REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, DULU, JJ.)

CRIMINAL APPEAL NOS.615 OF 2004 & 616 OF 2004

(CONSOLIDATED)

BETWEEN

JAMES MWANGI CHEGE……..……..……..……..1ST APPELLANT

JAMES MBOGO MUTURI…….……..……....2ND APPELLANT

-AND-

REPUBLIC ……..RESPONDENT

(Appeal from the Judgment of Principal Magistrate Mrs. J. Oseko of 10th December, 2004 in Criminal Case No. 1298 of 2004 at the Nairobi Chief Magistrate's Court)

JUDGEMENT OF THE COURT

The two appellants were charged with the offence of robbery contrary to s.296(2) of the Penal Code (Cap.63). The particulars of the charge were that on 9th May, 2004 along Muthithi Road in Parklands, within the Nairobi Area, while armed with offensive weapons, namely a *panga* (cleaver) and a *rungu* (club), the appellants robbed ***Charles Nyumu Ndegwa*** of a motor vehicle, a grey Toyota Corolla, registration number KAJ 238F, valued at Kshs.300,000, as well as cash in the sum of Kshs.4000/=, a Siemens mobile telephone valued at Kshs.7,200/=, and a driving licence all valued at Kshs.311,200/=, and at, or immediately before, or immediately after the time of such robbery, threatened to use personal violence against the said ***Charles Nyumu Ndegwa.***

On the occasion of hearing this appeal, learned State Counsel ***Mrs. Kagiri*** applied for consolidation of the two appeals filed separately, for convenience of hearing. As both appellants had no objections the two appeals were consolidated, to be heard under Criminal Appeal No. 615 of 2004 as the lead file, and with the appellant on that file, ***James Mwangi Chege*** as the 1st appellant, and the appellant on file No. 616 of 2004, ***James Mbogo Muturi*** as the 2nd appellant.

PW1 had testified that he is a taxi driver, operating motor vehicle registration No. KAJ 238F which belongs to his employer, PW2. On 9th May, 2004 at 8.30 p.m., while parked on Loita Street from which he operates, the 1st and 2nd appellants came along, and requested to be driven to the Westlands suburb of

Nairobi. The taxi charge was negotiated, and PW1 agreed to provide the service requested. Once the taxi arrived in Westlands, the two passengers gave directions, and PW1 following these, until he got to Tausi Road. Then, suddenly, the 2nd appellant who sat in the front seat held PW1's neck, and ordered the 1st appellant to remove PW1 from the driver's seat. This was done, and the 1st appellant took command of the vehicle, and attempted to driver the car which had just stopped.

The 1st appellant ordered PW1 to make no noise, otherwise he would kill PW1 with a cleaver which he displayed, for effect. PW1 was shown a cleaver in Court, which he believed was the one which the 1st appellant had on the material night. The 1st appellant then made a demand for money; and in the meantime, the 2nd appellant frisked PW1's pockets, extracting a wallet containing Kshs.4000/=. The 2nd appellant also seized PW1's Siemens cellphone. In the meantime, the 1st accused was driving on, and during that motion, the 2nd appellant opened the door of the car, and pushed PW1 out. The two robbers had also seized PW1's shoes. As they drove on, PW1 ran to Parklands Police Station, where he found that information regarding the robbery was just then being communicated to the Police officers from some source. Indeed, the Police officer who spoke to PW1 told him that an arrest of two suspects had just been effected. And only fifteen minutes later the appellants herein were delivered at Parklands Police Station. PW1 identified them as the two robbers, and recorded a statement on the night incident. PW1's vehicle was later towed to the same Police Station, and PW1 identified it. The trial Court adjourned to the Court's parking yard where the said motor vehicle was parked, a grey-coloured taxi, registration No. KAJ 238F. PW1 duly identified the said motor vehicle.

It was PW1's testimony that at the time he took the two passengers who turned robbers in his taxi, on Loita Street, there was abundant street lighting, and he clearly saw them. He remembered that the 1st appellant had been wearing the same clothes he had while in Court, and that it was the 2nd appellant who had negotiated the price. On cross-examination, PW1 told the Court he had seen the 1st appellant's face very well, on the material night, and that on that night the 1st appellant's hair was not as long as it was, during trial.

On cross-examination by the 2nd appellant, PW1 said he had given a description of this appellant when he reported the incident to the Police station. He recalled that the 2nd appellant negotiated the taxi price with him, and at the time the appellant was wearing a white shirt and a cap.

PW3, No. 31736 ***Police Constable Patrick Kubasai*** is the Police officer who, on the material night, PW1 found receiving a report of the theft of the car which is the subject of the charge herein. On 9th May, 2004 at 8.40 p.m. PW3 and his fellow officer, No. 45643 ***Police Constable Thomas Ngumi*** (PW4) were conducting patrols on Muthithi Road, Westlands. They saw a fast-moving motor vehicle which suddenly stopped, and the 1st appellant came out of the co-driver's seat; and immediately after, the 2nd appellant opened the driver's door – and the two started running away. At that time of flight, the 2nd appellant was wearing, front-turned-backwards, the hat which PW3 now identified in Court, and this coincided with the testimony of PW1 to a significant degree. As the 1st and 2nd appellants ran on the side of the road, PW3 and his fellow officers drove after them, seeing them with the aid of the vehicle's headlamp. PW3 and his colleagues then blocked the path along which the 1st and the 2nd appellants were running, got out of their vehicle, and arrested the two appellants. The two appellants had no answer to the question why they had left the vehicle with its engine running and with its headlamps on, as they decamped. The Police officers took the two appellants back to the vehicle the two had abandoned, conducted a search, and found in the back seat a club *(rungu*), a cleaver, and a pair of shoes. The Police officers arrested the two appellants, and took them to the Parklands Police Station, where, in the meantime, PW1 had already arrived and reported the very same situation which had led to the arrest of the two appellants. PW3 and his fellow officers found PW1 at the Police Station reporting the theft. As they led the two appellants past the Parklands Police Station crime office, where PW1 was, PW1 said without hesitation that "these are the ones who have robbed me." At this moment PW3 and the other officers were not showing the two appellants to PW1; so PW's remarks as he first set his eyes on the two appellants being led through the corridors, "they are the ones," are to be treated as "first report". PW3 testified that the street lights were

on, quite apart from the vehicle head-lights, at the time of arrest of the appellants, and that he had clearly seen the two appellants at the time of arrest. The streets were clear, and there were no others in motion, mingling with the appellants so as to cause confusion in identification. PW3 also said: "We did not lose sight of [the two appellants]."

Similar testimony was given by PW4, No. 45643 ***Police Constable Thomas Ngumi***. He corroborated the testimony of PW3; in his words: "We searched the car [abandoned by the two appellants]; its headlights were on. We found this *panga*, *rungu* and [these] shoes….We took them to the station. The 2nd [appellant] had a hat. When we arrived at the Parklands [Police Station] someone said that it is the [appellants] who had robbed him of the vehicle. He just said so before we asked."

On cross examination by 1st appellant, PW4 told the Court that the chase which he and his colleagues had mounted on the appellants, had not lasted one hour; they followed and monitored the appellants vigilantly, and never lost sight of the two; PW4 noted that the 1st appellant was the first to decamp from the car, followed by 2nd appellant who was wearing a hat; the road was very brightly lit, and PW4 clearly saw the 1st appellant's face when the arrest was effected on the material night.

PW5, No. 61753 ***Police Constable Franklin Ndolo*** testified that he was on duty at the Parklands Police Station at 8.30 p.m. on the material night, when he received a telephone call from an informer, that a suspicious motor vehicle with two occupants had been cited. The record of dates attributed to PW5 do not fall on all fours with the date of the material night; but upon consideration of the whole record, and of the complete factual circumstances attending the trial, we are convinced that the date associated withy the perceptions of PW5, as recorded on p.14 of the proceedings, is erroneous; and we hereby treat it as such. The correct date is ***9th May, 2004***.

