IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 144 OF 2019

BETWEEN

GEOFREY KINYANJUI……1ST APPELLANT

PETER KIAMA ……2ND APPELLANT

AND

REPUBLIC……RESPONDENT

***(Being an appeal from the Judgement of the High Court of Kenya at Nairobi (Kimaru, J.) dated 4th April, 2019* in H.C.CR.A No. 326 & 327 of 2011)**

JUDGMENT OF THE COURT

[1] In this second appeal, both ***Geofrey Kinyanjui*** and ***Peter Kiama*** (1st and 2nd appellants respectively), were jointly charged with two counts of the offence of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code; making a document without authority and handling stolen goods. The particulars of the offences being that on the night of 9th and 10th May, 2009 along Mai – Mahiu Nairobi Highway, the appellants jointly with others not before court, while armed with dangerous weapons namely a pistol, robbed ***Alex Mwangi Njama*** of a lorry registration No. KBA 898H Mitsubishi FH, loaded with timber all valued at Ksh. 3,450,000 and immediately before or immediately after, the time of such robbery threatened to use actual violence on the said ***Alex Mwangi Njama***.

[2] It was stated in the 2nd count that on the same date and place, the appellants jointly with others not before court, while armed with dangerous weapons, in the same fashion robbed the same victim of a Nokia phone valued at Ksh 6,000 and cash Ksh. 3,800 and before or after used violence on him. The appellants also faced a 3rd count of **making a document without authority**. The particulars of the charge were that on an unknown date and place with intent to deceive or defraud, without any lawful excuse they made an identity card **number 20398631** purporting it to have been issued by the registrar of persons. Lastly they faced a 4th count of handling stolen goods contrary to ***Section 322 (2)*** of the Penal Code. The particulars of the charge were that on 10th May, 2009 at Buru Buru Area, in Nairobi otherwise than in the course of stealing dishonestly retained motor vehicle registration No. KBA 898Y Mitsubishi FH Lorry loaded with timber which they knew or ought to have had reason to believe were stolen.

[3] Upon trial, before the Chief Magistrate's Court at Nairobi, both appellants were found guilty and convicted of the 2nd 3rd and 4th counts but they were acquitted of the 1st count. They were each sentenced to suffer death in respect to the 2nd count while the sentences in regard to the 3rd and 4th counts were held in abeyance. Their appeals before the High Court were unsuccessful against conviction but allowed against the sentences based on recent jurisprudence that holds that sentencing is a judicial function that allows a trial court to mete out a sentence that is proportionate to the severity of the offence committed. The Judge therefore set aside the death sentence and substituted it with a ten (10) years imprisonment with effect from the date of judgment of the High Court being 4th April, 2019.

[4] Both appellants who were represented at the hearing of this appeal by ***Mr. Ondieki*** Advocate each filed their own home grown memorandums of appeal which were augmented by the supplementary memorandum of appeal filed by their counsel. Briefly the grounds fault the learned Judge for: confirming the conviction which was based on a defective charge sheet; relying on evidence of identification that was not free from the possibility of error; failing to appreciate that the circumstantial evidence had gaps and did not point at the appellants as the only persons who had the opportunity to commit the offence; failing to provide the appellants with a fair trial under ***Section 77*** of the repealed Constitution; admitting proceedings which were not valid as the previous magistrate had ordered a re-trial; failing to find that the evidence did not discharge the burden of proof to the required standard; and failing to allow the appellants an opportunity to mitigate under ***Section 323*** of the CPC.

[5] The hearing of this appeal was conducted vide an electronic platform due to the prevailing extreme circumstances brought about by the COVID 19 Pandemic. ***Mr. Ondieki*** learned counsel for the appellants adopted his written submissions and made some oral highlights. Counsel submitted that the charge sheet was defective as it indicated that the subject motor vehicle was KBA 898 H Mitsubishi FH while the evidence of ***Alex Mwangi Njama*** **(PW1)** indicated the registration number as KBA 898 Y. Thus, according to counsel, the evidence did not tally with the particulars of the charge sheet. Counsel also poked holes on the evidence of identification stating that the identification parade was defective as **PW1** was categorical in his evidence that he had seen the 2nd appellant at the report office before the parade.

