IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE , MARAGA & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 78 OF 2008

BETWEEN

ANTONY MUCHAI KIBUIKA……. APPELLANT

AND

REPUBLIC……..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (J.B. Ojwang & Omondi JJ) dated 18th June,2008

in

HCCRA NO. 454 of 2005)

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JUDGMENT OF THE COURT

The appellant herein was charged in the Chief Magistrates Court at Kiambu vide Criminal Case No. 1845 of 2003 with two offences of robbery with violence contrary to section 296(2) of the Penal Code, in that on the 29th day of July, 2003 at Gathiga sub-location in Kiambu District of the Centrol Province, jointly with others not before court while armed with a dangerous weapon namely pistol (gun) robbed ***Benard Njoroge Wangui*** of his motor vehicle Reg. No. KAP 013H Nissan Shark, valued at Kshs.800, 000/= and cash 7,000/= and at or immediately before or immediately after the time of such robbery he threatened to shoot the said ***Benard Njoroge Wangui***. That it is regard count 1. In count 2 he was charged that on the same date and at the same place he robbed ***Peter Njuguna Wachira*** of cash of Kshs.300/= and at or immediately before or immediately after the time of such robbery threatened to shoot the said Peter ***Njuguna Wachira***. The appellant denied both counts.

The prosecution tendered evidence through (***PW1) Benard Njoroge Wangui, (PW2) Peter Njuguna Wachira (PW3) Samuel Kiragu Njuguna (PW4) No. 213361 Sergeant Ephantus Ndirangu of Gathiga APD post , (PW5) No. 218776 Inspector Charles Marangu*** attached to Divisional CID Kiambu and ***(PW7) No.77548 Ag. Inspector Hillary Kariuki*** attached to Nyeri CID headquarters and previously of Kiambu CID office. The appellant who gave unsworn evidence was the sole witness for the defence.

In a brief Judgment delivered on the 31st day of March, 2004 the learned trial magistrate ***M.W. Wachira (SPM)*** after assessing the evidence tendered before court made finding inter alia that:-

"***The court finds that the evidence of PW1 and PW2 is unchallenged. The accused is clearly identified by both PW2 and PW1 as he spent a whole afternoon with them as he was driven to. There is no denial in the defence of the accused that he committed the offence of robbery as charged. The accused did commit the robbery jointly with others not before court. The accused was the mastermind of the robbery.***

However there is no evidence that accused herein is the person who threatened to shoot PW1 and PW2. The woman had the pistol. The accused acted jointly with the woman and man. As such I reduce the offence of capital robbery to robbery under section 296(1) of the Penal Code, under section 179 (2) of the Criminal Procedure Code.

The accused defence is of no evidential value because it does not refer to the date the offence was committed. I dismiss the defence as a mere denial. I find the accused guilty of the minor offence of robbery contrary to section 296(1) of the Penal Code and I convict him on each count….."

The appellant was sentenced to serve seven (7) years imprisonment on each of the two counts. The appellant was dissatisfied with that decision and he appealed to the High Court at Nairobi vide Criminal Appeal No.454 of 2005. In a judgment dated the 18th day of June, 2008 at Nairobi ***J.B. Ojwang and H.A. Omondi JJ*** inter alia made the following observations:-

"***Appellant was sentenced to seven years imprisonment on each count. He appealed against both conviction and sentence where upon the learned state counsel Mrs. Kagiri put him on notice that if the appeal did not succeed, then she would be seeking for a higher sentence of death as the evidence proved the offence as charged since the appellant was (with) some two other people and there was a pistol used, so the court erred in reducing the charge. Appellant being duly warned of the notice stated "I understand I have decided to proceed with the appeal…"***

Upon re-evaluation and reassessment of the evidence on the record, the learned Judges of the first appellate court went on further to observe thus:-

"We cannot fault that argument nor do we find the learned trial magistrate to have erred in relying on that evidence. We find that the appellant and the witnesses had indeed spent a lot of time together and there was no room for mistaken identity the circumstances were favourable for positive identification.

However the identification did not just end with the encounter during the hiring , travel and robbery, there was an identification parade held and PW1 on cross-examination stated that he participated in the identification parade and identified appellant and he said this:-

"I identified you because you spoke to me at Githiga and we agreed with you that you would hire the motor vehicle.

This identification is buttressed by the evidence of PW2 who stated:-"I identified him because he approached me and we spoke and we drove him to Njabini…"

As regards the conduct of the identification parade, the learned judges observed thus:-

"PW5 described in detail how he conducted the parade and there is nothing to suggest that the Force standing orders regarding identification parades was at all flouted. We find that the identification parade was properly conducted "

Turning to the evidence regarding the circumstances leading to the appellants' arrest, the following observations were made:-

"of course none of the people who were part of the crowd that handed over appellant to the police testified, apart from PW2 who got information tha appellant had been seen at Githiga and he PW2 saw him….

The learned trial magistrate considered his defence and found it to be a mere denial noting that appellant clearly steered away from his activities or whereabouts on the day of the incident. However we note that appellant raised an alibi defence but offered no evidence to confirm that he was elsewhere when the incident occurred…"

Turning to the nature of the offence disclosed, the learned Judges made the following observations:-

"The learned trial magistrate correctly observed that although appellant was not with the gun, he was in the company of a man and a lady who had a gun and that appellant acted jointly with them. So having found that really there was no reason to reduce the charges to one of simpler robbery- the common intention was to use the fire arm to threaten the victims and we concur with Mrs. Kagiri that the moment the learned trial magistrate was convinced that the appellant was acting jointly with two others, (one of whom was armed) and a robbery had taken place, then the prosecution discharged its burden of proving the offences charged and indeed the ingredients of capital robbery were duly proved. To this extent then, we find that the learned trial magistrate misdirected herself and the appellant ought to have been convicted as charged for robbery with violence contrary to section 296(2) Penal Code on both counts.

Consequently we substitute the finding and convict appellant for the charge of robbery with violence contrary to section 296(2) of the Penal Code.

The seven years sentence on each limb that was imposed is set aside and substituted with a sentence of death on count 1. The sentence on count 2 will be held in abeyance"

The appellant was once more dissatisfied with the High Court's decision and he appealed to this court citing three grounds of appeal namely:-

1. ***That the High Court made an error in both law and fact by relying on the identification evidence by PW1 and PW2 without considering that the prevailing circumstances at scene of crime was not favourable for a positive identification.***
2. ***That the High Court failed to observe that the case for the prosecution was not proved beyond reasonable doubt.***
3. ***That the High Court did not consider as to my written submission in support of my appeal.***

On the day fixed for hearing of this appeal, learned counsel ***Mr. Mogikoyo, A,O*** and ***F.Njeru*** senior prosecution counsel appeared for the appellant and the state respectfully. In his oral submissions to court, ***Mr. Mogikoyo*** urged us to allow the appeal on the grounds that the offence was not proved as the vehicle was not robbed; secondly that there is nothing to show that PW1 had Kshs.7,000 on him as PW3 the owner of the vehicle, never mentioned that he had given Kshs.7,000.00 toPW1 to purchase a wheel. Further that the appellant was not arrested on the date of the alleged robbery which occurred on the 29th day of July, 2003 but almost two weeks later on the 13th day of August, 2003; that there is nothing to show that the appellant had been arrested in connection with a similar incident of attempting to hire a vehicle in a similar manner as the members of the public who allegedly apprehended the appellant did not come to testify and lastly; that PW4 never stated that the appellant was arrested in connection with a similar incident.

With regard to the offence in count 2, ***Mr. Mogikoyo*** urged us to disallow the conviction on this count as the same was not proved as there was nothing to demonstrate that PW2 had on him the said amount of Kshs. 300.00 allegedly robbed from him.

With regard to the evidence of identification of the appellant by PW1 and PW2 at an identification

parade, we were urged to disregard this evidence as there is evidence on the record that the witnesses saw the appellant at the Chief's camp, and even negotiated for his release; that the doctrine of common intention does not hold as it has not been sufficiently proved that appellant was in company of the alleged robbers; lastly that the appellant's failure to recount his movements on the day of the alleged robbery should not have been held against him as the appellant is not required to prove his innocence. The burden of proof always lies on the prosecution.

In response, ***Mrs. Njeru*** urged us to dismiss the appeal on the grounds that the appellant was positively identified in connection with the robbery as he is the one who negotiated for the hire of the vehicle; that the negotiations were done in the day time; that the appellant spent time with PW1 and PW2 from the time of the hire agreement and the time of the aborted robbery. The witnesses therefore had ample time to register in their minds the appellant's appearance.

