REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 184 OF 2010

ARMOGAST CHAI NGETI alias JAIRO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief

Magistrate's Court at Kibera in Cr. Case No. 1784 of 2008 delivered by Hon. P. Maundu (PM) on 26th February 2010).

JUDGMENT

1. The Appellant, **Armogast Chai Ngeti** was the 2nd accused and together with five others were charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the 28th day of June, 2008 at Ebony Park Villas Apartment-Riara, in Kilimani within Nairobi area, jointly with others not before court, while armed with dangerous weapons namely guns, robbed Emmanyel Anassis of a motor vehicle registration number KBB 230G make Hammer 3, two laptops computers, two laptop computer bags, four mobile phones namely three Blackberry and one Samsung, three wrist watches, one diamond necklace, black torch, one DVD player, one coloured TV set, debit royal card, six bank royal cards, Panasonic camera, cash Kshs. 15,000/=, United States dollars 15,000, 105 Canadian dollars all valued at Kshs. 10.2 million and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Emmanuel Anassis.

2. In the alternative he and another were charged with handling stolen property contrary to **Section 322 (2)** of the **Penal Code.** The particulars being that on the 28th day of June, 2008 at Konza area in Makueni District within Eastern Province, otherwise than in the course of stealing, jointly and dishonestly retained one motor vehicle registration number KBB 230G make Hammer 3 knowing or having reason to believe it to be stolen property. The Appellant pleaded not guilty to both counts. Upon trial, he together with the 2nd accused were convicted of the main charge and sentenced to suffer death. He was aggrieved by both his conviction and sentence and he preferred the instant appeal.

3. The Appellant raised four (4) grounds of appeal in his Petition of Appeal filed on 30th March, 2010. However, in his written submissions filed on 27th February, 2019, he raised additional grounds of appeal. The grounds of appeal can therefore be condensed into the following six (6) grounds:

i) That the learned trial magistrate exceeded his mandate and acted ultra vires by unlawfully releasing exhibits that were never ascertained by the court to be existing and which had not been produced before court as required by law.

ii) That the learned trial magistrate erred in law and fact in returning a finding of culpability on the part of the Appellant in a case wholly dependent on circumstantial evidence without corroboration.

iii) That there was no sufficient ground to support the production of motor vehicle photographs apparently under Section 77 of the Evidence Act without calling the maker.

iv) That the learned trial magistrate erred in law and fact in holding that there were no contradictions in the prosecution's case thereby convicting the Appellant on the testimony of witnesses without credibility.

v) That the learned trial magistrate erred by failing to properly direct himself on the mandatory requirements of Section 169 (1) of the Criminal Procedure Code in that he failed in his judgment to identify the point for determination, the decision thereon and the reasons for the decision and hereby misdirected himself on the essential ingredients of the offence of Robbery with violence.

vi) That the learned trial magistrate erred in law by failing to note that the prosecution did not prove its case beyond reasonable doubt and thus the guilty verdict was unsafe.

Evidence

4. 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 and give due regard for that. (See **Okeno v Republic (1972) EA 32).**

5. The Prosecution's case can be summarized as follows: On 28th June 2008, **Emmanuel Annasis (PW1)** arrived from Canada between 12.30 am and 1.00 am. He boarded his car and proceeded to his residence at Avenue Villa Apartments accompanied by his girlfriend **Fannie Guilbean (PW9)**. Upon entering their apartment at around 2.30 am, they were immediately attacked by a group of six (6) men. One of them had a military rifle and was wearing military attire and boots. The others had pangas, screw drivers and small knives. There was no light in the house but the light from the drive way was shining directly in the house since there were no curtains. He was tied up together with his girlfriend. They beat him up and put a gun behind his back. They stole his watch, his girlfriend's watch and jewels, two computers, a camera, LG television as well as his ATM cards and credit cards. They forced him to give them his PIN number and then called somebody from an ATM and started using the cards. PW1 and his girlfriend were dragged to the bathroom, gagged and locked in as the men continued to ransack the house. On their way out, they drove off in his car registration number KBB 230G Hummer 3, silver in colour.

