REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 270 of 2011

JOSEPH MWANGI NGIGE.....1ST APPELLANT

JOSEPH MACHARIA MBURU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kiambu Cr. Case No. 1606 of 2010 delivered by Hon. C. Oluoch, SRM on 13th October, 2011).

JUDGMENT.

Background.

1. Joseph Mwangi Ngige and Joseph Macharia Mburu, hereafter the 1st and 2nd Appellants and conversely the 2nd and 1st accused respectively were jointly 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 18th October, 2010 at around 7.30 p.m. at King'othua Kajiko Marram Road in Kiambu District within Central Province, jointly with others not before court being armed with dangerous or offensive weapon namely pistol robbed Samuel Njoroge Thuku of motor vehicle Reg. No. KZU 729 Nissan Sunny B12 white in colour valued at Kshs. 170,000/- and at or immediately before or immediately after the time of such robbery used personal violence to the said Samuel Njoroge Thuku. They were found guilty and sentenced to death. Dissatisfied with both the conviction and sentence, they proffered the instant appeal.

2. Learned counsel, Mr. Mutinda who represented both Appellants filed Amended Grounds of Appeal for both Appellants on 9th March, 2018 which he entirely relied on. I summarize them as follows; that the prosecution evidence was contradictory and unreliable, that they were not properly identified, that the learned trial magistrate improperly applied the doctrine of recent possession in convicting them, that the prosecution witnesses were coached and that the investigations were done when they had already been arrested and that their mode of arrest was riddled with doubts and that their respective defence statements were not considered.

Submissions.

3. The appeal was canvassed before me on 18th April, 2018. Mr. Mutinda only argued the 2nd and 3rd grounds of appeal which are with respect to the identification of the Appellants and the application of the doctrine of recent possession. Learned State Counsel, Miss Sigei filed submissions on behalf of the Respondent on 18th April, 2018. I shall consider the respective submissions in the judgment hereafter.

Evidence.

4. The prosecution's case was that **PW1, Samuel Njoroge Thuku** was a taxi driver based at Banana who drove car Reg. No. KZU 729 owned by PW2. On 18th October, 2010 at around 7.30 p.m. he was approached by the 1st Appellant to ferry him to ACK Kingothua at a fee. As they neared the gate where he was to drop him he noticed two men and informed his passenger that he would not stop there because he noticed that the men were walking towards him. That is when the 1st Appellant brandished something and pointed it to PW1's left side before ordering him to stop the vehicle. The men at the gate then entered the vehicle with one of them pointing a pistol to his face and ordering him to jump to the back seat where the other man tied him up. He identified the man who tied him up as the 2nd Appellant. He identified him using the light of the vehicle. He was dropped off at a farm near Kantaria Police Post with the man with a pistol acting as a sentry for about two hours. After he (2nd Appellant) left he untied himself and reported the matter to the police and the owner of the vehicle. The vehicle was tracked to Ol Kalau Police Station where the Appellants had been arrested under suspicion of stealing it.

5. In cross examination, PW1 stated that he informed the police when he reported the matter that he could identify the 1st Appellant. He stated that he was able to identify the 2nd Appellant when the vehicle's doors were open as the light in the vehicle turned on automatically. He added he identified both Appellants in the respective identification parades.

6. **PW2, Joseph Kahiga Njoroge** confirmed that he was the owner of motor vehicle Reg. No. KZU 729 and was PW1's employer. He testified that he received information that his vehicle had been stolen on 18th October, 2009. The vehicle was tracked by a tracking company to Ol Kalau Police Station. He produced documents attesting his ownership of the vehicle. **PW3, Samuel Kamau Karuma** an employee of Digital ISP Car Track Limited confirmed that the vehicle was tracked to Ol Kalau Police Station on 21st October, 2010.

7. **PW4, CPL Kimeti Rono** of Ol Kalau police station received information of a suspect car around the area on 19th October, 2010 at around 1700hrs. It was a Nissan Sunny registration number KZU 729. Together with other police officers they started following it up and also circulated it to his colleagues. On 20th October, 2010 at 0600hrs they spotted it around Kiganjo area with two occupants. It was parked a few metres from the tarmac road. Its occupants were the Appellants whom they arrested as they walked from it. They searched them and found nothing although the car keys were found under the driver's seat. PW1 booked them for possession of a stolen vehicle.

8. **PW5, PC Richard Musyoka** of Ol Kalau Police station was in the company of PW 4 when the vehicle was founded and arrest of the Appellants was made. He entirely corroborated the evidence of PW4. In cross examination, he stated that the vehicle had been diverted into a feeder road, about 15 to 20 meters off the tarmac.

9. **PW6, CIP Peter Ochieng Ogola** conducted an identification parade on the Appellants on 26th October, 2010. The first parade was in respect to the 1st Appellant. He was positively identified by PW1. The 1st Appellant expressed his dissatisfaction with the parade stating that he was older than the other members of the parade. The 2nd Appellant was also identified by PW1. He too said he was not satisfied with the parade because members of the parade were older than he was and that the witness had seen him at Kikuyu Police Station. In cross examination, he stated that he did not enquire as to the parade members' ages although he paraded members who looked similar to the suspects in terms of age, complexion and height. Further that he used the same members for both parades.