[6] Counsel for the appellant further submitted that there were very many inconsistencies surrounding the arrests of the appellants. For instance, the motor vehicle was variously described by witnesses as a canter silver in color. That was also the evidence of ***Matete Jackson Ksongoch*** who testified as (**PW4**) and ***Sgt. Geofrey Waigwa Mgombe*** **(PW6)** who also described the recovered motor vehicle as a canter KBA 896Y. Counsel for the appellant urged us to find that the circumstantial evidence was weakened by inconsistencies and that it was not safe to sustain the conviction. Furthermore, the admission of evidence regarding the exhibits that were produced before another magistrate who recused herself was inadmissible, null and void; and the appellants were denied a fair trial when the trial magistrate declined to allow an adjournment and the hearing proceeded without counsel for the appellants thereby occasioning them injustice. On sentence counsel urged us to follow the dicta in the case of **Ahamad Abolfathi Mohammed &Another vs. Republic [2018]** where this Court allowed an appeal based on the grounds that in sentencing, the trial court failed to take into consideration the period of time the appellants spent in custody.

[7] This appeal was opposed by ***Mr. O'Mirera*** learned counsel for the respondent. He submitted that there were concurrent findings by the two courts below regarding the identification of the appellants as perpetrators of the offences, that as regards the identification parade, the appellants did not object to the participation of **PW1** nor was the issue raised before the High Court; and that the issue cannot be raised on second appeal unless the appellants were able to point out how the two courts misapprehended the evidence of identification. Counsel argued that the evidence clearly established that there was sufficient lighting at the scene when **PW1** was called from his room and the witness spent considerable time with the appellants as he was driven throughout the night until he was abandoned in the early hours of the next morning in Mwiki area in Nairobi. Moreover, in re-evaluating the evidence, the learned Judge went further to find that even if the court were to ignore the evidence of identification, the recovery of the motor vehicle connected the appellants with the robbery.

[8] On the principles guiding a fair trial, counsel stated that after the first magistrate recused herself, the prosecution made an application to rely on exhibits that were already on record; that ***Section 34*** of the **Evidence Act** allowed the trial court to rely on the same, and that the trial court did in a ruling that the appellants did not challenge, allow the admission of the evidence. Also, counsel pointed out that the appellants had not demonstrated what prejudice they were caused by the court relying on those exhibits as all the witnesses were duly recalled and testified afresh during the *de novo* hearing except for **PW3** who could not be found. Counsel made reference to the provisions of ***Section 200*** and urged that the same was duly followed. On sentence, while agreeing that the Judge was supposed to allow the appellants offer a fresh mitigation before re-sentencing, counsel urged us nonetheless not to interfere with the sentence as it is clear that the Judge had considered the period the appellants had already served when he sentenced them to 10 years imprisonment. In the event the court was inclined to interfere with the sentence, counsel urged us to remit the matter to the High Court for sentencing hearing.

[9] This being second appeal, the jurisdiction of this Court is circumscribed under the provisions of ***Section 361(1)*** of **the Criminal Procedure Code** as follows: -

> **"A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in tis appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-**
>
> **a) on a matter of fact, and severity of sentence is a matter of fact; or**
>
> **b) against sentence, except where sentence has been enhanced by the High Court, unless the subordinate court had no power under Section 7 to pass that sentence..."**

See also **Karani vs. Republic (2010) 1 KLR 73, 77)**

[10] That said, it is necessary to appreciate the background facts of the matter so as to deduce the correctness of the points of law raised by the appellants. We find the facts were superbly captured by the learned Judge in his judgement and we could not do any better summarizing them but to produce them verbatim as follows:-

> ***"PW1 and PW2 were driving motor vehicle registration No. KBA 898Y from Kisii to Mombasa. PW1 was the driver and PW2 was the conductor. The vehicle was transporting timber. On the material night, they had parked the lorry at Mai Mahiu. It was late. PW1 booked a room at a motel while PW2 slept in the said lorry. At about 12.30 a.m.,***
>
> ***PW1 heard a knock at the door of his hotel room. Two men were at the door. PW1 stated that there were security lights outside his door. They identified themselves as police officers. One of them showed PW1 what seemed like a police identification card. He was informed that he was under arrest. They asked him to accompany them to where he had parked his lorry. When they arrived at the said lorry, PW1 woke PW2. PW2 was asleep in the lorry. PW1 informed PW2 that the police had arrested him. One of the men left. After a few minutes, he came back in a saloon car. There was another man with him in the saloon car. PW1 and PW2 were asked to enter the saloon car. The two men took their phones. One of the men drove PW1's lorry. Two men were with PW1 and PW2 in the saloon car. The two vehicles were driven to Nairobi. The two men informed PW1 and PW2 that they were taking them to Central Police Station. They were however driven past the said police station. The vehicles joined Thika Road. The saloon car made a U-turn at Kenyatta University. It was now heading back towards Nairobi. The saloon car joined Mwiki Road at the Kasarani Round about.***
>
> ***When they arrived at Mwiki, the two men alighted. After a few minutes, two different men came to the vehicle. They slapped PW1 and PW2 and accused them of trading in unlicensed timber. PW1 and PW2 were ordered to lie down inside the vehicle. They***