6. PW1 freed himself, broke the window and called for help. Security guards from a neighbouring compound came in through the front door which was left open by the gang. They broke down the bathroom door and freed PW1 and PW9. They called the police who came from Lavington. They narrated to the officers what happened and then went to spend the night at Serena Hotel. On the following day, they went to the police station to record statements. The officers told him that his motor vehicle had been recovered along Mombasa Road together with some of the items that were in it. One of the two people who were found with the motor vehicle had also been arrested. His brother **William Anassis (PW10)** subsequently went to the police station and identified some of the recovered goods being two laptop bags and a flashlight. Neither PW1 nor PW9 participated in the identification parades conducted upon the arrest of the suspects.

7. Earlier that night at around 11.30 pm, a taxi driver by the name **Joseph Kangethe (PW2)** had been called by one Benard alias "half bread" to go and pick a client at Bottom Line in Kangemi. He drove there and picked the customer who asked him to take him to Kangemi Stage where they picked another person. Thereafter, he was instructed to pick a third person at Uthiru Total Station then drove them to Dagoretti. The three passengers alighted at Wanyee Road then PW2 went back.

8. On the same night at about 3.30 am, **P.C. Peter Nyambare Otieno (PW3)** of Highway Patrol Sultan Hamud Base was with his colleague **Chief Inspector Michael Mwaura (PW5)** along Mombasa Highway at a place called Kima Estate conducting normal searches on vehicles. They stopped motor vehicle registration number KBB 230G Hummer H3 silver in colour which approached them from Nairobi. It had two occupants. The driver pulled aside and PW3 instructed him to switch on the lights inside the vehicle since the front lights were on. PW3 also had a spot light which was on. PW3 asked the driver to come out of the vehicle and demanded to see his driving license which was found mutilated. Upon being asked his destination, the driver (now the Appellant) told them that he was going to Voi to pick the owner of the motor vehicle called Mohammed Salim. PW3 asked him to call the owner so that he could talk to him. While the driver was scrolling his phone, he instructed the passenger who was still in the vehicle to alight. Upon asking the passenger who the owner of the motor vehicle was, the passenger told them that the owner was called Richard. PW3 became suspicious of the two in view of the contradictory names and instructed them to go to the patrol car parked by the roadside for further interrogation.

9. PW3 then took away the driver's Nokia 1100 phone. The driver attempted to grab his driving license from him then took off and ran towards the motor vehicle whose engine was still running while the passenger ran off to a different direction. PW5 chased after the passenger while PW3 fired a warning shot to stop the Appellant but he still ran towards the vehicle. When the Appellant attempted to open the vehicle's door, PW3 shot at him twice and he ran off into a nearby bush. PW3 and his colleague searched the vehicle, which they did not know by then that had been stolen, and then drove it to Sultan Hamud Police Station where it was booked.

10. On the same night around 4.00 am, **Corporal Titus Mutwiwa (PW12)** was at Muthangari Police Station with his colleagues when they received a report from Ultimate Security Response that there was a robbery which had taken place at Ebony Park Villas along Kingara Road. They rushed to the scene whre they found PW1 and PW9 therein who explained to them what had happened. PW12 learnt that the compound was being guarded by George Otonyi and Olive Alamini of Ngaita Security Firm who handled the keys to the houses sometimes. They were however nowhere to be found. There was also a dog handler from Ultimate Security who was found unconscious in the sentry house but the dog was nowhere to be seen. The dog handler told PW12 that he was given two (2) chapatis by his colleagues at 10.00 pm and became unconscious immediately after taking them. He did not see the thugs entering the compound.