10. **PW7, PC John Cheruiyot** was the investigating officer alongside PC Musembi. He summed up the prosecution case.

11. After the close of the prosecution case, the court ruled that a *prima facie* case had been established and both Appellants were put on their defence. The 2nd Appellant testified as **DW1.** He stated that on 20th October, 2010 he woke up at 7.00 a.m. to head to work although he did not normally open during public holidays. That while at the stage waiting for a matatu he met the 1st Appellant who was a neighbor. A taxi car arrived from which plain clothes officers alighted and searched them. They followed a path to the right where after 150-200 meters they came across a parked car. At the scene there were two police officers who had arrested two boys. There was a lady lamenting that the boys were students and could have not parked the vehicle there. They were escorted to Ol Kalau Police Station and later to Kikuyu police station. On the following day, they were taken to Kiambu in the stolen vehicle in the company of the complainant. An identification parade was done on the following day. The witness was PW1 and was dressed as in the previous day. He added that the other members of the parade were young boys.

12. **DW2,** 1st Appellant entirely reiterated the defence of DW1. He added that later that day they were moved to Nyahururu Police Station and during their transfer he saw two men one of whom was the complainant. That on 25th October, 2010 he was subjected to an identification parade to which he raised an objection as the other members were too young. That when the complainant was being called he could see him talk to the officer who was sent to pick him through the open door.

Determination.

13. It is now the onerous duty of this court to reevaluate the evidence afresh and arrive at an independent decision. In so doing, the court must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See **Pandya v Republic (1957) E.A.336, Kariuki Karanja v Republic (1986) KLR, 109**.

14. I have accordingly considered the evidence on record and the respective rival submissions before arriving at the following issues for determination:

i. Whether the Appellants were positively identified.

ii. Whether the doctrine of recent possession was properly applied.

iii. Whether the Appellants' defence statements were properly considered.

iv. Whether the offence was proved beyond a reasonable doubt.

15. With regards to the Appellants' identification, it was submitted that the same was by a single witness and that although the court warned itself on the dangers of relying on the evidence it went ahead to find that the Appellants were properly identified. Ms. Sigei in reply submitted that the Appellants were properly identified. Mr. Mutinda questioned whether the evidence of PW1 met the threshold in the cases that set out the basis for reliance on the evidence of a single witness. His view was that if the court were to rely on the evidence, PW1 needed to have given a description of the perpetrators of the offence in his first report. He submitted that this was not the case, and so the identification of the Appellants was not full proof.

16. According to PW1, when he reported the matter to the police he informed the police that he could identify the Appellants and he subsequently took part in an identification parade in which he positively identified the Appellants. The trial court however discarded the evidence from the parades on the basis that both Appellants were identified using the same members. It relied on **Muiruri & another *v.* Republic [2002]1 KLR** to support its finding.

17. While reliance on the same parade members was fatal to the 2nd parade it could not be a reason to invalidate the first parade. This is informed by the fact that the presence of the same members in the second parade would obviously point to the second suspect as the odd one out. In reaching this conclusion the court is guided by the case of **Mburu & another *v.* Republic [2008] 1 KLR 283** in which the Court of Appeal sitting in Nairobi delivered itself as follows;

> ***"1.The value of an identification parade as evidence would depreciate considerably unless it was held with scrupulous fairness and in accordance with the instructions contained in the Police Force Standing Orders.***
>
> ***2. The identification parade in respect of the 2nd Appellant served no purpose if the same members used in another parade minutes earlier were used for the same witness to pick out the suspect. The 2nd Appellant was the only strange person in the parade and was easily identifiable.***
>
> ***3. Whereas the first parade in which the 1st Appellant was identified was properly conducted, the value of the 2nd parade was irrecoverably compromised and was of no evidential value."***

18. Other issues were raised regarding the propriety of the parade chiefly that the members were younger than the Appellant and that they were the Appellants' cell mates. The officer who undertook the parade testified that he might have used some of the Appellants' cell mates but this does not render the parade defective if the members conformed to the specifications set out in the Force Standing Orders. The officer testified that he chose members who were similar to the Appellants with respect to age, complexion and height. Strangely and quite contradictory to their defence statements they did not state that the complainant had seen them prior to the parades. In cross examination the officer stated that while he did not ask the witnesses of their ages, he looked for persons who had similar physical traits.

19. In the view of the court, the physical traits of the suspect are what the witness must identify and when the parade officer chose members who had physical traits that conformed to those of the Appellants he had fulfilled his duty and therefore conformed to the Force Standing Orders. I accordingly find that the 1st Appellant was properly identified.