With regard to the conduct of the identification parade, we were urged to find that the same were properly conducted as there is no evidence to show that PW1 and PW2, who were the identifying witnesses, saw the appellant before the identification parade was held; that the appellant never raised any complaints about the conduct of the said identification parade as he signed the parade form stating that he had no complaints. We were therefore urged to ignore the appellant's belated complaint on appeal about the conduct of the identification parade.

With regard to the application of the doctrine of common intention, we were urged to find that the doctrine was properly invoked as the appellant was sufficiently identified to have been in the company of a woman who had a pistol and a man; that it is the appellant who left PW1, and PW2 waiting in the vehicle allegedly to go and make final arrangements for the school children who were to be transported by the hired vehicle; that is when the appellant came back with a woman and a man, he then informed PW1 and PW2 that the two companions were the ones making arrangements for the children who were to be transported. That it is the appellant who instructed PW1 and PW2 to drive towards the direction where they were to pick the children and on the way is when the woman companion pulled out a pistol and pointed it at PW1 causing PW1 to panic and loose control of the vehicle which landed in a ditch; that after the vehicle landed in a ditch, it is the appellant who unsuccessfully tried to drive the vehicle away after PW1 and PW2 had been ordered to lie down at the back of the vehicle and when he failed to get the vehicle out of the ditch, they walked away.

This being a second appeal, our mandate is simple. It is simply to deal with issues of law only. See the case of ***Gacheru versus Republic (2005) 1KLR 688.*** Where this Court held inter alia that:- "***As a second appeal, only points of law may be raised since the court will not disturb concurrent findings of facts made by the two courts below unless those findings are shown to be based on no evidence."***

In the discharge of our mandate, we have revisited the contents of the record as assessed by the first two courts and considered the same in the light of the rival arguments advanced before us. Three issues of law have been fronted for determination, namely whether the appellant was sufficiently identified in connection with the commission of the alleged robberies; secondly whether the doctrine of common intention was established sufficiently to link the appellant to the use of violence which is a necessary ingredient or element in the commission of the offence of robbery with violence and thirdly whether the offence charged in count 1 was established and proved beyond reasonable doubt as required by law.

On identification of the appellant in connection with the offence subject of this appeal, we wish to draw inspiration from the decision in the case of ***Waithaka Chege versus the Republic (1979) EA271*** there is observation made inter alia that:-

> ***"…..One always needs to approach the issue of visual identification with great care and caution…"***

See also the case of ***Simiyu and another versus Republic(2005) 1KLR 192*** wherein the Court of Appeal laid down the guiding principle that:-

> "***In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by a person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given"***

The crucial evidence on identification of the appellant in connection with the commission of the offence in this appeal is that of PW1 and PW2. These two witnesses were categorical in their testimonies that being a driver and conductor of motor vehicle KAP 013H belonging to PW3, they are the ones who negotiated for its hire to the appellant. It is further their testimony that the hire transaction was done in broad day light. They conversed with the appellant in broad day light. They travelled with appellant up to the place where they went to change a tyre, and up to the venue where children were supposed to be picked. Upon arrival at the venue, the vehicle stopped and the appellant come out and talked to them, telling PW1 and PW2 that he was going to prepare the children who were to be picked. He also came back and informed them that Kshs.1, 000.00 was required in order to release the children. They also conversed when the appellant came up and informed PW1 and PW2 that all was ready and they should drive to the point where they were to pick up the children.

It is on the way to this children pick up place that two people joined them, a man and a woman and after driving off for a short while the woman pulled out a pistol and pointed it at PW1 who panicked and lost control of the vehicle landing it in a ditch.

There is no mention that appellant ever covered his face at any one particular time. It is correct that both PW1 and PW2 panicked when they saw the pistol. But we are satisfied, as were the first two courts, that the panic came after the appellants' appearance had already been registered in their minds. The length of time PW1 and PW2 took travelling with the appellant in a peaceful atmosphere from the place of hire to the place of robbery was sufficient to enable them to register the appearance of the appellant with ease.

Turning to the identification parade, we are in agreement with the first two courts that they were properly conducted; that PW1 and PW2 did not see the appellant before the parade, and that PW1 and PW2s' identification of the appellant was based on the fact that they had registered the appellants' appearance in their minds prior to the wielding of the pistol. Lastly that the parade officer had no reason to lie about appellants' intimation on the parade form that he had no complaint.

In the circumstances, we are satisfied that the identification of the appellant on the identification parades was therefore proper and reliable.

An issue was also raised about the prosecutions' failure to call members of the public who allegedly arrested the appellant to testify. While we agree that indeed this is what happened, we find the failure to call these witnesses to testify occasioned no miscarriage of justice to the appellant as the arrest of the appellant where the members of the Public were involved was only relevant to the suspicion that the appellant was involved in a syndicate whereby un suspecting motorists/ vehicle owners and drivers would be lured into the area on the pretext that their motor vehicles were being hired for one reason or another only to be robbed of their vehicles.

Turning to the issue of common intention, section 21 of the Penal Code provides:-

> ***"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purposes an 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 Wanjiro d/o Wamario versus republic 22 EACA 521*** the predecessor of this court, the Eastern African Court of Appeal defined this doctrine as:-

> ***"Common intention generally implies a premeditated plan but this does not rule out the***

possibility of a common intention developing in the course of events though it might not have been present to start with"

This doctrine has also been applied in numerous other cases including the case of ***Anthony Simiyu Masasabi & 4 others versus Republic (2008) EKLR), James Omari Nyabuto & another versus Republic (2009) EKLR and Francis Ngina Kegiri versus Republic (2009) eKLR***.

In the circumstances of this appeal, the fact that the woman wielded the pistol in a bid to enable the appellant get control of the vehicle from PW1 and PW2, is clear evidence that the appellant had planned the robbery with them.

We are therefore satisfied that the first appellate court was entitled to conclude that the appellant, had a common intention with the woman with the pistol and the man who joined them later to rob PW1 and PW2 of the vehicle which had been meant for hire and other valuables.

The foregoing immediate conclusion brings us to the crucial question paused by ***Mr. Mogikoyo*** as to whether the offences of robbery with violence charged infact took place bearing in mind that nobody was injured. In the case of ***Ganzi & 2 others versus Republic (2005) 1KLR 52*** the Court of Appeal set out elements of the offence of robbery with violence as:-

"(a) ***The offender is armed with any offensive weapon or instrument; or***

(b) The offender in company with one or more other persons; or

(c) At or immediately before and or immediately after the robbery the offender would beats, strikes or use other personal violence to any other person.

In the case of ***Ajode versus Republic (2004) 2KLR 81*** the same Court of Appeal went further and stated inter alia that:-

"It is clear that injury of the victim itself is not the only ingredient of the offence of robbery under section 296 (2) and to reduce the charge to that of simple robbery under section 296(1) because none of the witnesses was injured is not correct in law"

In the case of ***Opoya versus Uganda (1967) EA752*** as approved by the Court of Appeal in the case of ***Moneni Ngumbao Mangi versus Republic (2006) eKLR***. The following observation was made:-

"The word "robbed" is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property"

In the circumstances of this case, we have no doubt that the offence of robbery with violence contrary to section 296 (2) of the Penal Code was complete the moment the appellant teamed up with the woman and man who had joined him at a later stage coupled with the fact that the woman wielded a pistol and pointed it PW1 and the trio had PW1 and PW2, bundled to the back of the vehicle, and made them to lie down; and the appellant took control of the vehicle and attempted to drive it off. It matters not that the vehicle veered into the ditch. The taking of control and attempting to drive it off was sufficient to complete the element of theft in the commission of the offence of robbery with violence.

Mr. Mogikoyo raised the issue of lack of proof of theft of Kshs.7, 000.00 and Kshs.300.00 from PW1 and PW2 respectfully. Indeed there is no documentary proof that PW1 and PW2 had these amounts. But as the first two courts found PW1, and PW2 had no reason to tell lies about the appellant whom they did not know before. It is our considered opinion that the gravity of the offence of robbery with violence does not depend on the value of the subject matter robbed, but on the completion of the action of robbery which is an aggravated form of theft since it is accompanied with violence or threat of violence which has been demonstrated to exist herein.

The upshot of the foregoing assessment is that we find no merit in this appeal. The same is accordingly dismissed in its entirety.

Dated and Delivered at Nairobi this 11th day of October, 2013.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

……..…….

JUDGE OF APPEAL

I certify that this is a

True copy of the original.

DEPUTY REGISTRAR