were tied down using ropes. The men started the car. After driving for a while, PW1 and PW2 were dumped at a forest. They managed to untie themselves. They did not know where they were. They met a watchman who informed them that they were at Githurai 44 Area. He gave them a phone. They called their employer at Mombasa and informed him of their ordeal. They proceeded to Kasarani Police Station where they reported the robbery.

Meanwhile, PW5 PC Kirama Timothy Gathiari then based at Buruburu Police Station was on 10th May 2009 at about 2.30 a.m. on patrol with PC Mungai. They were on patrol at Umoja Estate. PW5 testified that at that time, he saw a Mitsubishi Canter motor vehicle being driven along a rough road. Since they were on foot, they followed the vehicle. They found that it had stopped outside some houses. Timber was being offloaded from the vehicle. They asked the persons who were there to produce a permit. They were shown a permit which indicated that the timber was to be transported to Mombasa.

They were four people at the scene. Two managed to escape. They arrested the remaining two. One of the persons arrested is the 2nd Appellant. PW5 informed PW6 Inspector Geoffrey Musomba then working as a duty officer at Buruburu Police Station. He arrived at the scene and caused the motor vehicle to be towed to Buruburu Police Station. While on the way, he received information from the police radio call reporting that the motor vehicle that they had recovered being Registration No. KBA 898Y had been robbed from the driver along Naivasha-Mai Mahiu Road. The report of the robbery was made at Kasarani Police Station. PW6 informed the police officers at Kasarani Police Station that the motor vehicle had been recovered and was being taken to Buru Buru Police Station.

Meanwhile, at the said Kasarani Police Station, PW1 and PW2 were informed that their stolen lorry had been recovered. The lorry was at Buruburu Police Station. They went to Buruburu Police Station and identified the lorry. On 11th May 2009, PW1 and PW2 were asked to attend police identification parades held respectively at Kilimani Police Station and at Shauri Moyo Police Station. In the first identification parade held by PW4 IP Francis Njeru Nyamu, PW1 and PW2 were able to identify the 1st Appellant. In the second identification parade, PW1 identified the 2nd Appellant. PW2 was unable to identify anyone in the said parade.

Photographs of the recovered motor vehicle were taken by PW8 PC Edward Muhia, a Scene of Crime officer attached to Nairobi Area. The photographs were taken on 14th May 2009. They were produced into evidence. The case was investigated by PW10 Sgt Nathan Njoroge of the Special Crime Prevention Unit, Nairobi. He told the court that after completing his investigations, he came to the conclusion the Appellants were involved in the robbery. He told the court that the Appellants, with others hijacked the motor vehicle driven by PW1 at Mai Mahiu, after subduing him using a pistol. They had the vehicle driven to Nairobi where they dumped PW1 and PW2 before driving the motor vehicle to Umoja Estate. The 2nd Appellant and others were found unloading timber from the motor vehicle. They were found by police officers on patrol. The police were informed that the owner of the timber was the 1st Appellant. He was called to the police station where he was arrested. A police identification parade later confirmed the identity of the Appellants as the persons who robbed PW1 and PW2. The fact that the motor vehicle that was robbed from PW1 and PW2 was recovered in their possession was another piece of evidence that connected the Appellants to the crime.

The 1st Appellant was put to his defence. He stated that on 10th May 2009 at about 3.15 a.m., he received a call from his neighbour, a Mr. Kiplagat. Kiplagat informed him that his brother Matete had been arrested. He needed his help to bail him out. The 1st Appellant stated that the police officers requested for Ksh.10,000/- in order to release Kiplagat's brother. Kiplagat promised to refund him the money. He withdrew Ksh.20,000/-. He proceeded to Buruburu Police Station where Kiplagat's brother was being held. He arrived at the said station at about 5.30 a.m. At the reception, one of the officers requested for Ksh.10,000/-. He gave him the money. He was asked to wait in a different room. He was later taken to the OCS who requested for Ksh.10,000/-. He informed the OCS that he had already given the money to the police officer at the reception.