20. With respect to the identification of the 2nd Appellant it drives me to the second issue for determination, whether the doctrine of recent possession was properly applied. The circumstances under which the doctrine of recent possession is applicable was set out in the case of **Malingi v Republic (1989) KLR, 225** in which the Court of Appeal held that;

> ***"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved 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, from the nature of the item and circumstances of the case, recent; that there are 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 a rebuttable presumption. 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."***

21. Mr Mutinda submitted that the officers who testified regarding the recovery of the motor vehicle and the arrest of the Appellants gave contradictory evidence. He pointed that PW5 had changed goal posts in his testimony so that it could tally with that of PW4. That the contradictions meant that the court could not rely on the doctrine of recent possession. Ms. Sigei, in reply, submitted that the contradictions were not material and any inconsistencies in the evidence could be explained by the different perceptions by the witnesses. She relied on **Philip Nzaka Watu *v.* Republic [2016] eKLR** to buttress this submission.

22. The prosecution evidence did confirm that the stolen vehicle was received by PW4. It is also clear that the police initial attempt to recover the vehicle on 19th October, 2010 was unsuccessful. The police took a taxi and came across the vehicle at Kiganjo village where it was parked a few meters from the tarmac road. The Appellants were not arrested in the vehicle but the 1st Appellant was seen exiting from the driver's side and the 2nd Appellant from the passenger's side. The evidence of PW5 was more detailed than that of PW4. Nevertheless, just as the trial court found, I do also find that the testimonies of the two witnesses were essentially similar. I arrive at a similar conclusion that both Appellants were in possession of the vehicle and were arrested just after dumping it. The little discrepancies in the witnesses' account of events can be explained by the fact that hardly two people can give an exact account of the events that happened at the same time and at the same place. What matters is that the accounts should be similar in the critical material that a court is looking for. See **Philip Nzaka Watu v REPUBLIC(**Supra**)** where the Court of Appeal held that:

> ***"...it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two persons perceive the same phenomena exactly the same way."***

23. I have no doubt therefore that the Appellants were in possession of the stolen vehicle. This is further buttressed by the fact that PW5 testified that after they saw the vehicle and turned to pursue it, it diverted into a feeder road and stopped about 15 to 20 meters from the tarmac road. That when they got onto this feeder road they saw the Appellants exit the vehicle and they were walking towards the main road when they arrested them. The short period between the time the vehicle turned into the feeder road and the time the Appellants were arrested creates no room for doubt that they had the vehicle. Besides, they were seen exiting from it.

24. On proof of the doctrine of recent possession, the first test is whether the prosecution established that the vehicle was recently stolen. It was stolen on the night of 18th October, 2010 and the Appellants were arrested in its possession on the morning of 20th October, 2010. No evidence pointed to them as being handlers. They neither claimed this in their defence statements. I find that the only inference available is that they were part of the gang that robbed the complainant. This inference is buttress by the identification of the 1st Appellant in the parade.

25. With regard to proof of ownership of the vehicle, PW1 as the taxi driver positively identified it as the one stolen from him. PW2 was the legal owner of the vehicle. He produced a log book under the name of Joram Kimata Gichuki from whom he had bought the vehicle. He produced a sale agreement in that respect.

26. On whether the Appellants' defence statements were considered, I first observe that they gave unsworn statements whose veracity could not be tested by way of cross examination. The trial court examined the statements and found that they were littered with inconsistencies that called into question their truthfulness. On the part of this court, the defence of the 1st Appellant's was riddled with inconsistencies that failed to dislodge the prosecution case. This were; (i)the date when the identification parade took place; 25th October instead of 24th October and (ii)the presence of the complainant at the police station on 20th October, 2010 contrary to the evidence of PW1, PW2 and PW3 that they traveled to Ol Kalau on 21st October, 2010 after the car was tracked. The statement by the 2nd Appellant had inconsistencies with regards to (i)the date of their transfer from Ol Kalau Police Station; he said it was the same date of arrest and (ii)the date of the identification parade which he said was the day after their arrest which was 21st October, 2010. I would be hard pressed to put any weight on the already untested evidence which in this case weighs very little against the prosecution case.

27. In sum, I find that the prosecution proved their case beyond a reasonable doubt. I uphold the conviction. With respect to sentence, the Appellants were considered as first offenders. The circumstances of the offence were however grave as they threatened to shoot the complainant with a pistol. It was a life threatening situation which calls for a deterrent sentence. The same is however mitigated by the fact that the stolen motor vehicle was recovered. In respect to the 1st Appellant, he mitigated that his children who had gone abroad had left him as the guardian of their children (his grand children) and asked for leniency. The 2nd Appellant did not mitigate. I would in the circumstances find that upholding the death sentence would be too punitive. I set it aside and substitute it with an order that each of the Appellants shall serve fifteen years imprisonment commencing the date of sentence. The period they spent in custody of eleven months eighteen days shall be deducted from the jail term. It is so ordered.

DATED and DELIVERED this 5th day of JUNE, 2018.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. **Mr. Mutinda for the Appellant**

2. **Miss Akunja for the Respondent.**