REPUBLIC OF KENYA

AT THE HIGH COURT IN NAIROBI

CRIMINAL APPEAL NO. 480 OF 2010

HARRISON WAWERU CHEGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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

Chief Magistrates' Court at Kibera Cr. Case no. 1322 of 2009

delivered by Hon. U. P. Kidula, C. M on 1st of September, 2010).

JUDGEMENT

BACKGROUND

The appellant, **Harrison Waweru Chege** was charged with two counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars in Count 1 were that on the 12th of March, 2009 at Kipeto Sub- location in Kajiado District within Rift Valley Province, jointly with others not before the court while armed with dangerous weapons namely pistols, pangas and rungus robbed Muresi Ole Lenkanona of cash Ksh 51,000 and at or immediately before or immediately after the time of such robbery used actual violence to the said Muresi Ole Lenkanona.

In count II, the particulars were that on the 12th of March, 2009 at Kipeto Sub- location in Kajiado District within Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely pistols, pangas and rungus robbed Yunis Seinta of unknown amount of money and at or immediately before or immediately after the time of such robbery killed the said Yunis Seinta.

The appellant was found guilty in both counts and sentenced to death. His co-accused persons were acquitted for lack of evidence. Being aggrieved by the conviction and sentence he preferred this appeal. It is premised on 10 grounds of appeal which are condensed into the following;

1. That the charge sheet was defective.

2. That the circumstantial evidence that founded the conviction and sentence was insufficient.

3. That the mode of his arrest is tainted with doubts and could not lead to a conviction.

4. That the conviction was arrived at by mere suspicion and speculation.

5. That the doctrine of common intention under Section 21 of the Penal Code was not established.

6. That the case was not proved beyond a reasonable doubt.

7. That appellant's defence of alibi was ignored.

8. That essential witnesses did not testify.

SUBMISSIONS.

The appellant's submissions are dated 23rd of May, 2017. He submitted that the charge sheet was defective as the name of PW1 was misspelt and that he had other names that were not indicated in the charge sheet. For instance, the name Jeremiah was mentioned by all other witnesses throughout the trial. He further submitted that the only evidence linking him to the crime was the car that was found at the scene and therefore the circumstantial evidence against him was insufficient. He added that the mode of his arrest was marred with uncertainty. This was in light of the fact that although he had been given the vehicle prior to the robbery, he was not arrested with it at the time of the robbery. He was neither found with it at the scene it was recovered. He submitted that his conviction was based on mere suspicion and speculation as he was never identified at the scene of crime. He also submitted that his alibi defence was not considered. He faulted the prosecution for not calling a crucial witness, namely the Bishop into whose house he went immediately he came to after his kidnapping ordeal. According to him, the witness would have confirmed that he was not at the scene of crime on the material night. He was of the view that the case was not proved beyond a reasonable doubt and urged that the appeal be allowed.

Learned Prosecution Counsel, Miss Kimiri opposed the appeal. She submitted that the charge sheet was not defective. The misspelling of PW1's name was a typographical error that was curable under Section 382 of the Criminal Procedure Code.

She also added that the case was proven beyond a reasonable doubt. He conceded that the conviction of the appellant was based on circumstantial evidence. However, the same was sufficient to found a conviction against the appellant. She pointed to the fact that it had been established that the appellant was the person who last handled the vehicle that was involved in the robbery. The said vehicle was later found near the scene of crime. Further, the appellant was injured by PW1 during the robbery as the latter tried to ward off the robbers. He (appellant) was later, on the following day arrested in a hospital trying to seek medical treated for the injuries he had sustained. It was also established that after he picked up the vehicle from its owner, PW2, he switched off his mobile phone only for the vehicle to be recovered abandoned after being involved in a robbery. Counsel submitted that all these circumstances pointed a guilty finger on the appellant. She submitted that the appeal had no merit and urged that the same be dismissed.

EVIDENCE.

In summary, the prosecution's evidence was that on the 12th of March, 2009 at about 11.30 pm., a vehicle pulled up at the compound of Jeremiah Muresi, PW1 with its headlights at full beam. Four men proceeded to the door of PW1 and his wife which was one of the four houses in the homestead of PW1 urging him to open the door as they were police officers. They claimed that PW1 had been dealing with zebra meat. With hesitation, he opened the door while wielding his sword to protect himself. The four men forced their way as PW1 opened the door. A struggle ensued upon realizing that the visitors were thugs. One of them was armed with a sword. One of the assailants hit PW1 on the head with the sword which caused him to lose consciousness. He also suffered injuries on his leg. They proceeded to attack Yunis Seinta, his wife, who was in the same house resulting in her death.

The men then continued to the other houses in the homestead demanding money from the brother of PW1 and his mother in law, PW3 and PW4 respectively. Briefly thereafter, they sped off in the vehicle they had come with. The robbers made away with Ksh 51,000 in cash as well as 6 title deeds. The police were notified of the incident and rushed to the scene with sniffer dogs which managed to trace the scents in the car to a nearby house; the owner of the house opened the door to the Police but was grabbed and lynched

by an angry mob of Masais that was trailing the police officers. PW3 and 4 assisted the Police in apprehending the 2nd, 3rd and 4th accused persons.