The said police officer denied receiving any money from the 1st Appellant. They had an argument about the money. He was arrested and locked in a police cell. At about 2.00 p.m., he was ordered to accompany police officers to his house. They took his national identity card, his military identity card and photographs from his house. Back at the station, he was subjected to an identification parade. Eight people from his cell were included in the parade. He stood between the 3rd and 4th person. A witness was brought in. He identified the first person on the parade. He left the room. The said witness later came back and touched him. A second witness came in and touched him. He stated that the witnesses had seen him at the report office before the parade was conducted. He was later charged with the present offences. The 1st Appellant denied all the charges against him.

The 2nd Appellant was put to his defence. He stated that he worked as a driver. On 10th May 2009, he left for work at about 4.30 a.m. Before arriving at the bus station, he met two police officers. They asked for his identity card. He had however left it at home. He gave them his driving licence. The police officers declined to accompany him to his house where his identity card was. They arrested him alongside another man. He was taken to Buruburu Police Station. He was later transferred to Shauri Moyo Police Station. The following day, an identification parade was conducted. Two witnesses came. They did not identify him during the parade. He was later charged with the present offences. He denied any involvement in the same."

[11] Having carefully considered the record of appeal, and deliberated on the submissions, the law and the authorities cited, we find what translates to issues of law for determination are; whether the charge sheet was defective; whether the appellants were properly identified as the perpetrators of the offences they were charged with; whether the appellants were denied a fair trial and finally whether the prosecution proved its case to the required standard.

[12] Counsel for the appellant faulted the charge sheet because it described the motor vehicle that was stolen as Lorry Registration No KBA 898H Mitsubishi FH, which was at variance with the evidence of **PW1** who described the same vehicle as KBA 898Y. The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants' conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the

case of **JMA v. Republic (2009) KLR 671**, it was held *inter alia* that:

> **"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."**

[13] Applying the above test to the instant case, we find that the registration No, of the motor vehicle that was stolen from PW1 was as stated in the Charge sheet a lorry whose registration number was KBA 898H Mitsubishi FH…….and this is the same

vehicle that was found in possession of the two appellants with the timber being off loaded. This is what PW1 stated in his evidence:-

> "***My name is Alex Mwangi Njamba. I am a driver with 15 years' experience. I drive a lorry KAY 038N. It belongs to Mr. Wakaba. In May 2009 I was a driver of m/v KBA 898Y, it belonged to one Mugo.***
>
> ***It was doing business between Meru, Nairobi and Mombasa…I recall on 9/5/09 I was coming from Kisii. I spent the night at Mai Mahiu. It was Motor vehicle KBA 898Y".***
>
> ***PW2 testified;***
>
> ***"My name is Geoffrey Kinyanjui Wanjohi. I used to be a turn boy in a vehicle owned by David Mugo. A Mitubishi Lorry which was doing transport work. It was Reg. KBA898Y Yellow in colour body."***

The small variance in the description of the motor vehicle by letter Y instead of H is not grave enough to vitiate a charge sheet. We have weighed this discrepancy against the other evidence on record as well as the other counts that faced the appellants and are not persuaded. This ground of appeal has no merit.

[14] The ground of appeal on evidence of identification was based on the fact that the identification parade was defective because the appellants were seen by **PW1** and **PW2** at the report office before the parade was conducted. According to the evidence by the two courts below, they found that both **PW1** and **PW2** closely interacted with the appellants during the entire ordeal from the time the two witnesses were taken to the subject motor vehicle, bundled into another car and were driven from Mai Mahiu up to the early hours of the morning when they were abandoned at Mwiki area in Nairobi. Besides this concurrent finding by the two court below, we find the appellants did not raise the issues of the defective parade before the two courts below.

[15] We are in agreement with the conclusions by the two courts below that the fact that the appellants were found with the stolen motor vehicle connected them to the robbery. That is even if the evidence of the identification parade were to be discarded, the fact that the evidence of the appellants having been found in possession of the stolen motor vehicle which was stolen the day before was not challenged. This is how the Judge expressed himself in regard to this aspect which we find was a proper analysis of the matter and therefore disposes the ground of appeal on identification:-

> ***"Even if this court were to ignore the evidence of identification, the recovery of the motor vehicle connected the Appellants to the robbery. The motor vehicle was recovered by the police who were on patrol at Umoja Estate a few hours after the robbery incident. The 2nd Appellant was found in the motor vehicle. He had the keys to the motor vehicle. Investigations revealed that the timber was being off loaded in the premises belonging to the 1st Appellant. The police were told that the timber 'belonged' to the 1st Appellant. The 1st Appellant went to the police station after he was summoned on information given by the 2nd Appellant. The recovery of the motor vehicle, a few hours after the robbery, therefore connected the Appellants to the robbery. The doctrine of recent possession applied in their case. The Appellants did not give a reasonable explanation how they came to be in possession of a robbed motor vehicle a few hours after the robbery incident. This court came to the conclusion that the defence put forward by the Appellants was a mere diversion and did not dent the otherwise strong, cogent and overwhelming evidence that was adduced by the prosecution witnesses".***

