REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG & DULU, JJ.)

CRIMINAL APPEALS N0s. 443 OF 2003 & 446 of 2003 (CONSOLIDATED)

BETWEEN

SAMUEL MURAYA MWANGI……………..………1ST APPELLANT

DAVID MWANGI KARIUKI………………………2ND APPELLANT

-AND-

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

(*An appeal from the judgement of the Senior Resident Magistrate, Mrs. S. Omondi in Makadara Law Courts Criminal Case No. 13641 of 2002 dated 14th May, 2003)*

JUDGEMENT OF THE COURT

The appellants had been charged with the offence, committed with others not before the trial Court, of robbery contrary to s.296(2) of the Penal Code (Cap.63). The particulars of the charge were that on 4th June, 2002 along Pumwani Road in Nairobi, while armed with a dangerous weapon, namely a pistol, they robbed ***Margaret Wanjiku Mwangi*** of Kshs.130,000/=, and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence against the complainant.

The complainant (PW1) testified that on 4th June, 2002 she had been lent the sum of Kshs.20,000/= by a friend. On the same day she sold goods in Thika, for which she was paid Kshs.110,000/=, and she thereafter returned to her hotel in Gikomba, Nairobi, with the total sum of Kshs.130,000/= in her possession.

The complainant was at her hotel, at about 7.00 p.m., being served with tea, by PW2. At this moment three people, who had been her customers in the past, entered the hotel and were served tea. They had been in the company of a fourth person who remained outside. After taking tea the three left, only to return later, one of them, the 2nd appellant, wielding a pistol and ordering everyone to lie down. The 2nd appellant ordered PW1 to produce all the money she had. PW1 first surrendered Kshs.1000/=; then Kshs.20,000/= — but the attackers demanded still more. At this moment the 2nd appellant who was identified by both PW1 and PW2 (***Rosemary Nzuki***, an employee of PW1) as a customer at the hotel, inspected PW1's pockets even as the 1st appellant assaulted her with a first blow to the head. The appellants then stripped off PW1's clothing including her jacket, and helped themselves to the sum of

Kshs.100,000/= which was found in the jacket pockets. They also seized two mobile phones from the complainant and departed. All this time the electrical lights had been on, but when the intruders departed, they switched them off.

At this moment PW1 and PW2 screamed, and crowds came along. PW1 reported the matter at the Kamukunji Police Station, and she and PW2 recorded statements with the Police.

After PW1 got word, on the following day, that the Police had recently effected a number of arrests in the area of her hotel, she went along to the nearby Kombo Munyiri Police Post, to see if her attackers could be among those arrested; and while there she identified the 2nd appellant who she had known as a customer at her hotel for some four months. The 2nd appellant was at the time wearing her jacket which had been stolen during the robbery. Inside one of the jacket's pockets was found the sum of Kshs.52,500/=, in Kshs.1000/= notes. PW1 stated during cross-examination that she knew the 2nd appellant well, even by his nick-name, ***Muraya Mrefu***; and she knew the 1st appellant equally well, even by his nick-name ***Muraya Mfupi.***

PW3, a Police Officer at the Kamukunji Police Station was on patrol on 5th June, 2002 (one day after the robbery), when he met the 2nd appellant fleeing, and he became suspicious of him; he arrested the 2nd appellant and held him at Kombo Munyiri Police Post, where the 2nd appellant was identified by PW1 and PW2 as one of the previous evening's robbers; the 2nd appellant was wearing a jacket identified in Court as belonging to PW1. Subsequently, PW2 identified the 1st appellant to PW4, a Police Officer at Kamukunji Police Station, and PW4 arrested him.

On this evidence, the learned trial Magistrate thus found:

> *"The prosecution case against the 1st and 2nd accused [i.e. 2nd and 1st appellants, respectively] has been proved beyond any reasonable doubt. At the time of the robbery both the [2nd and 1st appellants] were known to PW1 and PW2 and they had just walked into the hotel, [taken] tea and chapati and walked out only to come back and stage the robbery. The [electric] lights were on throughout and the [2nd and 1st appellants] were well known to PW1 and PW2 who both said they were frequent customers. Further, PW1 identified her jacket, stolen [during] the robbery only hours [earlier]… [as it was being worn by the 2nd appellant], and part of her money stolen [during the robbery]…"*

The learned Senior Resident Magistrate found the appellants herein guilty of the offence of robbery contrary to s.296(2) of the Penal Code, convicted them and sentenced them to death as provided by law for the offence.

In the petitions of appeal, the appellants contended that: the evidence of identification was questionable; the jacket later found with the 2nd appellant and identified as the property of PW1, had not figured in the very first report to the police; the trial Court had not adequately considered the appellant's defence; the evidence of PW1 and PW2 was unreliable; far too much weight had been laid on the evidence of the arresting officers; no tangible reasons had been stated for rejecting the defence made in the trial Court.

Learned counsel ***Mr. Makura*** urged the Court to uphold conviction and sentence as meted out by the trial Court, on the basis that the prosecution had adduced overwhelming evidence proving the charges laid. Counsel submitted that identification had been properly done, as the appellants were well known to the complainant and to her employee (PW2). Although the act of robbery had taken place at bout 8.00 p.m., PW1 and PW2 had clearly seen the robbers, as the electric lights were fully operational at the time.

Mr. Makura urged that sufficient evidence had been adduced, of recognition as well as of recovery of stolen property; and these amounted to foolproof identification of the appellants as the culprits.

We do recognise that proper identification of the accused, in criminal trials, is a fundamental question,

that carries clear legal implications. This principle is embedded in abundant case law: for instance, the Court of Appeal's decision in ***Walter Awinyo Amolo v. Republic*** (1991) 2 KAR 254 in which it is stated (p.256) that:

> "the evidence of identification [is to be] tested with the greatest care…"

It is the concern for proper identification that may be said to be the central element in our consideration of this appeal case; and we have considered the recognition of both appellants by both PW1 and PW2, and come to the conclusion that these two witnesses effectively identified those persons who had attacked them and committed robbery against them. If the apparel of PW1 found worn by the 2nd appellant, only so recently stolen, is taken into account, it becomes evident that the 2nd appellant was one of the robbers who had been definitely observed as he committed the offence charged, accompanied by the 1st appellant. We do not doubt that both PW1 and PW2 clearly saw, recognised and identified the two appellants as robbers, at a time when PW1's hotel room was brightly lit. The doctrine of recent possession would also apply here. The doctrine is well recognised in case law. For instance, in ***Rex v. Bakari s/o Abdulla*** (1949) 16 EACA 84 the Court of Appeal for Eastern Africa held:

> "..cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or breaking and entering but of murder as well, and if all the circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal."

Applying the doctrine of recent possession, we have come to the conclusion that possession of the complainant's jacket only so recently stolen, by the 2nd appellant was further proof that the 2nd appellant had been properly identified as a robber.

We have no doubts, therefore, that the appellants were quite properly convicted, and sentenced as required by law, in the trial Court.

We dismiss the appeals, and uphold both conviction and sentence in each case, as pronounced by the trial Court.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 5th day of June, 2007.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ.

Court Clerks: G. Ndungu, Eric

For the Respondent: Mr. Makura

Appellants in person

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