As PW5 walked along the corridors of the Parklands Police Station, on the material date at 8.30 p.m., he met PW1 who was walking on bare feet. PW5 asked what was wrong, and PW1 presented a complaint: "He told me that he had been robbed of his vehicle Reg. No. KAJ 238, Toyota Corolla, grey in colour." PW5 identified the said motor vehicle, parked outside the Court as an exhibit. PW5's informer on the phone at that time told him that two persons who had decamped from a car in suspicious circumstances were just then being chased in the streets by Police officers, in the Westlands area. A little later, the informer told PW5 that the two suspects – who are the appellants herein – had just been arrested. And even as PW1 was making his report to PW5, two Police officers arrived at the station with two suspects, the appellants, who had just been arrested. PW5 is the one who provided PW1 with alternative sandals to wear, and he escorted PW1 to town to find his way home.

PW5 is the one who conducted investigations into this case. The subject motor vehicle was towed to Parklands Police Station, and the *panga*, *rungu* and shoes found in the motor vehicle were kept at the Police Station as exhibits. The complainant (PW1) identified the car and the other exhibits.

The 1st appellant when put to his defence, gave sworn evidence but called no witnesses. He said he was just having a walk on the material night, when he was arrested. The 2nd appellant too gave sworn evidence but called no witnesses. He denied the charges.

The learned trial Magistrate found as follows. That the appellants had been arrested by PW3 and PW4 on the material night, was not in dispute. The question for the trial Court was, whether the accused persons are the ones who robbed the complainant of his motor vehicle and his personal effects. The inculpatory evidence tendered against the defendants was direct evidence. PW1 had negotiated service charge with 2nd appellant, and he clearly saw the person he negotiated with. Lighting was abundant, and he clearly saw both PW1 and PW2 and he perceived even their mode of dress. PW1's testimony on dressing was corroborated by PW3 and PW4. PW3 and PW4 themselves perceived the appellants in plentiful street lighting as the appellants decamped from PW1's car, as indeed they continued to do when they placed the appellants under arrest after following and keeping track of them, without a break. Upon arresting the two appellants and searching the vehicle from which they had decamped, PW3 and PW4 found items which had been noted and identified by PW1 as having been involved in the violent robbery of the material

night.

From the foregoing assessment of the evidence which the learned Principal Magistrate made correctly, in our opinion, she went to state as follows:

> ***"Only PW1, a single witness, was there and he is the one who identified the accused persons [the appellants herein] as his assailants. I am aware of the requirement to consider the conditions prevailing at the material time and [to] consider if the same are conducive to positive identification. PW1 stated that the lighting was sufficient; during cross-examination he reiterated the same; their proximity too was close, and he was with the accused person for 30 minutes from the time they hired his vehicle to the time when the left him. He also spoke to them and [noted that] one had a hat on. This evidence is corroborated… by PW3, PW4 and PW5. My view is that the evidence of identification was sufficient and gave no room for mistake. I have adequately warned myself of [the] dangers of [relying on the] evidence of a single witness. But corroboration by other witnesses confirms that it is the two [appellants] who committed the offence and no one else. There is no [possibility] of mistaken identity as they allege in their defence. I dismiss their entire defence as casting no doubts on the prosecution case."***

Before convicting the appellants of the offence of robbery with violence which carries the death penalty, the learned Magistrate correctly, in our view, analysed the terms of the governing law, s.296(2) of the Penal Code (Cap. 63, Laws of Kenya): the appellants were armed with dangerous weapons – a *rungu* and a *panga*; the appellants operated in numbers – being more than one; the appellants, in the course of the robbery, wrenched PW1 out of the driver's seat by the neck, and threatened to kill him; the appellants violently threw PW1 out of a moving vehicle. The learned Magistrate, on those facts, remarked: "Thus they indeed used violence on him [PW1]…and so the required ingredients are satisfied. In this regard, a conviction must be sustained. The evidence tendered proves the guilt of the two [appellants] beyond any shadow of doubt." The learned Magistrate found the appellants guilty as charged, and sentenced them to death as provided by law.

The appellants, in their petition of appeal, contended that proof-beyond-reasonable-doubt as a basis of conviction, had not been achieved; that conviction on the basis of the direct evidence of PW1 alone was an error of law; that the night conditions had not been conducive to an accurate identification of the suspects; that the learned Magistrate had disregarded the defence evidence.

Responding to the appellants' written and oral submissions founded on the grounds of appeal, learned State Counsel ***Mrs. Kagiri*** urged that the conviction be upheld, and the sentences confirmed, as the appeal was not well-based in law or fact. From the evidence, the two appellants had carried offensive weapons, as they robbed PW1 of his taxi, registration No. KAJ 238F; of his mobile phone, and of his driving licence and shoes. The appellants had carried a *panga* and a *rungu* as they effected the robbery, and as they manhandled PW1. PW1 had made first reports, which were later corroborated in detail by the accounts coming from others, who also were witnesses – PW3, PW4 and PW5. PW1 came to the Parklands Police Station when he was on bare-foot, and reported that he was robbed of his shoes; and those shoes were found in the robbed car which was identified (by PW3 and PW4) to have been in the wrongful possession of the appellants. PW1 reported that a *rungu* and a *panga* had been used to rob him; and the same were found in the robbed vehicle, which was identified to have been in the wrongful possession of the two appellants. PW1 reported to the Police on the apparel worn by the robbers; and substantially, the appellants were arrested while dressed in that very mode. The lighting conditions in the streets, where the arrests took place, were adequate for reliable identification – and so the appellants were properly identified by PW1, PW3 and PW4 as the robbers. The testimonies of PW3 and PW4 are strongly corroborative of that of PW1. PW3 and PW4 saw the appellants decamp from the stolen motor vehicle, leaving its engine running and its headlamps on, and they kept sight of the appellants without a break up to the time of arrest.

Thus learned State Counsel ***Mrs. Kagiri*** submitted, and correctly in our view, that there would have been, in the circumstances, no need for an identification parade as urged by the appellants.

We have carefully considered the evidence tendered against the appellants, and we are in agreement with the findings of the learned Principal Magistrate. PW1 had all the best conditions, in terms of *lighting, time,* and *proximity to the robbers* – for perceiving and identifying them; and when he had the very first opportunity, he made *first reports*, founded on uncompromised *vision and perception*, to the Police Station at Parklands; and his account was later vindicated in every detail by information later received, and which has been recorded in the testimonies of PW3 and PW4 in particular.

The testimonies of PW3 and PW4 cannot, in our view, be faulted. These two Police officers saw clear signs of an offence having been committed, when the appellants abandoned a car with its engine running, and took to their heels. They chased and arrested the appellants, conducted searches, and came by all the incriminating symbols which were later aligned with first reports of the robbery, to establish with singular accuracy that, indeed, the appellants were the robbers who violently robbed the complainant of his motor vehicle and effects, on the material night.

This is one of those cases in which proof of criminal conduct was achieved with almost *scientific accuracy*. We have absolutely no doubt, that the appellants herein were the robbers who, on 9th May, 2004 along Muthithi Road in Nairobi, robbed ***Charles Nyumu Ndegwa*** of his taxi-cab and other effects.

We dismiss the appeals by the two appellants, uphold conviction, and confirm sentence as dispensed by the learned Principal Magistrate.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 10th day of July, 2007.

J.B. OJWANG

JUDGE

G. A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ.

Court Clerks: Tabitha Wanjiku and Erick

For the Respondent: Mrs. Kagiri

Appellant in person