REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 207 OF 2013

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 208 OF 2013

DENNIS MBUVI KIOKO...1ST APPELLANT

JOHN GITHINJI MUGO..2ND APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani

in Cr. Case No. 389 of 2013 delivered by Hon. J. Karanja, SPM on 25th October, 2013).

JUDGMENT

Background

1. The Appellants, **Dennis Mbuvi Kioko** and **John Githinji Mugo**, were charged in count 1 with the offence of robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code**. The particulars thereof were that on the 15th day of March, 2013 along Banda Street in Nairobi County, jointly with others not before court, while armed with dangerous weapons namely a broken bottle and knives, robbed **Dennis Onsarigo** a mobile phone make Iphone 5 IMEI 013429000656500 valued at Kshs. 90,000/= and at the time of such robbery, used actual violence against the said **Dennis Onsarigo**.

2. In count 2, they were charged with preparation to commit a felony contrary to **Section 308(1)** of the **Penal Code**. The particulars of the charge were that on the 23rd day of March, 2013 at around midnight along Kimathi Street in Nairobi within Nairobi County while not at their place of abode, were found armed with a dangerous weapon namely a sharp knife (kindler) in circumstances that indicated that they were so armed with intent to commit a felony namely robbery with violence.

3. The Appellants pleaded not guilty to both charges. Upon trial, they were found guilty of robbery with violence and convicted accordingly. Consequently, they were sentenced to suffer death. Aggrieved by both their conviction and sentence, they preferred respective appeals to this court which I have

consolidated for purposes of this judgment.

4. The Appellants raised the following six (6) similar grounds of appeal in their respective Amended Grounds of Appeal filed alongside their respective written submissions on 11th December, 2019:

> ***i. THAT the learned trial magistrate erred on points of law and fact by failing to consider that the conditions that prevailed during the said robbery did not warrant proper and positive identification due to circumstances in question.***
>
> ***ii. THAT the learned trial magistrate erred on points of law and fact when he relied on the evidence of identification which was construed as equal hence neglecting to conduct a properly instituted identification parade.***
>
> ***iii. THAT the learned trial magistrate erred on points of law and fact when he was impressed by their mode of arrest which was not in tandem with the events at the scene of crime.***
>
> ***iv. THAT the learned trial magistrate erred on points of law and fact when he failed to perceive that the standard of proof that was required to prove the case did not meet the required threshold.***
>
> ***v. THAT the learned trial magistrate erred on points of law and fact by contravening their right to a fair trial by denying them*** their ***right to be heard and failed to observe Section 216 and 329 of the CPC which vitiated the whole original trial.***
>
> ***vi. THAT the learned trial magistrate erred on points of law and fact by refuting their defence statements without giving points for determination.***

Summary of Evidence

5. I am minded that this is the first appellate court whose duty is to reevaluate the evidence and make independent conclusions. See: **Okeno v Republic (1972) EA, 32** and **Kiilu &Another v Republic (2005)1 KLR, 174**. I thus summarize the evidence adduced as follows.

6. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses. (See **Okeno v Republic (1972) EA 32).**

7. The Prosecution's case can be summarized as follows: On Friday 15th March, 2013 at around 11.30 pm, the complainant **PW1, Dennis Onsarigo** and his friend **PW2, John Munene Kabuitu** were walking along Banda Street while heading to I & M parking lot to pick PW1's car. The area had street lights. After passing a building known as Al Yusra, PW1 saw a group of about six to seven young men who looked suspicious and informed PW2. They continued walking then PW1 removed his phone, a white iphone 5 to call his wife. Before PW1 could put it to his ear to talk, the 2nd Appellant came from behind and demanded for the phone saying "*give me that phone*". PW1 turned and saw the 2nd Appellant's face. The 2nd Appellant grabbed the phone away from PW1, switched it off immediately and took to his heels.

8. PW1 gave chase to the 2nd Appellant at close range in between rows of parked vehicles and almost caught up with him. However, before he could do so, the 1st Appellant who had been running beside him asked him "*where do you think you are going?*" When PW1 turned to look, the 1st Appellant tripped him as PW2 watched from a distance as he was not fast enough. PW1 fell and landed on the palm of his hands. Before PW1 could stand, the 1st Appellant hit him on the left side of his head with a soda bottle. PW1was able to identify the 1st Appellant because he saw his face. The 1st Appellant was wearing a black sweater with white stripes. When PW1 stood up, he saw PW2 standing in front of him. PW2 told him that

his head was bleeding. There were pieces of broken glass on his shirt as well as on the ground where he had fallen. Thereafter, PW1 picked his car keys which had fallen on the tarmac then they went to pick his car. PW2 drove him to the hospital where his palm and head were stitched and was discharged on the same night.

9. PW1 and PW2 reported the incident at Central Police Station on 18th March, 2013. PW1 was issued with a P3 Form. PW1 told the police that he could identify the people who robbed him. The police gave them the telephone numbers of a few officers to contact in case they spotted the robbers on the street again. On 22nd March, 2013, PW1 and PW2 went to Jamia Mosque parking lot where they parked the car and waited. Between 10.30 and 11.00 pm, they saw the two robbers. Coincidentally, they were in the same clothes that they had on the night of the robbery. PW1 called one of the officers known as Mumba whose contact he had been given. The officer asked him to describe how the suspects were dressed which he did.

10. PW3, AP Corporal George Wambugu of CID Central Police Station and his colleague PC Mumba met the Appellants at a parking lot near City Market. They followed their movements keenly until they arrested them near a club called Tribeca. Police then called PW1 and PW2 to go and confirm whether the persons arrested were the assailants. PW1 and 2 identified the Appellants by their clothes and faces. They searched the 2nd Appellant and recovered a key boot in the right pocket of his trouser. The Appellants were escorted to Central Police Station where they were booked.

11. PW4, Corporal Joyce Chepkurui investigated the case. She recorded witnesses' statements and visited the scene of crime. She said she did not conduct an identification parade because PW1 and 2 are the ones who identified the Appellants to the arresting officers.

12. Upon being placed on their defences, both Appellants elected to give unsworn testimonies. **DW1, the 1st Appellant** stated that on 22nd March, 2013, he went to his place of work in town where he worked until 9.00pm. As he was going to the bus stage to get a vehicle back home, someone touched him from behind. When he asked the person why he was holding him, the person told him that he was a police officer. They were three of them. He told them that he had not done anything wrong. They went around town and when they reached near Tribeca club, he heard one officer asking another how many they had caught. When they got near Jamia Mosque, he found five people who were not known to him. One person there said that the person had a sweater like his. He was taken to the police station and placed in the cells from Friday to Monday. They were then taken to court. He denied involvement in the robbery.

13. On his part, **DW2, the 2nd Appellant** stated that on 22nd March, 2013, he went to his place of work at Muthurwa where he hawks shoes. He worked until 7.00 pm then closed work. He then went to Tuskys Chip opposite City Market to collect the balance of 800/= from a friend whom he had sold shoes to. At about 8.30 pm, he headed to the stage. Upon reaching Banda Street, a man emerged holding a gun at him. The man said he was a police officer and handcuffed him. He took him a few steps away and told him to sit on the ground. Some other officers came. Then another man whom he had never seen before was brought and told to seat next to him. The police decided to take them to Central Police Station. When they got to Jevanjee Gardens, the police started saying that they should be killed. They headed towards Globe Cinema but he declined as he feared for his life. Police beat them up and escorted them to police station after which they were charged. In his view, he was arrested because PW1 said he was robbed by someone who was dressed in clothes like his.

Analysis and determination

14. The Appeal was canvassed by way of both written and oral submissions. The Appellants filed their respective written submissions on 11th December, 2019 and appeared in person during the oral highlighting of the same. The Respondent on the other hand was represented by the learned state counsel, Ms. Ajunja who made oral submissions. Upon carefully re-evaluating the evidence on record and considering the parties' respective submissions, I find that there are three issues for determination namely; whether the prosecution proved its case beyond a reasonable doubt; whether the Appellants'

defences were given due consideration and whether the sentences imposed was legal and proper.

Whether the prosecution proved its case beyond a reasonable doubt

15. The most paramount issue for consideration under this head is whether the Appellants were positively identified. The Appellants submitted that the circumstances prevailing at the time of the alleged robbery did not favour a positive identification. They argued that the events in question occurred within a very short span of time. They stated that the attackers were alleged to have appeared from behind and the only time that the victims had to identify the robbers was during the chase at which point PW1 was more focused on recovering his phone than who was holding the phone. They submitted that it was incomprehensible how PW1 was unable to master the colour of something that was conspicuously in front of him since he was not sure whether the 2nd Appellant was wearing a red or brown jacket.

16. They also questioned how PW1 could identify the facial appearance of a person who was running while facing away from him. Further, the Appellants contended that the nature of the street lights was not interrogated. They argued that there was no inquiry as to whether they were illuminating from the top of street posts or were emanating from nearby buildings and/or their size and position from the suspects. They further questioned how PW1 knew that the people he saw while waiting in his car were the same robbers who had attacked him. According to them, the witnesses were called to make identification after the police had made an arrest on their own. They submitted that it was against the Police Standing Orders for the arresting officers to show PW1 and PW2 the suspects at Kimathi Street instead of calling them to identify them in a well arranged identification parade. They contended that the witnesses merely identified them in the dock and cited the case of **Njoroge V Republic [1987] eKLR** where the court stated that dock identification is worthless unless preceded by a properly conducted identification parade.

17. According to the learned state counsel however, the circumstances under which the Appellants were identified were very conducive for a positive identification.

18. No doubt the robbery took place at night. However, both PW1 and PW2 were categorical that there were street lights at the scene which enabled them to see the Appellants' faces as well as their respective dress code. They also gave consistent evidence that when the 2nd Appellant grabbed PW1's phone, PW1 immediately gave chase at close range and almost got a hold of him. PW1 only lost sight of the 2nd Appellant when the 1st Appellant, who was running right beside him, tripped him causing him to fall to the ground. Notably, PW2 who was running after them saw the 1st Appellant tripping PW1 and hitting his head with a soda bottle.

19. Further, PW1 and PW2 were able to recognize the Appellants a week later when they spotted them around the same area wearing the same clothes that they had on the fateful night. It is instructive to note that both witnesses gave their evidence in a clear and concise manner and remained unshaken even during cross examination. PW3 also confirmed that upon arresting the Appellants, PW1 and PW2 identified them by their faces and clothes. In the circumstances, I am satisfied that the Appellants were clearly and positively identified.

20. The Appellants further submitted that PW1 did not indicate in his first report whether he could identify his attackers and neither did he give their description. In their view, this was a clear indication that he could not positively identify them. In support of this, they cited the case of **Mary Wanjiku Gichira V Republic. Criminal Appeal No. 17 of 1998** where court held that suspicion however strong cannot provide a basis for inferring guilt.

21. The position of the law is that the failure to give a description of a person involved in the commission of an offence is not fatal if the witness informs the police when making a report that he would be able to identify the person if he saw them again. (See ***Nathan Kamau Mugwe vs. Republic [2009] eKLR).*** In any event, PW1 was categorical that he could identify the people who robbed him. This was confirmed by PW3 who stated that they managed to look for the robbers since PW1 said that he knew them.

22. The Appellants further faulted the prosecution for failing to call the members of the public who witnessed their arrest to testify so as to explain how they were arrested. However, this court finds that the prosecution is not obliged to call a superfluity of witnesses in order to prove a fact. (See **Section 143 of the Evidence Act (Cap 80) Laws of Kenya** and **Bukenya & Others V Uganda (1972) EA 549**). The witnesses called sufficiently demonstrated that the Appellants were culpable.

23. As to whether the offence of robbery with violence was established, it is trite that the 2nd Appellant had snatched the phone from PW1. The 1st Appellant then tripped him causing him to fall before he could catch the 2nd Appellant. The 1st Appellant was armed with a soda bottle which was no doubt a dangerous weapon. He smashed the bottle on PW1's head and injured him. From the foregoing, it is clear that the 1st Appellant was acting in concert with the 2nd Appellant. His actions were meant to prevent the 2nd Appellant from getting caught and thus enabled the 2nd Appellant to make away with the stolen phone. In the circumstances, I find that the offence of robbery with violence was accordingly proved as provided under Section 296(2) of the Penal Code.

24. Under the said provision, a proof of any of the following elements sufficiently establishes the offence, that is:

> ***a) The offender is armed with a dangerous or offensive weapon or instrument; or***
>
> ***b) The offender is in the company of one or more person or persons; or***
>
> ***c) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.***

Whether the Appellants' defences were given due consideration

25. The Appellants further faulted the trial court for failing to give their respective defenses due consideration. I agree that the learned trial magistrate did not adhere to this cardinal principle in his judgment. Nevertheless, this court being the first appellate court has duly reevaluated the entire evidence adduced by both the prosecution and the Appellants before arriving at its conclusion of whether to uphold or dismiss the conviction. The Appellants merely narrated how they were arrested and raised issues that they did not even cross examine the arresting officer PW3 on. I therefore find that the defences advanced by them were irrelevant and hollow and did not impact on the strong prosecution evidence adduced. (See **Anthony Njuguna Wanjema v Republic [2014] eKLR).**

Sentence

26. The Appellants further submitted that their constitutional rights to a fair trial were violated upon their conviction. They argued that that they were legitimately entitled to the opportunity to mitigate and a consideration of their mitigation by the trial court before a proper sentence could be passed. They urged the court to relieve them from the harsh death sentence in view of the Supreme Court decision in the case of **Francis Karioko Muruatetu & Anor v Republic [2017] eKLR.**

27. The learned state counsel conceded that the court ought to impose an appropriate sentence in light of the **Muruatetu Decision [supra].**

28. The Appellants sentences were passed on 25th October, 2013. By then, the penalty of death for the offence of robbery with violence was cast on stone. The only relief available was for the same to be commuted to a life imprisonment.

29. In trial court, the 1st Appellant mitigated that his father had passed on from HIV and that one of his siblings who living with his grandmother was suffering the same fate. The 2nd Appellant offered no mitigation. The prosecution urged that the Appellants be treated as first offenders. Having therefore considered the circumstances of this case, I am of the view that a lesser sentence is justified. As such, I set

aside the death sentence and substitute it with seven (7) years imprisonment for each of the Appellants from the date of arrest.

30. The totality of my findings is that the appeals are dismissed. I uphold the conviction. As for the sentence, the Appellants were convicted on the 25th October, 2013. They have therefore served the sentence. I order that they be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi This 9th Day of April, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. 1st Appellant in person.

2. 2nd Appellant in person.

3. Miss Chege for the Respondent.