11. On 1st July, 2008 around 8.00 pm, **PC Paul Kipkorir Ngeno (PW4)** and **PC Elijah Gichuki Gitahi (PW6)** were called by **Inspector Njeru Namu (PW8**) who was with one Samson, an employee of "Track it" company. PW8 informed them that the driving license found in the recovered vehicle belonged to Armogast Chai Ngeti, the Appellant herein, who was an employee of "Track it" company. PW8 also informed them that another suspect by the name Nahashon Kembero Ayiecho had been arrested at Sultan Hamud and moved to Kilimani Police Station. The director of 'Track It' company helped them trace the Appellant herein through his brother one Benard Wakera Nyeti who lived in Kangemi. The Appellant's brother took them Kitui on 2nd July, 2008 where they found him sleeping in his ex-wife's house. They arrested him and brought him back to Nairobi. He led them to arrest one Richard Atambo. They searched Atambo's house and recovered a torch, two black laptop bags which were identified as having been part of the stolen goods as well as Kshs. 20,000/=.

12. On 8th July, 2008, **Inspector David Nyakundi (PW11)** of Kilimani Police Station conducted an identification parade in which the suspect was the Appellant herein and the witness was PW2. The investigating officer **(PW14)** was present but was just observing. PW2 identified the Appellant by his facial appearance as one of the people he picked in his taxi and dropped at Dagoretti on the night of the robbery. Upon confirming that the Appellant was contented with how the parade was conducted, PW11 filled the parade form which he produced in evidence.

13. The investigating officer **Corporal Robert Kariuki (PW14)** informed the court that he charged the Appellant and his co-accused persons because they did not tender a satisfactory explanation of how they acquired the goods recovered from them. He produced the goods together with the Appellant's mobile phone and driving license.

14. In his unsworn defence, Appellant denied committing the offence. He stated that on 27th June, 2008, he was at his house in Kitui, Muhutu area having gone there on 15th June, 2008 since he had been granted leave until 7th July, 2008. On 4th July, 2008 at around 11.00 pm as he was sleeping with his wife and three children, he heard a knock on the door. He recognized the voices of two peoples being Mr. Ngeno and Gichuki. He woke up, lit a lamp and opened the door. They told him that he was required in Nairobi and asked him to accompany them to Nairobi. They spent the night at Machakos town then came to Nairobi in the morning. He was taken to Makongeni Police Station and booked in without a reason. After two days, he was moved to Kilimani Police Station where he met his brother who had also been remanded in police cells. His brother told him that Mr. Ngeno, Njeru and Gichuki broke into his house on 2nd July, 2008, searched the house and took away his (Appellant's) driving license, employment card, two passport pictures and a diary book which had Kshs. 700/=. On 10th July, 2008, he was brought to court and charged with offences he did not know. He also stated that upon his arrest, the police officers took his Nokia 2300 phone whereas Mr. Ngeno took his Kshs. 7,800/= which he asked him to take to his wife.

15. In his judgment, the learned trial magistrate held that the Appellant was positively identified by PW3 and PW5 as having been found in possession of PW1's recently stolen motor vehicle but failed to give a satisfactory explanation as to how his driving license was found in the said motor vehicle. According to the trial magistrate therefore, the prosecution proved beyond reasonable doubt that the Appellant was among the people who robbed PW1.

Analysis and Determination

16. The Appellant relied on written submissions are dated 25th October, 2018 whist those of the Respondent are dated 27th February, 2019. After carefully re-evaluating the evidence on record and considering the parties' respective submissions, I narrow down the issues for determination to be: *whether the doctrine of recent possession was properly applied by the trial court; whether there was proper identification; whether the Prosecution case was tainted by material contradictions, whether the prosecution proved its case beyond reasonable doubt and whether the trial magistrate failed to comply with the mandatory requirements of* ***Section 169*** *of the* ***Criminal Procedure Code.***

Whether the doctrine of recent possession was properly applied.

17. It was the Appellant's contention that the trial magistrate erred by relying on the doctrine of recent possession, which is largely circumstantial evidence, in convicting him. He faulted the court for invoking the same on the basis that his driving license was recovered in the stolen motor vehicle. He argued that since his booking report did not indicate that his driving license was recovered in the said motor vehicle, it was highly probable that he was right when he said that the police collected his driving license from his house and not at the road block as alleged. In response to the Appellant's aforesaid submission, the Respondent submitted that the prosecution's evidence which linked the Appellant to the possession of a recently stolen vehicle vide the recovery of his driving license, was watertight and consistent. The same could not be toppled by the Appellant's defence which was in any event a mere afterthought.

18. The principles guiding the application of the doctrine of recent were laid down in the case of **Malingi v Republic [1989] KLR 225** as follows:

> ***"He can only be asked to explain his possession after the prosecution has proven certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there were no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is rebuttable. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."***

19. There is no doubt as evidenced by PW3 and PW5 that they recovered the Appellant's driving licence after they stopped and searched motor vehicle registration number KBB 230G Hummer 3, silver in colour which had two occupants. PW1 had reported the theft of the vehicle at Muthangari police station. The two occupants gave conflicting names of the owner of the vehicle thereby prompting further interrogation. The driving license was handed over to the Special Crime Prevention Unit for investigation. The investigation of the driving license which bore the name of the Appellant herein led to his arrest in Kitui. PW3 identified the Appellant in court as the person who was driving the motor vehicle when they stopped it at the road block on the material night. PW1's brother PW10 was able to identify the recovered motor vehicle as belonging to PW1. The recovery of the driving licence in the vehicle could only be accounted with an explanation that the Appellant had a hand in its handling and by extension its theft. This created an inference that he stole the vehicle or received it knowing that it was stolen.

20. However, upon being given an opportunity to explain how his driving license made it to the stolen motor vehicle, the Appellant claimed that his license was taken away by police officers who broke into his house on 2nd July, 2008. In my honest view, this explanation is ousted by the strong cogent evidence of PW3 and PW5 that indeed the licence was recovered from the vehicle. His alibi defence could not therefore bail him out. In the premises, I find that the trial court correctly applied the doctrine of recent possession in convicting him.

Whether the Appellant was properly identified.

21. On this issue, the Appellant submitted that the circumstances prevailing at the time they were stopped at the road block could not have favored a positive identification by PW3 and PW5. He argued that the said witnesses had never seen him or the other occupant before the material night. Further, he stated that there was no evidence that there was sufficient light at the scene. The intensity of the light emanating from the torch held by the officers was not established and there was no evidence that the light from the torch was directed on their faces.

Further, he stated that the duration PW3 and PW5 had the suspects under observation was unknown and their statements did not describe the Appellant's appearance. In response to the Appellant's submission in this regard, the learned stated counsel Ms. Sigei submitted that the identification of the Appellant was perfectly aided by light from the stolen motor vehicle.

22. The positive identification of an accused person is a very important element of any offence. In the instant case, it is not in doubt that the Appellant was not known to either PW3 or PW5 before the material night when they stopped him at the road block. The unquestioned evidence on record shows that the front lights of the vehicle were on when they pulled aside. PW3 also had a spot light and instructed the driver to switch on the light inside the motor vehicle. Further, the record is clear that PW3 was not aware that motor vehicle was stolen when he stopped it. His curiosity was only raised when the two occupants gave conflicting names of the owner thus prompting further interrogation. This means that he took more than just a moment to observe the Appellant.

23. In the circumstances, I am satisfied that there was sufficient light at the scene which aided the witnesses in identifying the Appellant and his accomplice. I am also convinced that the duration taken to interrogate the two was long enough to enable the witnesses positively identify the Appellant. In this regard, the only thing that would have erased doubt that the identification of the Appellant was beyond reproach was an identification parade. One was conducted in which PW2 was the witness and he positively identified the Appellant as one of the persons he ferried from Kangemi area to Wanyee. Although visually no one attested that the Appellant was one of the persons who was in victims' house on the material night, the fact that the doctrine of recent possession nailed him to the offence is sufficient proof of his participation in the robbery.

Whether were material contradictions in the prosecution's case.

24. Further, the Appellant argued that the evidence tendered regarding him having left his driving license behind was contradictory, inaccurate and incoherent. He referred to PW3's testimony that he demanded for the Appellant's license which the Appellant gave him. He stated that this testimony contradicted PW6's testimony that the driving license had been recovered from the stolen vehicle. The Appellant further stated that PW3 and PW5's testimonies that he was the one driving the vehicle at the point of recovery contradicted the investigating officer's testimony that PW3 told him that it was one Nahashon (1st accused) who was driving the Hummer. In his view, this meant that the contradictory accounts were both false and therefore unreliable. I have carefully perused the evidence and found that these contradictions are not substantial enough to create a doubt that the Appellant committed the offence in question. I am guided by the Court of Appeal in the case of **Richard Munene v Republic [2018] eKLR** where it was stated that:

> ***"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."***

25. The Appellant further faulted the prosecution for failing to tender any spent cartridge in evidence to prove that PW3 and PW5 fired several bullets at the scene where the vehicle was recovered. It is my view that the shooting at the scene was not in issue and therefore the production, or lack, of the spent cartridges did not create any doubt on his guilt.

26. The Appellant also faulted the trial magistrate for failing to carefully analyze the evidence adduced. He submitted that the trial magistrate indicated in the judgment that PW4 was at the road block where the Appellant was stopped while driving the stolen motor vehicle whereas PW4 did not say that he was ever at the Roadblock. He added that PW5 testified that he was in the company of PW3 and not PW4 as indicated in the judgment. However, a perusal of the record reveals that this was merely a typographical error.

Whether the prosecution proved its case beyond reasonable doubt

27. In determining this issue, the court is enjoined to consider whether the prosecution proved the essential elements of the offence of robbery with violence under **Section 296 (2)** of the **Penal Code**. These are:

> ***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.***

28. When PW1 was attacked, the assailants were armed dangerous weapons namely military riffle, pangas, screw drivers and small knives. The assailants were more than one in number. They used personal violence on PW1 by beating up and tying him up with a television code together with PW9. They also stole several goods including the subject motor vehicle which was recovered in possession of the Appellant herein. I am therefore satisfied that the prosecution established the ingredients of the offence of robbery with violence beyond a reasonable doubt.

29. The Appellant faulted the trial court for relying on the photographs of the subject motor vehicle in convicting him instead of the actual vehicle. He submitted that the actual vehicle should have been produced in evidence by the prosecution for scrutiny by the court before being released to the owner. In his view, the failure to do so was a fatal error since the case depended on physical evidence. It is a common practice in criminal trial that photographs can be tendered in evidence where the actual exhibit cannot be produced so long as the photographs are processed in a manner authorized by law. (See **Republic v John Nganga Mbugua [2014] eKLR).** There was therefore nothing wrong with producing the photographs thereof in evidence in place of the vehicle.

Section 169 of the Criminal Procedure Code was complied with.

30. Finally, the Appellant submitted that the trial magistrate did not itemize the points for determination contrary to the requirements of Section 169 of the Criminal Procedure Code. He argued that all the trial magistrate did was to summarize the evidence tendered by the prosecution and defence and thereafter entered a conviction in four lines. In his view, this was a fatal error as the trial court failed to address itself on the essential ingredients of the offence in question as a result thereof. In the judgment the learned magistrate did not set out the points for determination. He only considered the evidence on record and made a general conclusion. I find that this was not fatal as this court upon evaluation of the evidence finds that the conviction was safe.

31. On sentence, I take into account that the assailants were armed with guns. They subjected the complainants to torture and fear before they robbed them of money, personal effects and fled with a vehicle. Had the vehicle not been recovered along Mombasa Road by keen officers, the robbers would have completely gotten away with it. It is a case that deterrence measure is called for. I accordingly set aside the death sentence and substitute it with a fifteen year jail term. The same shall be reduced by ten years eight months and twenty eight days spent in custody since the date of arrest.

DATED and DELIVERED this 2nd day of April, 2019

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.

2. Mr. Momanyi the Respondent.