A few metres from the scene was a motor vehicle registration number KAL 731 X which was stalled inside a ditch; inside it was a sword sheath at the back as well as matchsticks in the fuel tank. The appellant Harrison Waweru however, had been given the car by PW2 the day before to begin taxi operations in the area. PW14 testified that they(police) had received information about a man who was trying to gain entry into a nearby hospital and he had been beaten up by a crowd. They went and apprehended the man who was the appellant. He was identified by PW2 at Ongata Rongai Police Station as the driver who had been given the car. PW2 also identified the vehicle which had been towed from the scene by Police. It had also been vandalized with a missing radio and spare tyre. A week after the incident when PW1 regained consciousness, he went to the Police Station where he identified all four men who were charged. He identified the appellant as the one who shouted he was a police officer and accosted him with a sword at the door in his house. The other accused persons were casual labourers who worked for him.

In his sworn defence, the appellant claimed that on the night of the incident he picked up a lady from Ongata Rongai who wanted to be taken to Matasia. As he approached her gate, he was attacked by someone who put a wire around his neck. This forced him to veer off into a fence. He then saw four other men come around the car and they began to hit him and tied him up. The men seemed to know the female passenger as they were conversing. He was handed tablets and ordered to ingest them. He was hit by an axe after which they blind folded him and put him in the boot of the car. After a while, they stopped and ordered him to take more tablets which he did. They then tied his feet and onto a post where they left him. He came to after 7 hours where he crawled to a place that had light and was rescued by a good Samaritan at about 3.00 a.m. He went to Kiserian Police Station where he reported before being taken to Kenyatta National Hospital. He lost his memory and regained it after 9 days.

The appellant called a witness, DW1(Joseph Kinua Ngige), who claimed to have found the appellant sitted on a wheelchair severely injured at Matasia Nursing Home. He was urged by the doctor to report the same at the Police Station before proceeding to Kenyatta National Hospital where he was referred for further treatment. On arrival at the station he was thrown into a Police Land Rover where DW1 did not see the appellant again. He stated that he was denied a chance to record a statement.

DETERMINATION.

Having summarized the evidence and the respective rival submissions, it is now the duty of this court to re-evaluate the evidence adduced and come up with its own independent findings. See the case of **Pandya vs. Republic [1957] EA. 336**.

On whether the charge sheet was defective, the appellant was charged alongside three others as having robbed one Muresi Ole Lenkanoma alias Jeremiah Muresi Sokote. The appellant alleged that the real name of the complainant was Lenkanona and not Lenkanoma as written on the charge sheet. This is clearly a typographical error as the identity of PW1 was consistent throughout the trial. It did not therefore occasion a miscarriage of justice. The error being one for want of form is curable under **Section 382** of the **Criminal Procedure Code.** The same provides that;

> ***"382. Finding or sentence when reversible reason of error or omission in the charge or other proceedings***
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> ***Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgement or other proceedings before or during the trial or any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure***

of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The appellant challenged the manner of his arrest. According to PW14, the appellant was dropped by unknown people at the hospital gate in a vehicle whose registration number he did not note down. He then took the appellant to Ongata Rongai Police Station. The witness testified as follows;

"… I went to the person and took him inside the station…"

However, in his statement, PW14 went on to say that members of the public brought the appellant to the station. He said;

"…I have said in my statement that you were brought to the station by members of the public…"

Notwithstanding the testimony of PW14, the appellant and DW1 also gave contradictory evidence on the particulars surrounding the arrest as compared to PW14. The appellant stated;

"…Nobody asked me questions. I was thrown in the cells…"

Lines 15,16 and 17;

"…my memory vanished. After nine days my memory came back. I found myself at Ongata Rongai Police Station…"

In cross examination, he asserts that it was DW1 who rescued him. DW1 had this to say;

"…he(doctor) told me to pass through the Police station to report before going to Kenyatta National Hospital. I took the accused 1 into my vehicle. I drove to Kiserian Police Station. There, I left him in the vehicle for me to go and report. I found a police officer at the OB. I told him my story from where I had been called. He asked to see the person. We went with him to the vehicle. He saw the 1st accused. As he was still looking at him a police land rover drove into the police station. Two men came from it. They alighted and asked what was going on. I told them. One of these police men said so this is the driver of the motor vehicle we have seized elsewhere. They ordered the 1st accused into their land rover and drove to Ongata Rongai Police Station… he was booked into the OB…"

From the above summary, it is clear that the witnesses gave differing accounts on how the appellant was arrested. Indeed, the learned magistrate made no reference to these discrepancies. That said, it is clear that no one identified him at the scene. It is thus clear that the appellant was arrested purely based on circumstantial evidence. He had no prior relationship or encounter with any of the witnesses but PW2 who had given him the vehicle in question which was found at the scene. And this was the only link between him and the robbery. In fact, he was arrested when PW1, the only eye witness, was unconscious in hospital therefore clearly pointing that PW1 did not lead the police to arrest the Appellant. This court must then critically relook at the circumstantial evidence and determine whether it was so strong that it pointed to nothing less than that the guilt of the appellant. See the case of **Prosecutor vs. John Ndungu Njoki and Another [2012] eKLR** where it was held;

"The Court of Appeal has re-affirmed the above position in the recent case of **Peter Moate Obero & Gideon Kamau Mburu vs. Republic, Criminal Appeal No. 177 of 2008 (Mombasa),** when the court said:

"It is the essence of circumstantial evidence that, in order to justify an inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis that that of guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference… with

those safeguards in place circumstantial evidence is as good as any direct evidence which is tendered and accepted as to prove a fact."

There is no doubt that the Appellant was given the car by PW2 as he confirmed that he collected it from her on the 11th of March, 2009. However, the appellant was meant to repair the car and reach PW2 at around 5 p.m. later that day. He had not reached her by 9 p.m. and his phone was off. PW2 was called by a friend on the morning of 12th of March, 2009 where she was notified that her car was being towed to the Police Station where she found it and the appellant was in the cells. Be that as it may, the failure of the appellant to pick up his phone at around 5 p.m. cannot be used as an inference of guilt in itself.

This court brought to its attention the discrepancy in distances between the homestead of PW1 and where the car KAL 173X was found inside a ditch. The scenes of crime officer took photographs of the vehicle and its contents but gave no testimony on the relevant distances. But, it begs the question whether the car that drove into PW1's the homestead was the car that was recovered at the ditch outside the homestead of PW1. This would rule out any doubt that it was not involved in the robbery.

None of the witnesses testified that they were able to identify the car that drove into the compound of the complainant. None also was able to identify the vehicle that drove into PW2's compound. They also were not able to identify the driver of the car and its occupants. The appellant was not found inside the car. He was neither arrested in possession of any of the stolen property. In my view, only this kind of evidence would have nailed the appellant. On the other hand, he gave a plausible account of how he was kidnapped after being drugged as a result of which he lost consciousness. His defence was consistent with that of DW1 who went to see him at Matasia Nursing Home.

Although the appellant failed to call the Bishop into whose home he staggered after he regained consciousness, it is clear that the police were able to smoke out a suspect whose smell was picked by the sniffer dogs from the vehicle. This suspect unfortunately was lynched by a mob. At this time the appellant had already been arrested and was being held at Kiserian Police Station. Therefore, if the police believed he was a culprit, nothing was easier for them than leading the dogs to his presence. This would have compiled direct evidence against him. This was not the case leading the court to doubt that he was an assailant. I am accordingly more inclined to believe his defence.

The appellant submitted that crucial evidence was left out and that crucial witnesses did not testify. He referred to the Bishop to whose home he sought refuge after he came to following the alleged kidnapping ordeal. My view is that this was a witness who was best suited to give evidence for the defence as opposed to the prosecution.

The appellant also raised a ground of appeal on the basis that the doctrine of common intention was not established pursuant to **Section 21** of the **Penal code**. He referred to the suspect who was traced by the police but was lynched by a mob. The Section states that;

''When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with another, and in the prosecution of such purpose as offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.''

In the case of ***Dickson Mwangi Munene & Another vs. Republic [2014] EKLR***, common intention is was defined as:

"… where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention… It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence…"

It is clear that no common intention formed in the instant case. The identity of the assailant was not ascertained as well as his participation in the robbery. Therefore, an attempt to create a common purpose

with him is unsustainable.

The appellant also submitted that his alibi defence was not considered by the court. He submitted that he called DW1 to support the assertion that he had been attacked and went to hospital for treatment. Although DW1 did not corroborate the fact that he was with the appellant at the time of the crime, the burden always lies with prosecution to prove their case beyond a reasonable doubt. In this case, there was no evidence linking the injuries the appellant sustained to the incident in PW1's house. According to the Respondent, the appellant was injured by PW1 as he tried to ward off the robbers. However, that remained allegations based on mere suspicion as the sword PW1 is alleged to have used was never adduced as an exhibit to demonstrate that he had cut one of the robbers.

In the circumstances, the prosecution was enjoined to dislodge the alibi defence put forth by the appellant. See **Kiarie vs Republic [1984] KLR 739, the Court of Appeal** seating at Nairobi held that:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that alibi and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not purported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi."***

As enunciated above, the prosecution dismally failed to discharge this burden.

There is no doubt that all the elements of the offence of robbery with violence as defined under **Section 296 (2) of the Penal Code** were proved. The robbers were armed with crude weapons being pangas, rungus and a pistol, they were more than one in number, they used actual violence against the victims of whom one died and stole some money and property belonging to the victims. However, there was no sufficient evidence linking the appellant to the offence.

In the result, this appeal succeeds. I quash the conviction, set aside the sentence and order that the appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and **DELIVERED** in **Nairobi** this **8th June, 2017**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.

2. M/s kimiri for the Respondent.