REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 297 OF 2008

(From Original Conviction and Sentence in Criminal Case No. 639 of 2006 of the Senior Resident Magistrate's Court at Voi: ***J.M. Gandani – S.R.M.)***

MICAH MWANGALE MWATA …………….......................….…………….. 1ST APPELLANT
DENIS MWAMBELA MWAWASI ……………….…..........................……... 2ND APPELLANT

=VERSUS=

REPUBLIC ……………………………..………………….............………….. RESPONDENT

JUDGMENT

The two Appellants namely **MICAH MWANGALE MWATA** (hereinafter referred to as the 1st Appellant) and **DENIS MWAMBELA MWAWASI** (hereinafter referred to as the 2nd Appellant) have both filed this appeal challenging their conviction and sentence by the learned Senior Resident Magistrate sitting at Voi Law Courts. The two Appellants were first arraigned in the subordinate court on 28th June 2006 where they were jointly charged on Count Nos. 1 and 2 with the offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. In addition the 1st Appellant was charged on Count No. 3 with **BEING IN POSSESSION OF A FIREARM WITHOUT A FIREARM CERTIFICATE CONTRARY TO SECTION 4(1) as read with SECTION 4(3) OF THE FIREARM ACT CAP 114, LAWS OF KENYA** and on Count No. 4 with **BEING IN POSSESSION OF AMMUNITION WITHOUT A FIREARM CERTIFICATE CONTRARY TO SECTION 4(1) as read with SECTION 4(3) OF THE FIREARM ACT CAP 114, LAWS OF KENYA**. Both Appellants pleaded ***'not guilty'*** to the charge and their trial commenced before **HON. GANDANI** on 5th December 2006. The prosecution led by **INSPECTOR MUNGA** called a total of ten (10) witnesses in support of their case.

The charges revolve around a robbery incident which occurred on 15th June 2006 at Shigalo Village in Taita Taveta District. **PWI MICHAEL MUKUA** and **PW2 JAMES GITHAGUI** told the court that they were masons based in Kinoo in Nairobi. They had been contracted by one **NANCY** to repair her parents' graves in Taita Taveta. The two masons traveled to the Coast province in order to carry out the task. For the duration of their stay in Shigalo Village they were being accommodated in the homestead of the said Nancy in the house of her brother **LAWRENCE MWATA PW3**. On the material day **PW1** and **PW2** worked until evening when they went back to the house to prepare dinner and rest. At about 7.30 p.m. the 1st Appellant knocked on the door and enquired if their host ***'Mwata'*** was in. The two men told the visitor that their host was not in. The man left only to rush back into the house immediately

with a second man. The 1st Appellant was armed with a pistol whilst the 2nd Appellant grabbed a knife off the table. They threatened the masons demanding to be given Kshs.10,000/-. The hapless masons said they had no money as they had not yet been paid. The two Appellants ransacked the bed-room and searched the two victims. They took from **PW1** Kshs.500/- and Kshs.50/- from **PW2**. At that moment **PW3** came home and the two men ran away.

PW3 who had seen the robbers recognized the 1st Appellant who was a close neighbour. The matter was reported to Wundanyi Police Station. That same night **PW3** led police to the home of 1st Appellant. Police searched the house and recovered hidden under the mattress a pistol and eleven (11) rounds of ammunition. Whilst in custody the 1st Appellant named the 2nd Appellant as his accomplice. Police went to Taratibu Restaurant where the 2nd Appellant was working and arrested him. The 2nd Appellant led police to the spot where he had tossed the knife used in the robbery. The said knife was duly recovered. Upon completion of police investigations both Appellants were charged with the offences as per the charge sheet.

At the close of the prosecution case both Appellants were ruled to have a case to answer and were each placed on their defence. Each Appellant gave unsworn statements in which they denied any and all involvement in the robbery. On 14th October 2008 the learned trial magistrate delivered her judgment in which she convicted both Appellants on the two counts of robbery. Similarly the 1st Appellant was convicted on Count Nos. 3 and 4. Thereafter the Appellants were both sentenced to death in accordance with the law. Being aggrieved with both their conviction and sentence the two Appellants filed this present appeal. The 1st Appellant who acted in person chose to rely entirely upon his written submissions. **MR. MAGOLO** Advocate argued the appeal on behalf of the 2nd Appellant. **MR. MACHARIA**, learned State Counsel represented the Respondent State and opposed the appeal.

Being a court of first appeal we are obliged to re-examine and re-evaluate the prosecution evidence and to make our own independent conclusions on the same [see **AJODE –VS- REPUBLIC (2004) KLR 82]**.

Both **PW1** and **PW2** told court that the robbery occurred at about 7.30 p.m. They were both indoors and were using a hurricane lamp for lighting. Both witnesses state that there was sufficient light to enable them to see and identify the robbers. From their narration of how after bursting into the room, the two robbers proceeded to make demands then moved **PW1** and **PW2** to the adjacent bedroom which they proceeded to ransack, the whole incident must have taken several minutes. It is clear that the two witnesses caught far more than a mere fleeting glance of their assailants. This is more so because the two robbers engaged their victims in conversation giving them even greater opportunity to see and identify them.

Although **PW1** and **PW2** were strangers to that area, having only come there to work a few days prior to the robbery there is evidence that the 1st Appellant was not a total stranger to them. **PW1** told the court that the 1st Appellant often passed by the site where they were working, and that he greeted them each time he passed. There is therefore clear evidence of recognition with respect to the 1st Appellant. Evidence of recognition has been held by the Court of Appeal to be more assuring and more reliable than mere visual identification alone [**ANJONONI & 4 OTHERS –VS- REPUBLIC 1980 KLR 59].** The fact that **PW1** was able to see and describe the attire of each robber reinforces the fact that he was in a position to see and identify them. In his evidence at page 9 line 22 **PW1** states:

"I do recall that Accused 1 had worn a red top but I do not know if it was a shirt or T-shirt and a grey trouser.
Accused 2 was wearing a light blue T-shirt. I recognized Accused 1 as he used to pass by and greet us. I looked at Accused 2 well during the robbery. He stood near me …."

Although there is evidence that the 2nd Appellant was wearing a cap at the time of the robbery, it is our

considered opinion that there was no obstruction to his face and in view of the amount of time the two robbers spent with **PW1** and **PW2** we are satisfied that a clear identification was possible. Indeed both witnesses state with certainty that it was the 2nd Appellant who first knocked on the door and came in to enquire about the whereabouts of their host Mwata **PW3**. Both witnesses are also clear that whereas the 1st Appellant was armed with a pistol, it was the 2nd Appellant who rushed to the table and picked up a knife which he then used to threaten the two men.

Further corroboration on the identity of the 1st Appellant is provided by **PW3** who walked in on the robbery. He told the court that as he came in the two robbers rushed past him and out of the house. **PW3** told the court that he was able to see the two men from the light of the hurricane light. At page 31 line 20 **PW3** says:

"There was light from the bed room and due to lack of ceiling there was a bit of light on the corridor and sitting room. I heard people talk in the bedroom. Then I saw the robbers come out of the house …"

As the robbers passed him **PW3** was able to recognize the 1st Appellant whom he knew very well as a neighbour. **PW3** led police to the home of the 1st Appellant on the very same night where police recovered the red T-shirt which **PW1** and **PW2** identified as the shirt 1st Appellant had been wearing at the time of the robbery.

Mr. Magolo for 2nd Appellant challenges the identification of his client. He submits that the eyewitnesses did not get a good look at the 2nd Appellant. With respect we do not agree. The narration of **PW1** and **PW2** is clear, concise and consistent. They have each specified with clarity the role played by the 2nd Appellant in the robbery.

We do however concede that the identification parade held at Voi Police Station at which the 2nd Appellant was identified by **PWI** was botched up. This is because there is evidence that **PW1** may have seen the 2nd Appellant at Wundanyi Police Station a day before the parade was conducted. **PW1** admits under cross-examination by the 2nd Appellant at page 12 line 21:

"My statement says I saw the 2nd accused at Wundanyi Police Station on 16/6/2006. I then attended an identification parade on 17/6/2006 …"

Clearly having seen the 2nd Appellant earlier the witness could not be deemed to have properly identified him at the parade. As such we discount this evidence of identification of the 2nd Appellant at the police parade.

Mr. Magolo submitted further that the conviction of the 2nd Appellant was flawed because it was based on identification by the 1st Appellant who was a co-accused. We do agree that if the **only** evidence linking the 2nd Appellant to this crime was the evidence of the 1st Appellant, then certainly his conviction would stand faulted. However in our assessment of the evidence apart from the visual identification by **PW1** and **PW2** placing the 2nd Appellant at the scene of the crime there exists the more compelling evidence of the recovery of the knife used during the course of the robbery **Pexb4. PW5 PC JAMES THUVA** told the court that he and other officers went to Taratibu Hotel where the 2nd Appellant was working. They arrested him and the 2nd Appellant showed the police where he had hidden the knife. **PW5** told the court at page 36 line 21:

" ……….. the 2nd accused led us to where they had dropped a kitchen knife which they were armed with during the robbery. We found the knife had been dropped off the murram road on the Shigharo-Bengonyi road at a place whose name I do not know. It was between Shigharo and Bengonyi. The knife was in a bush so the accused pointed to us where it was. It was a small knife with a wooden handle and tied with a black tyre band. It is MFI'4'. A2 is the one who led us to where the knife was"

There is no possible way the 2nd Appellant could have known the exact location of the knife used in the robbery other than if he was an active participant in that robbery. **PW3** the owner of the said knife has positively identified it in court. Under cross examination by the 2nd Appellant at page 32 line 23 **PW3** states:

"I was shown the knife by a police officer from Voi. I was only shown one knife. I know it is my knife as it is unique. I am the one who made it and wrapped it in a black tyre band. I knew my knife well. The band is tied on its handle beginning where the metal enters the wood …."

The knife has been positively identified by **PW1** and **PW2** as the knife which the 2nd Appellant picked from the table during the robbery. Both witnesses identified the knife by way of the black tyre band around its handle. This was a mark exclusive to this particular knife.

Mr. Magolo once again objects to the admissibility of the evidence of recovery of the knife. He submits that since the 2nd Appellant led police to the knife **after** he had been arrested then this amounts to a confession which is inadmissible in law. Once again with respect we cannot accept this submission. The 2nd Appellant volunteered to show police where he had thrown the knife. There is no allegation that he was forced or cajoled to show police where the knife was. In any event police had no knowledge of the whereabouts of the knife and if not led by the 2nd Appellant, it would not have been recovered at all. All the 2nd Appellant did was to show police where the knife was. He made no admission to any involvement in the robbery thus the issue of a confession does not arise. The facts linked the 2nd Appellant to the robbery include the evidence given by **PW1** and **PW2**. It cannot be a mere coincidence that the witnesses identify the 2nd Appellant as the robber who picked a very unique looking knife from the table and then 2nd Appellant leads 1 police to a bushy area on a road where the knife is recovered. Only one conclusion can be drawn from this set of facts – that the 2nd Appellant was one of those who robbed the two masons on the evening in question.

Based therefore on the foregoing we are satisfied that there was a clear, positive and reliable identification of both Appellants as the men who robbed the two complainants. The incident in our view fell squarely within the definition of a ***'robbery with violence'*** as envisaged by S. 296(2) of the Penal Code. There was more than one assailant. Both robbers were armed, one with a pistol and the other with a knife. These weapons were used in furtherance of the theft by threatening **PW1** and **PW2** and evoking real fear or apprehension for their lives. We are satisfied that the ingredients of Robbery with Violence as set out in the case of **OLUOCH –VS- REPUBLIC [1985] KLR 549** are in existence. As such we find that the two Appellants were properly convicted on Count Nos. 1 and 2 and we therefore do uphold these convictions.

With respect to the 1st Appellant he faces charges of possession of both firearms and 11 rounds of ammunition. As stated earlier in this judgement both **PW1** and **PW2** identified the 1st Appellant as the robber who was armed with a pistol. Later that same night **PW3** led police to the house of the 1st Appellant. **PW6 CORPORAL ROBERT MURINGA** was one of the officers who searched the house of the 1st Appellant. He told the court that police recovered one Browning pistol serial No. 289796 which pistol was loaded with 11 rounds of 9 mm bullets. Both the pistol and the ammunition were produced as exhibits **Pexb3** and **Pexb4**. This recovery was confirmed by **PW3** who was present when the house of the 1st Appellant was searched. He witnessed the recovery of the pistol and the bullets.

PW4 INSPECTOR ALEX MUDINDI MWANDAWIRO is a firearms examiner based at the Ballistics Laboratory at CID headquarters in Nairobi. He confirms having carried out a test and examination of the Browning pistol S/No. 289796 as well as the 11 rounds of ammunition. He found the pistol to be complete in all its parts and capable of being fired. He also found the bullets fit for use. He produced his report as an exhibit **Pexb7**. This evidence proved that the pistol and ammunition were Firearms and Ammunition as defined by Section (4) of the Firearms Act Cap 114 Laws of Kenya. The 1st

Appellant did not show court any certificate authorizing him to possess the pistol and 11 rounds of ammunition. The prosecution did adduce sufficient evidence against the 1st Appellant and we confirm his conviction on both Count Nos. 3 and 4. Thus the appeals of both Appellants against their convictions are hereby dismissed.

Both Appellants were handed the death penalty in line with the provisions of S. 296(2) of the Penal Code. We find these sentences to be lawful and hereby uphold the same. In view of the death penalty imposed the subsequent five year sentence imposed upon the 1st Appellant in respect of Count No. 3 and 4 are hereby held in abeyance. Finally this appeal is dismissed in its entirety.

Dated and Delivered in Mombasa this 14th day of February 2012.

………………………………	……………………………
F. TUIYOTT	**M. ODERO**
JUDGE	**JUDGE**

In the presence of:
Mr. Magolo Advocate
Mr. Gioche for State