothing could have been easier to do. We hold that the decision in *Godfrey Mutiso vs. R* to be per *incuriam* in so far as it purports to grant discretion in sentencing with regard to capital offences. Our reading of the law shows that the offences of murder contrary to section 203 as read with 204 of the Penal Code, treason contrary to section 40 of the Penal Code, administering of oaths to commit a capital offence contrary to section 60 of the Penal Code, Robbery with Violence contrary to section 296(2) of the Penal Code and Attempted Robbery with Violence contrary to section 297(2) of the Penal Code carry the mandatory sentence of death"**

We however do not agree that the charge was defective for failure to state in the particulars that the appellant was armed with a dangerous weapon since the particulars clearly stated that the appellant was with another person hence at least one ingredient of the offence was particularized.

It follows that this appeal fails and is dismissed.

Judgement accordingly

Judgement read, signed and delivered in open court this 9th day of December 2013.

F N MUCHEMI

JUDGE

G V ODUNGA

JUDGE

In the presence of:

The appellant

Mr Okeyo the State Counsel