REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: KWACH, BOSIRE & KEIWUA, JJ.A.)

CRIMINAL APPEAL NO. 79 OF 2001

BETWEEN

PHABIAN ANNEA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT OF THE COURT

Following conviction by a Senior Principal Magistrate at Mombasa for the offence of robbery with violence contrary to section 296 (2) of the Penal Code, Phabian Annea, the appellant, was sentenced to the Mandatory death penalty. His first appeal to the Superior Court was dismissed and hence the present appeal. The particulars of the charge against the appellant were as follows:

> ***"PHABIAN ANNEA: On the 25th day of September, 1997 at Tononoka area in Mombasa District within Coast Province, jointly with others not before the Court, and while being armed with pistols, robbed ABDULKADIR AWADH of Motor Vehicle registration number KAH 481Q, Toyota Camr y Saloon valued at Kshs.500,000/=, one wrist watch make "QQ" valued at Kshs.800/= and cash Kshs.320/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ABDULKADIR AWADH.".***

Before us, Mr. Bryant for the appellant submitted, relying on the case of **Daniel Morara Mose v. R. (Criminal Appeal No. 86 of 2000)** (unreported), that the charge as drawn is fatally defective as the particulars of the charge omitted vital ingredients of the offence of robbery with violence contrary to section 296 (2) of the Penal Code, namely the words to the effect that the pistol was "a dangerous or offensive weapon.

". ***Section 296 (2)*** , aforesaid, provides as follows:

> ***"(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or, if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shal l be sentenced to death."***

The manner in which the charge against the appellant was drawn, clearly shows that the prosecution was relying on more than one mode spelled out in the above section for committing the offence of robbery with violence. Being armed with a dangerous or offensive weapon or instrument was one mode. The other

mode was that the appellant was in company of one or more persons at the time of the robbery complained of. That being the case it cannot be said that the particulars of the charge against the appellant omits vital ingredients as would render the charge fatally defective.

This Court has repeatedly held that in a charge of robbery with violence under ***Section 296 (2)*** , it is sufficient to state in the particulars of the charges either that the offender was armed with a dangerous or offensive weapon or instrument, or that he was in the company of one or more persons, or that immediately before or during or immediately after the time of the robbery used personal violence, or a combination of any two or more of the foregoing. That being our view of the matter Mr. Bryant's submission in that regard has no merit.

The robbery complained of took place on 25th September, at about 8:20 p.m. in the Tononoka area of Mombasa. It was on a road lined with shops along either side of it. Abdulkadir Awadh, the complainant, had parked motor vehicle registration No. **KAH 481** off the said road in order to talk to a former friend, one **Mohamed**, when another vehicle, a Nissan Sunny, with foreign registration marks was parked directly in front of it. Two people immediately came out of that car armed with a gun each. They cocked their guns and ordered the complainant to move to the co-driver's seat, which he did. These two were joined by other people and together they commandeered the complainant's car towards Makupa. At Kibarani, the gangsters forced the complainant out of the car and abandoned him by the roadside.

In his evidence before the trial court the complainant testified that at the time he was attacked he was able to identify the appellant as one of his attackers with the aid of security lights from the shops at the scene of the attack. He stated that the light enabled him to see "**very well two people**" one of whom was the appellant, and that he was able later to identify him in an identification parade which the police organized. It was further his evidence that prior to the time of the parade he had told the police that he would be able to identify some of the people who robbed him of his car even though he had not met or seen any of them before. Apart from the complainant, his friend, **Mohamed Omar (PW 2),** also picked the appellant in the said parade. His evidence was that he was able to identify the appellant because the locus in quo had **"a lot of light ... because the road is between shops.".**

The appellant was arrested on 26th September, 1997, at about 5:30 p.m., by Corporal Kiprono and Naftali Nioba, a police constable, among other police officers, when they found him in a car which was then parked in between two houses in Mikindani and which the complainant later identified as his. It bore foreign registration marks and numbers. He was unable to produce any documents to show he owned the motor vehicle; nor was he able to offer a reasonable explanation as to how he came to be in possession of the said motor vehicle. The explanation which appears to emerge from his cross-examination of Constable Naftali Nioba, is that he was a mechanic and that the said vehicle came into his possession in the course of his employment as a mechanic. But in a statutory statement in his defence he stated that he was arrested as he walked along a road near a garage where he worked carrying a rivet gun. He was then taken to his place of work where after a search foreign motor vehicle number plates were recovered. It was his case that the robbery charge was framed against him. In his judgment, the trial Magistrate held that the complainant and his friend, Mohamed, had ample time during the robbery to observe the appellant and that the security lights from the shops nearby facilitated their observation and identification of the appellant, with the result that they were later able to pick him up in an identification parade. Besides, he said, the appellant was arrested with the stolen vehicle only a day after it was reported as having been stolen. On the basis of that evidence he found the appellant guilty of the charge.

On first appeal the superior court agreed with the trial Magistrate that conditions favouring a correct identification existed at the time of the robbery complained of, and for that reason and the fact that the appellant was found in possession of the stolen motor vehicle on the next day after the robbery left no doubt as to the guilt of the appellant. That court also accepted and acted on evidence of identification of the appellant at an identification parade and rejected a suggestion, as did the trial Magistrate, that the appellant had been exposed to the identifying witnesses before the said parade was held. The concurrent findings of fact by both the trial and first appellate courts were based on evidence which was before them which they accepted. That being the case, we have no basis upon which to fault both the courts on their findings. Mr. Bryant for the appellant made various attempts to challenge those findings, but with due

respect to him those being findings of fact we could only reopen them if we were shown that in coming to their respective conclusions the two courts below either overlooked certain material facts or took into account irrelevant or extraneous facts. No evidence was shown in that regard. Consequently, we cannot possibly interfere with those findings of fact.

Clearly the appellant was positively identified at the scene of the robbery and was found inside a motor vehicle stolen in the course of that robbery. It was incumbent upon him to explain his possession of the vehicle to the satisfaction of the trial court which he failed to do. The possession was recent and raised a rebuttable presumption of fact that he was the thief of it. His belated attempt to attack the credibility of witnesses who testified against him by suggesting that he was not arrested as had been stated by the arresting officer is untenable. In the result we are of the view and so hold, that the appellant's appeal lacks any merit. It is accordingly dismissed in its entirety. Order accordingly.

Dated and delivered at Mombasa this 18th day of January, 2002.

R.O. KWACH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

M. Ole KEIWUA

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JUDGE OF APPEAL

I certify that this is
a true copy of the original.

DEPUTY REGISTRAR