[16] The last issue is whether the appellants were denied a fair trial, in that the trial court relied on exhibits that were produced before a magistrate who recused herself and the hearing started *de novo* before another magistrate. In answering this issue, the learned trial magistrate made reference to the ***Section 34*** of the Evidence Act which she reproduced verbatim as follows;

> **"34. (1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—**
>
> **(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable, and where, in the case of a subsequent proceeding—**
>
> **(b) the proceeding is between the same parties or their representatives in interest; and**
>
> **(c) the adverse party in the first proceeding had the right and opportunityto cross-examine; and**
>
> **(d) the questions in issue were substantially the same in the first as in the second proceeding.**

(2) For the purposes of this section—

(a) the expression "judicial proceeding" shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and

(b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused". (Our emphasis).

[17] We note that all witnesses were recalled to testify before the trial magistrate except **PW3** who could not be found. There were about nine (9) other prosecution witnesses who gave evidence and were subjected to vigorous cross-examination and the only portion of the impugned evidence that was used was the exhibits that were produced before the first magistrate. The question we have to answer is whether this resulted in unfair trial. We find the language of ***Section 34*** wide enough to encompass situations where the witness who had already testified and produced exhibits and cannot be found, or is incapable of giving evidence, or where his presence cannot be obtained without an amount of delay or expense which in all fairness would be unreasonable were present in this case. The threshold provided in section 34 of the Evidence Act was met in this case as the proceedings were between the same parties as the previous proceedings and the appellants were given the opportunity to cross-examine the witnesses; and the questions in issue were substantially the same in the first as in the second proceedings. Accordingly, we find this ground of appeal also has no leg to stand on. We are satisfied that the prosecutions' case was indeed proved to the required standard.

[18] On the sentence, the learned Judge addressed it within the current jurisprudence that was expounded by the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** and this is what the Judge posited;

> "***In the present appeal, the Appellants' robbed the complainants after subduing them using a firearm. They subjected them to a horrendous ordeal from the time they kidnapped them to the time they abandoned them in Nairobi. Violence was meted out on the complainants. This court can only imagine the psychological torture that the complainants experienced during the ordeal. The court has also taken into account that the Appellants have been in lawful custody for a period of ten (10) years. The court also took into account their mitigation. However, taking into account the entire circumstances of the case, this court formed the view that the death sentence is not called for. In the premises, this court sets aside the death sentence meted by the trial court. The same is substituted by an order of this court sentencing the Appellants to serve ten (10) years imprisonment with effect from the date of this judgment. This court has taken into account the period that the Appellants were in pre-trial custody and the period that they have been prison since their conviction. It is so ordered".***

[19] Counsel for the appellants invited us to further interfere with the said sentence of ten (10) years arguing that the Judge did not factor in the period that the appellants were in custody which was to be factored by dint of ***Section 333(2)*** of the **Criminal Procedure Code** (CPC). On the other hand, ***Mr. O'Mirera*** urged that since the Judge did not conduct sentencing proceedings, we should submit the matter to the High Court for re-sentencing. However, ***Mr. O'Mirera*** had not cross-appealed on this aspect. That notwithstanding, the record of proceedings before the trial court shows that the appellant's lawyer offered mitigation to the effect that the appellants were young people and sole bread winners of their young families, that no one was injured and there were no aggravating circumstances. The mitigation was duly considered by the trial magistrate who found that ***Section 296 (2)*** of the Penal Code,provides a death penalty and her hands were tied. We are satisfied the Judge considered all the circumstances in revising the sentence, the mitigation as well as the period before trial and after sentencing. We accordingly decline an invitation to interfere with the sentence as we find no justification to do so.

[20] In the upshot of the foregoing, we find this appeal lacking merit and the conviction and re-sentence of the appellants well founded. We hereby dismiss the appeal in its entirety.

Dated and delivered at Nairobi this 25th day of September, 2020.

M. K. KOOME

……..……

JUDGE OF APPEAL

HANNAH OKWENGU

……...……...……

JUDGE OF APPEAL

F. SICHALE

……....…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR