IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 288 & 293 OF 2007

SAMUEL MURAYA MWANGI.....1ST APPELLANT

DAVID MWANGI KARIUKI.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Nairobi (Ojwang & Dulu JJ) dated 5th June 2007

in

H.C.CR.A. NO. 443 & 446 of 2003

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JUDGMENT OF THE COURT

These two consolidated appeals are second appeals from the decision of Ojwang and Dulu JJ by which the superior court dismissed the appeals and upheld the conviction and the sentence of death imposed upon the appellants by the Senior Resident Magistrate, Makadara, for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code

Samuel Muraya Mwangi and **David Mwangi Kariuki**, the two appellants herein, were arraigned on a charge that alleged that on 4th June, 2002 along Pumwani Road in Nairobi, while armed with a dangerous weapon, namely a pistol, they robbed Margaret Wanjiku Mwangi (PW1), the complainant, Kshs. 130,000, and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence against her.

The prosecution presented the following evidence before the trial court. PW1 was on 4th June, 2002 lent a
sum of Kshs. 20,000 by a friend. Again on the same day she sold goods in Thika, for which she was paid Kshs. 110,000 and she thereafter returned to her hotel in Gikomba, Nairobi, with the total sum of Kshs. 130,000 in her possession. At about 7.00 pm whilst being served tea by her employee, Rosemary Nzuki (PW2) three people, who had been her customers in the past, entered the hotel and were also served tea. They had been in the company of a fourth person who, however, remained outside. After taking tea

the three left, only to return later, one of them David Kariuki, the 2nd appellant, wielding a pistol and ordering everyone to lie down. The 2nd appellant approached PW1 and ordered her to produce all the money she had. PW1 first surrendered Kshs. 1000/- then Kshs. 20,000/- but the attackers demanded still more. At this moment the 2nd appellant who was identified by both PW1 and PW2 as a frequent customer at the hotel, inspected PW1's pockets even as the 1st appellant assaulted her with a fist blow on the head. The appellants then stripped off PW1's clothing including her jacket, and helped themselves to the sum of Kshs. 100,000 which was found in the jacket pockets. They also seized two mobile phones from PW1 and fled. All this time electricity lights had been on, but when the robbers ran out they switched them off.

At that moment PW1 and PW2 screamed and a large crowd came along. PW1 reported the matter at the Kamukunji Police Station, and she and PW 2 recorded statements with the officers there. On the following day PW1 got word that the Police had recently effected a number of arrests in the area of her hotel and she went along to the nearby Kombo Munyiri Police Post, to see if her attackers could be among those arrested. While there she identified the 2nd appellant who she had known as a customer at her hotel for some four months previous to the robbery. The 2nd appellant was at the time wearing her jacket which had been stolen from her during the robbery. Inside one of the jacket's pockets was found the sum of Kshs. 52,500 in Kshs. 1000 notes. PW1 told the trial court during cross-examination that she knew the two appellants well even by their nick-names Muraya Mrefu; and Muraya Mfupi, respectively. Pc Nyamame (PW3) of Kamukunji Police Station was on patrol on 5th June, 2002 (one day after the robbery), when he met the 2nd appellant fleeing, and he became suspicious of him. He arrested the 2nd appellant and held him at Kombo Munyiri Police Post, where he was identified by PW1 and PW2 as one of the previous evening's robbers; the 2nd appellant was wearing a jacket identified by PW1 as hers. Subsequently, PW2 identified the 1st appellant to P.C. Chengo (PW4), a Police Officer at Kamukunji Police Station, and PW4 arrested him.

The appellants in their defence denied committing the offence charged. They stated that they were petty traders within Mathare North and Gikomba areas of Nairobi. The 1st appellant testified that on 6th June 2002 while selling sugar cane, the police arrested him for nothing and took him to the Police Station. He was subsequently charged with the offence of robbery of which he knew nothing about. The 2nd appellant stated that on his way home at about 6.30 p. he met two people standing beside the road. They ordered him to stop. As he had money in his pockets with which he wanted to go and buy second hand bales of clothes he ran away since he suspected them to be thieves but they chased him, arrested him and handcuffed him. They turned out to be police officers.

In dismissing the appellants' first appeal the superior court held:-

"we do recognize that proper identification of the accused, in criminal trials, is a fundamental question, that carries clear legal implications. This principle is embedded in abundant case law: for instance, the Court of Appeal's decision in <u>Walter</u> <u>Awinyo Amolo v Republic</u> (1991) 2 KAR 254 in which it is stated (p.256) that:

"The evidence of identification (is to be) tested with the greatest care....."

It is the concern for proper identification that may be said to be the central element in our consideration of this appeal case; and we have considered the recognition of both appellants by both PW1 and PW2, and come to the conclusion that these two witnesses effectively identified those persons who had attacked them and committed robbery against them. If the apparel of PW1 found worn by the 2nd appellant, only so recently stolen, is taken into account, it becomes evident that the 2nd appellant was one of the robbers who had been definitely observed as he committed the offence charged, accompanied by the 1st appellant. We do not doubt that both PW1 and PW2 clearly saw, recognized and identified the two appellants as robbers, at a time when PW1's hotel room was brightly lit. The doctrine of recent possession would also apply here."

In expounding the doctrine of recent possession which it had invoked the learned Judges of the superior court stated:

"The doctrine is well recognized in case law. For instance, in Rex v Bakari s/o Abdulla (1949) 16 EACA 84 the Court of Appeal for Eastern Africa held:

".....cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or breaking and entering but of murder as well, and if all the circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal."

The superior court then concluded:-

"Applying the doctrine of recent possession, we have come to the conclusion that possession of the complainant's jacket only so recently stolen, by the 2nd appellant was further proof that the 2nd appellant had been properly identified as a robber.

We have no doubt, therefore, that the appellants were quite properly convicted, and sentenced as required by law, in the trial Court."

It is against the above findings that the appellants came before us on second appeal. Each appellant has preferred eight grounds of appeal in a supplementary memorandum of appeal and were ably represented by their learned counsel Mr. Wamwayi.

The first ground of appeal was that the conviction of the appellants was invalid and cannot be sustained in law since it was founded on a defective charge. Mr. Wamwayi pointed out that the charge sheet described the complainant variously as "Wanjiku" and "Wanjiru" but the one who gave evidence is listed as "Wanjiru". Mr Wamwayi argued that the wrong name of the complainant had misled the appellants. It is true the complainant's name has been given both as "Wanjiru" and "Wanjiku" but the first and the last names have not been misdescribed. They have remained Margaret Mwangi through out both in the charge sheet and during the trial. We find the error on the charge sheet typographical in nature and we hold that it was only of form and did not go to the substance of the charge. In our view the error was curable under **section 382** of the Criminal Procedure Code. We are further satisfied that the appellants were clear of what charge they faced and they were not at all prejudiced by the error nor misled.

Mr. Wamwayi further contended, in the second main ground of appeal, that the circumstances pertaining to identification of the scene were difficult and not favourable to a positive identification and were not free from the possibility of error; and consequently, the conviction of the appellants was not safe. The two courts below held that at the time of the robbery the hotel was well-lit with electricity lights which were on throughout the robbery; and thus, PW1 and PW2 had full opportunity to identify the appellants. Moreover, the two appellants were well known to the witnesses as they were frequent customers whom witnesses knew by their nicknames. We are not prepared to depart from the concurrent findings of the two courts below with which we agree.

Mr. Wamwayi again argued that the trial court misapplied the doctrine of recent possession since the recovered jacket did not form part of the particulars of the charge sheet. True, the charge sheet does not mention the jacket as one of the stolen articles. It simply lists the cash money which was said by the complainant that it was inside the pocket of the jacket. We think that the omission did not in any way prejudice the appellants and in any case it did not occasion them a miscarriage of justice

We have considered the evidence on record and we think that the doctrine of recent possession was applicable to the facts of the case and we find no reason to fault the two courts below for applying it.

We have on our part re-examined the entire evidence upon which the conviction of the appellants, was based and, with respect, we find that it was well-founded. Consequently, we have no reason to

disturb the concurrent findings of the two courts below. The appellants were properly convicted and the conviction is safe. We uphold it.

We reject the appeal which we hereby order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 30th day of April 2010.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. OKUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR