REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 44 OF 2014

(Formerly Nakuru HCCRA No. 95 of 2010)

(Being an Appeal from Original Conviction and Sentence in Criminal Case No.1604 of 2008 of the Chief Magistrate's Court at Naivasha before P. M. Mulwa - PM)

STEPHEN NGANGA GACHUHI.....APPELLANT

-VERSUS-

REPUBLIC.....PROSECUTOR

J U D G M E N T

1. The Appellant herein was charged jointly with another person with the offence of Attempted Robbery with Violence contrary to Section 297 (2) of the Penal Code. In that on the 6th day of October 2008 at Maai Mahiu market in Naivasha District of the Rift Valley province jointly and being armed with an imitation gun, they attempted to rob **John Karanja Muhoro** of a television make JVC, a DVD make Sanyo, a Radio Cassette, a mobile phone make Nokia 1600 and cash Kshs 5,000/= or immediately before or immediately after the time of such attempted robbery with violence used or threatened to use actual violence to the said **John Karanja Muhoro**.

2. The second count was Being in possession of imitation gun Contrary to Section 89 (1) of the Penal Code. In that on the 6th day of October 2008 at Maai Mahiu market in Naivasha District of the Rift Valley province without reasonable excuse, they were both found in possession of an imitation gun in circumstances which raised reasonable presumption that the said imitation firearm was intended to be used in a manner prejudicial to public order.

3. Both of the Accused in the lower court had denied the charges. Upon a full trial, the first Accused was acquitted under Section 215 of the Criminal Procedure Code while the Appellant herein who was the second Accused in the trial, was convicted and sentenced on both counts. The sentence in respect of the second count was ordered held in abeyance.

4. Aggrieved by the decision, the Appellant filed an appeal in the High Court of Kenya, Nakuru, which was subsequently transferred to this court. By his seven amended ground of appeal, the Appellant primarily challenges his visual and voice identification at the attempted robbery scene and laments that the prosecution evidence was inadequate. Further, that the defence he made at the trial did not receive full consideration.

5. His submissions also dwell on the issue of the identification and argued that the prosecution had not proved the intention to commit a robbery. He relied on several authorities concerning identification by

voice, including **Paul Mwanthi Sungu -Vs- Republic [2005] eKLR** and on **Kiarie -Vs- Republic [1984] KLR 739** concerning visual identification. He therefore urged this court to find the conviction unsafe and allow his appeal.

6. Mr. Koima representing the Director of Public Prosecutions opposed the appeal. Reiterating the prosecution evidence at the trial, he argued that the Appellant was correctly identified; that all elements of the offence had been proved.

7. In **Pandya -Vs- Republic [1957] EA 336** the Court of Appeal of East Africa set out the duty of first appellate court, stating that:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

8. The prosecution evidence through **PW1** to **PW5** was that **John Karanja Muhoro** (**PW1**) was a trader operating a provision shop at Maai Mahiu. The premises was partitioned to create a shop on one part and an adjoining residential room. On the night of 6th and 7th October 2008, **PW1** and his wife **Emily Wangu Karanja** (**PW2**) were asleep in the residential partition.

9. At about half past midnight, a knock was heard on the door. A man who identified himself as **"Pate"** and whose voice **PW1** identified told **PW1** that he had some wheat to sell to him. But **PW1** responded by saying that he had no money, whereupon the man pleaded to be allowed to store his wheat in **PW1's** shop overnight.

10. Convinced, **PW1** got up, turned on his lights and opened the shop door. Two men, including the Appellant who was armed with what later turned out to be a toy pistol, stormed in, set upon the complainant and assaulted him. **PW1** screamed for help forcing **PW2** to get up and proceed to the shop area while also screaming. The Appellant pointing the "gun" at her ordered **PW2** to be quiet.

11. The couple's screams however attracted three Administration Police Constables namely **Mwaniki**, **Njoroge** and **Wainaina** (**PW3**, **PW4** and **PW5** respectively) who were on patrol within Maai Mahiu town. Getting to the couple's shop, they pushed the door open. The two intruders forced their way out, **PW3** being knocked down in the process. The constables gave chase in the lit street and caught up with the Appellant who had dropped the toy pistol in his flight. **PW5** got hold of him and took him back to **PW1's** shop. The other suspect was also caught by members of public.

12. In his sworn defence, the Appellant stated that he was a resident of Mai Mahiu. He stated that on 6th October 2008, after his day's activities he went into town, arriving at 10.00pm. After dinner at a hotel there, he started to walk home but was intercepted by police officers who searched him and took his wallet. Another "drunk" man was arrested just as screams rent the air. The Appellant and the "drunk" man were led by police to the house of **PW1** and **PW2** who implicated the two suspects in an attempted robbery. He denied the offences.

13. There seemed to be no dispute that **PW1** was persuaded by night visitors on the material night to open his shop door, only to be confronted by two men who wielded what appeared to be a firearm. That the men, in a bid to subdue him started to assault him. He and later his wife (**PW2**) raised an alarm. There is

no dispute that the Appellant was arrested on the streets of Maai Mahiu on the material night, albeit the circumstances were disputed, and led to **PW1's** shop/home. This appeal turns on the question of identification, in my considered view.

14. In ascertaining the actual time of the incident, I turned to the handwritten record which, unlike the typed copy of the record of appeal, shows that the offence occurred at half past midnight and not at 10.30am or 3.00am as some of the typed record of the testimony by **PW1** to **PW4** purported. It seems that the record of appeal was not carefully proof read by the certifying Judicial Officer, a common omission.

15. All the prosecution eye witnesses put the time of the incident at 00.30hours, which is half past midnight. That said, the offence clearly occurred at night. **PW1** said that he recognized the voice of the Appellant as he conversed with him while he tried to persuaded **PW1** to open up to buy wheat, and then to keep the same, for him. **PW1** said the Appellant gave his name as "Pati". **PW1** and **PW2** recounted the conversation between the former and the night visitors.

16. In cross-examination **PW1** said he identified the Appellant by voice and that the latter gave his name as **"Pati"** and that he knew him before. Regarding voice identification the Court of Appeal stated in **Choge -Vs- Republic [1955] 1 KLR** stated that:-

> **"Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure it was the accused's voice, that the witness was familiar with it and recognised it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it."**

17. It is true in this case that **PW1** did not explain what made him recognize the Appellant's voice, but he was seemingly assured when the name **"Pati"** was stated. The witness' conversation with the night visitors as narrated in court, reflects apprehension and reluctance on the part of **PW1** to open his shop doors at night. It is believable then that he only deigned to open up because he was convinced of the bonafides of the person he was speaking to. That is why he opened the door to his shop.

18. Secondly before opening the door, **PW1** switched on the lights. He maintained this in his evidence. He stated that the Appellant came in with the "pistol" and hit him. When he screamed, **PW2** also shouting, came up and witnessed the assault of **PW1** by the two men. Although she did not know any of the men before, **PW2** corroborated their conversation with **PW1** prior to them gaining access to the shop and said that the lights were on in the shop.

19. An error in the typed record of **PW2's** evidence-in-chief purported that "the lights were out". The original record of the court reflects that **PW2** said in her evidence-in-chief and in cross-examination that the lights were on. **PW1** as he opened the door for the night guests must have been calm, based on his belief that there was no sinister motive behind the visit by the person he had already recognized by voice and name.

20. The assault must have happened while the assailants were up close to **PW1** and in the illumination of electric lights, **PW1** had opportunity to observe his assailants. The details in his description of the incident leave no doubt about the opportunity.

21. Concerning identification by a sole witness at night, the Court of Appeal (Nyeri) stated in **Joseph Muchangi Nyaga & Another -Vs- Republic (2013) eKLR** that:-

> **"Evidence of visual identification should always be approached with great care and caution (See Waithaka Chege versus Republic (1979) (KLR**
>
> **217). Greater care should be exercised where the conditions for favourable identification are**

poor. (Gikonyo Karume and Another Versus Republic (1980) KLR 23) ……before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of and the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him……"

22. In the case of **Abdalla Bin Wendo & Another -Vs- Republic [1953] 20 EACA166,** the Court of Appeal for Eastern Africa stated that:-

"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness *but his rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification*, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on testimony of a single witness, can safely be accepted as free from possibility of error." (Emphasis added).

23. The slightest doubt regarding the Appellant's identification by **PW1** is cleared by the fact of the Appellant's arrest after **PW3** to **PW5** were attracted to the shop by the screams of the complainant couple. The evidence of the witnesses is consistent regarding their intervention, the escape by the two robbers and ensuing chase. **PW5** in particular stated that he is the one who caught Appellant.

24. In his judgment the trial magistrate correctly noted that:

"…….The 2nd Accused person (Appellant herein) was the first to sense danger and fled from the house. At the door he fell one of the officers to the ground but was pursued. PW3 confirmed he was the officer who fell to the ground. He tried to get the 2nd Accused who held what looked like a gun but he slipped away. The three Administration Police officers PW3, PW4, and PW5 said they gave chase and managed to apprehend the 2nd Accused before they could lose sight of him. He then dropped the object they had seen him flashing like a gun and found it was a toy pistol. It was the evidence of these officers that the complainant's place of business was near a hotel and there were street lighting. And that at no time during the chase did the 2nd Accused get out of their sight. Nothing had been stolen from the complainant who said he suspected that the suspects wanted to rob him violently……" (sic)

25. Reviewing the evidence on my own, I cannot fault this finding. The Appellants defence is implausible. It suggests that he was arrested at 10.30pm before the offence had been committed, and that later, when the police officers rushed to the home of the complainants on hearing screams, the complainants immediately identified him and his co-accused as the persons who had attempted to rob them. The trial magistrate correctly dismissed it.

26. The Appellant had a toy pistol that was tendered in court. Upon entering **PW1's** shop in the company of an accomplice he set upon **PW1**, attacking him. In these circumstances it is evident that the Appellant was intending to rob the complainant.

27. An attempt is defined in Section 388 of the Penal Code as follows:

"**When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence."**

28. The Court of Appeal has further elaborated on the above section in the case of **Francis Mutuku Nzangi -Vs- Republic [2013] eKLR**, by stating that:

"**Our understanding of this provision is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain the objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible."**

29. By rousing **PW1** from his sleep and deceiving him in order to lure him to open his shop door, entering thereon while in the company of an accomplice while armed with a "pistol", assaulting **PW1** and threatening **PW2** to "shut-up", the Appellant was taking steps in the execution of his intention, which on the facts herein must have been the commission of a robbery at the shop and residence of the complainant. At that moment, all valuables in the complainant's shop and residence were potentially at the risk of being forcefully taken by the robbers.

30. In light of all the foregoing I do agree with the DPP that the Appellant was properly convicted on both counts. The appeal on conviction has no merit and is dismissed. Regarding the second count however, the trial court erred by imposing a sentence. Having sentenced the Appellant to death on the first count, the court ought to have held sentencing in respect of the second court in abeyance.

31. In the circumstances the sentence in respect of count 2 is hereby set aside. I substitute therefore an order that sentencing in respect of the second count be held in abeyance. To that extent only the appeal has succeeded.

Delivered and signed at Naivasha, this **22nd** day of **June, 2017.**

In the presence of:-

Miss Kavindu for the DPP

N/A for the Appellant

C/C - Barasa

Appellant - present

C. MEOLI

JUDGE