



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 479 Of 2010**

**NICHOLAS NJUGUNA NGANGA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case 361 of 2009 delivered by Hon. Kidula, CM on 31<sup>st</sup> August 2010).*

**JUDGMENT**

**Background**

Nicholas Njuguna Nganga, herein the Appellant, was charged with six counts of robbery with violence. In counts I and II he was charged alongside on Margaret Wanjiru Makumi. The particulars of Count I were that on 6<sup>th</sup> January, 2009 at Moi Estate in Langata area within Nairobi Province, alongside with others not before the court, while armed with dangerous weapons namely pistols robbed Kariuki Kavore of his motor vehicle reg. No. KBA 070V, Kshs. 2,000/- in cash, a HP laptop, a modem, Samsung digital camera, a Barclays cheque book, gold ring and a gym bag full of personal items. The items were all valued at Kshs. 2,600,000/- and at or immediately before or immediately after the time of such robbery wounded the said Kariuku Kavore..

The particulars of the charge were that on 6<sup>th</sup> January, 2009, at Moi Estate in Langata area within Nairobi province, jointly with others not before the court, while armed with dangerous weapons namely pistols robbed Jane Mwikali of Kshs. 8,000/- in cash, a Motorola W220 mobile phone Serial No. SJUG2419AA, a pair of earrings, a ring and a flash disk all valued at Kshs. 26,000/- and that at or immediately before or immediately after the time of such robbery beat the aforementioned Jane Mwikali.

The particulars of Count III were that on 6<sup>th</sup> January, 2009 along Ngong Road near Nakumatt Supermarket within Nairobi province, jointly with others not before the court while armed with dangerous weapons namely pistols robbed Ryan Daniel Schomachel of a laptop make Apple, 2 mobile phones, an Ipod, an Equity Bank blank cheque, Equity Bank credit card, a Bank of America credit card and a pair of sunglasses all valued at Kshs. 340,000/- and at or immediately before or immediately after the time of the said robbery they threatened to use actual violence on the aforementioned Ryan Daniell Schomachel.

The particulars of Count IV were that on 6<sup>th</sup> January, 2009 at the Total Petrol Station within Nairobi province, jointly with others not before the court, while armed with dangerous weapons namely pistols, robbed Francis Amutabi Okwara of a Blackberry phone, a Nokia 6500 phone, two wallets, a Commercial

Bank of Africa credit card, a Kenya Commercial Bank credit card, two Standard Chartered Bank cards, a National Identity Card, a voter card and a firearm certificate all valued at Kshs. 30,000/- and at or immediately before or immediately after the time of the said robbery they threatened to use actual violence to the aforementioned Francis Amutabi Okwara.

The particulars Count V were that on 6<sup>th</sup> January, 2009 at the Total Petrol Station along Ngong Road within Nairobi Province, jointly with others not before the court, while armed with dangerous weapons namely pistols, robbed Benson Ayila Omuodo of one wallet, Kshs. 7,000/- in cash, a National Identity card, four credit cards, car keys and a pair of sunglasses all valued at Kshs. 20,000/- and at or immediately before or immediately after the time of the said robbery they threatened to use actual violence on the aforementioned Benson Ayila Omuodo.

The particulars of Count VI were that on 6<sup>th</sup> January, 2009 at the Total Petrol Station along Ngong road within Nairobi province, jointly with others not before the court, while armed with dangerous weapons namely pistols, robbed Paul Ritho Ichangi of a Nokia 3230 phone, a wallet, 3 credit cards and Kshs. 11,000/- in cash all valued at Kshs. 30,000/- and at or immediately before or immediately after the time of the said robbery threatened to use actual violence on the aforementioned Paul.

The Appellant was charged in Count IV with being in possession of a firearm without a firearm certificate contrary to **Section 4(2)(a)** as read with **Section 4(3)(2)(a) of the Firearms Act**. The particulars of the charge were that on 15<sup>th</sup> January, 2009 at Langata in Nairobi within Nairobi area, was found in possession of a firearm, namely; a Carl Walther serial number 213303A, without a valid firearm certificate.

The Appellant was charged in Count VIII with being in possession of ammunition contrary to **Section 4(2) of the Firearms Act**. The particulars of the offence were that on 15<sup>th</sup> January, 2009 at Langata in Nairobi within Nairobi Area, the Appellant was found in possession of one round of ammunition, 7.65mm calibre without a valid firearm certificate.

The Appellant was arraigned and tried whereupon he was found guilty in all the counts. He was sentenced to death in the first count while the sentences on the rest of the offences were held in abeyance. He was dissatisfied with that court's decision and has preferred the current appeal. He set out his grounds of appeal in his memorandum of appeal filed on 9<sup>th</sup> September, 2010. He applied on grounds that his identification was flawed, that the charge sheet was defective, that it was not proved he was in possession of a firearm or ammunition, that both **Sections 211 and 169 (1) of the Criminal Procedure Code** were not complied with and on the whole the case was not proved beyond a reasonable doubt.

### **Submissions.**

The appeal was canvassed by way of filing written submissions. Those of the appellant were filed on 9<sup>th</sup> May, 2017 by learned counsel Gicheha Kamau Advocates. It was submitted that the trial was a nullity as both **Sections 211 and 169 (1) of the Criminal Procedure Code** were not complied with. With regard to the later, counsel submitted that the learned trial magistrate failed to frame the issues for determination in the judgment and the reasons for arriving at the decision convicting the appellant. On identification, counsel submitted that the same was flawed and could not found a basis for conviction. It was submitted that the conviction was based on identification of the appellant by both PW1 and 2. However, both witnesses did not give a description of the persons who robbed them in their first report to the police. Counsel emphasized that initial report was paramount as it assists in the confirmation of any subsequent identification of suspects. The case of **Ntalejo Lokwam Vs. Republic criminal appeal no. 112 of 2003, High court sitting at Nakuru Koome**(as she then was) **and Kimaru, JJ**) was cited to buttress the submission. Further, it was the counsel submission that the identification parade that was conducted in which the appellant was identified by PW1 and 2 was not conducted in accordance with the right procedure. In this regard, counsel pointed out that the witnesses had seen the appellant prior to the parade. Furthermore, one of the complainants, PW7 testified that he had been shown some photographs of some people from whom he was asked by the police to identify the assailants. This was done as a precursor to a

possible identification parade which move rendered the entire process a nullity. It could not therefore be ruled out that PW1 and 2 had also been shown the photographs which ultimately prejudiced the appellant.

With regard to Counts 7 and 8, counsel submitted that it was established that it was the appellant who was in possession of the firearm and ammunition. Furthermore, the prosecution relied solely of the evidence of the arresting officers which could not be deemed as independent. In addition, the arresting officers gave contradicting evidence on where the appellant was arrested. Again, no search certificate or inventory was adduced as prove of recovery of the exhibits. The police also failed to dust the exhibits for finger prints so as to establish that the appellant was in their possession. It was urged that the appeal be allowed.

Learned State Counsel M/s. Sigei opposed the appeal. She relied on her written submissions filed and dated 29<sup>th</sup> May, 2017. In summary, she submitted that both **Sections 211 and 169 (1) of the Criminal Procedure Code** were complied with. On identification, she submitted that the appellant was properly identified by PW1 and 2 as they could also vividly recall the motor vehicle that was used in the robbery in which the appellant was. Further, the appellant was positively identified in the identification parade conducted by PW11. She also submitted that the evidence of the arresting officers was consistent and corroborative and therefore established that the appellant was found in possession of both the firearm and ammunition. It was therefore immaterial that neither a search certificate nor an inventory was produced. Furthermore, **under Section 57 (1) (a) and Section 60 of the National police Act** police had powers to search the appellant on believe that he had committed an offence. In this case, the police were aware about the robbery incident that was being investigated by the DCIO Langata. She was of the view that the case was proved beyond the reasonable doubt. Thus, the appeal was unmerited and ought to be dismissed.

### Evidence

The prosecution's case was that the Appellant and others not before court accosted PW1 and his friend outside her gate and after robbing them used his vehicle to perpetrate a number of offences around the city. The Appellant was finally traced through his wife who was found to be using one of the stolen phones. When he was arrested he was found to be in possession of a pistol and ammunition.

**PW1, Kabore Kariuki** was the complainant in Count I. He lived in Langata. He recalled that on 6<sup>th</sup> January, 2009 at around 2200hrs he was in Moi Estate within Langata driving his motor vehicle registration number KBA 070B with his friend, one Jane Mwikali. He testified that he parked the vehicle outside her gate when four men arrived on both sides of the vehicle from behind. They were armed and they asked them to open the doors which they did. They asked them to get on the back seats and they took control of the vehicle. They stole his possessions before proceeding to Mobil Petrol station where they fueled the vehicle then drove towards Ngumo Estate. They asked his friend to get in the boot and lie flat while he remained on the back seat with two of the robbers on either side of him. That they asked them for the PINs to their credit cards and passed them to some colleagues.

PW1 testified that as they drove around the robbers kept robbing other people which he witnessed. That at some point during the ordeal they hit him on the head asking him to lie down. They finally abandoned them near the Kibera Chief's camp. PW1 got back into the driver's seat and drove to Kilimani police station where he reported the matter. He gave them a list of the items stolen from him before taking them to the scene in Kibera where they were abandoned. He testified that the robbers were young men aged between 20-30 years and that three of them were dark skinned. He recalled that the police later called him to identify a recovered item and he found that it was his friend's phone which he identified from the scratch marks. He testified that he was later informed that one of the thieves had been arrested. He attended an identification parade on 20<sup>th</sup> January, 2009 where he identified the Appellant as one of their assailants by touching him on the shoulder.

In cross examination, PW1 stated that he saw the Appellant very well as he entered the vehicle on the passenger's side.

**PW2, Jane Mwikali** was the complainant in count II. She Lived in Moi Estate in Langata. At the time of the robbery, she was in the company of PW1. She entirely corroborated the evidence of PW1. Amongst the items she was robbed of was a Motorola W220 mobile phone which she identified in court with some scratch marks. In addition, she testified that amongst the robbers, it was the appellant who had a gun which he held on her hand. She testified that she was able to identify the appellant and the gun with the help of the car lights inside when the car door was opened as she was being forced into the car. Further, when the car stopped at Mobil Petrol Station to fuel she clearly was able to see the appellant. Furthermore, they were held hostage for three hours.

**PW3, Francis Amutabi Okwaro** was the complainant in Count IV. He recalled that on 6<sup>th</sup> January 2009 he was at a Kenchic outlet near Total Petrol station on Ngong Road where they had a meal. That after the meal they stood at the parking lot next to their vehicles talking and that he noticed a vehicle drive into the police station which came to stop near where they were. It was registration number KBA 070V. The vehicle stopped for about 15 seconds before being reversed and parked. After about 5 minutes the motor vehicle pulled out of the parking lot with great gusto and they had to split up as it appeared that it was going to run them over. The car stopped just before it got to them and that some persons emerged from the vehicle and headed for them. One of the men was armed. The men started frisking them and that they took his possessions. He testified that the whole affair took about 3 minutes and that the robbers got back into the vehicle and drove away.

He testified that the men looked like they were in their mid-twenties and that there was good lighting at the scene. They then went and reported the matter to CID Nairobi area before heading home. He recalled that on 28<sup>th</sup> January, 2009 he was called to CID Nairobi Area and asked to go identify some recovered items. He identified a receipt from a purchase he made at Nakumatt Nyanza and also his Nokia 6500 phone. He testified that he identified the phone through a crack in the screen. He could not produce a receipt evidencing the phone's purchase. He identified the Appellant in court.

In cross examination, he stated that he did not give a description of any of the robbers in his statement.

PW4 Paul Gichangi accompanied PW3 on the fateful night and thus corroborated the evidence of PW3. PW5 Ryan Daniel Schomachel was the complainant in count III. On the fateful night, he had just dropped guests at Pentecostal Guest House along Ngong Road. He was walking on the road to pick up a cub to his residence. It was then that a car pulled to where he was and three men jumped off the car shouting at him to surrender all the money he had. He gave up Kshs. 10,000 and a blank equity bank cheque for Love Mercy Projects. Three weeks down the line, he was called to the police station to check if any of his stolen items had been recovered. He identified the blank cheque drawn by Love Mercy projects.

**PW7, Paul Ritho Ichangi** was the complainant in Count VI and was in the company of PW3 and 4 outside Total Petrol Station at the Kenchic Restaurant when they were struck by the robbers. According to him, two of the robbers were armed with guns. After they were abandoned, they reported the matter to Kilimani Police Station. His further testimony was that during the robbery he was able to identify one of the robbers who was not amongst those charged. He identified him through a photograph given to him by CID officers.

**PW6, Inspector Alex Mudindi** Mwandawiro was a firearms inspector based at the CID headquarters ballistics laboratory. He examined a Carl Walther Pistol Serial No. 2133303 which had a magazine and a load of ammunition of caliber 7.65 mm. The exhibits were handed over to him by Cor. Stephen Wachira. His findings were that the pistol was of 9 mm caliber and was in good general mechanical condition. He also tested the ammunition which he confirmed was live. He produced a ballistic report as an exhibit.

**PW8, Dr. Zephania** Kamau of police Surgery examined PW1 on allegations that he had been assaulted. He had tenderness on the lower end of the nasal bone which he concluded might have been inflicted by a blunt object. He also made reference to treatment notes made by Dr. Kungu. He assessed the degree of injury as harm and produced a P3 form accordingly. PW11 (indicated as PW10) Inspector Ombacha Kuria of Provincial CID Nairobi conducted identification parade in respect of the appellant. The same

was done at Langata Police Station. The witnesses were PW1 and 2. Both witnesses positively identified the appellant. In respect of PW1, the appellant protested that the witness had seen him before the parade was conducted but no negative remark was made by PW2.

**PW9 CPL Samuel Kamau, PW10 CPL Gabriel Ndungu and PW12 CPL Nicholas Muluko** all participated in the investigation of the case. PW10 was an arresting officer. His evidence was that he was led to Kibera Line 7 to the arrest of the 2<sup>nd</sup> accused Margaret Wanjiru Makumi after it was established that she had used the Motorola mobile phone stolen from PW2. The phone serial number was given as SFU4198AA. Together with other police officers, they arrested the appellant opposite KWS gate along Lang'ata Road. His testimony was that on searching the appellant, they recovered from him a pistol serial no 213303 which was inside a holster in a black polythene bag. Also recovered was one round of ammunition. The appellant led the police to his house in Makadara where a Nokia Mobile phone was recovered. No inventory or a search certificate was made.

In cross-examination PW9 stated that he wrote a certificate of search. But which he said was not in court. He also stated that he handed over the pistol and ammunition to the PCIO Nairobi. He confirmed he arrested the appellant at 1600 hrs.

**PW10** was in the company of PW9 when the appellant was arrested and he corroborated his evidence. In contrasting the evidence of PW9, he testified that the appellant was arrested outside KWS gate. In cross-examination, he stated that an entry was not made in the occurrence book (OB) showing that the appellant was taken from the cells and he then led them to his house where the mobile phone was recovered. He also confirmed that he did not write in the search certificate that a mobile phone was recovered from the 2<sup>nd</sup> accused.

PW10 testified that he saw all the recovered exhibits at Kilimini Police Station. His testimony was that PW4 identified the blank cheque leaf while PW3 identified the Nokia Phone and a Nakumatt purchase receipt. He also confirmed that the pistol and the ammunition were taken to a ballistic examiner for testing.

After the close of the prosecution case, the learned trial magistrate ruled that the appellant had a case to answer and would therefore be put on his defence. The appellant exercised his right under Section 211 of the Criminal Procedure Code to remain silent.

### **Determination**

It is now the duty of this court to re-evaluate the evidence on record and come up with its independent conclusions. See: **Pandya v Republic (1957)E.A. 336.**

This court has considered the parties' submissions and the evidence on record before concluding that the following issues arise for determination:

1. Whether Sections 211 and 169(1) of the Criminal Procedure Code were complied with.
2. Whether there was proper identification of the Appellant.
3. Whether the search on the Appellant was properly conducted.

The first issue arises from the Appellant's contention that Section 211 of the Criminal Procedure Code was not complied with after a ruling under Section 210 of the Code was read. The Appellant relied on **Stephen Riungu Njeru & 2 others v. Republic [2010]eKLR** to buttress this submission. The proceedings were recorded as follows;

***“Ruling read in open court before me***

***U. P. Kidula CM***

**CC Chivoli**

**acc both presentation**

**Pros CIP Musyoka**

**1<sup>st</sup> acc: I elect to say nothing in my defence.....”**

Clearly, there is no indication on the record that the Appellant was informed of the provisions of Section 211. However, the instant case can be distinguished from the cited case law. In the latter case, the trial magistrate indicated after making the ruling, **“Court, Defence hearing now”** before proceeding with the Appellant’s defence. In reaching its conclusion that there was a breach of Section 211 the High Court held that:

**“There is no record stating either compliance with the requirements of section 211 aforesaid, or any responses by or from the Appellants(Accused Persons). This is a breach of the Appellants statutory rights and renders to(sic) trial not merely irregular but a nullity.”**

In the present case, it is recorded that the Appellant and his co-accused chose to remain silent. This leads to the conclusion that they elected to remain silent because they understood the import of Section 211. The same provides for the various ways by which an accused can defend himself, one of which is to remain silent. In my view therefore, the failure by the learned trial magistrate to indicate that Section 211 had been complied with was an oversight on her part and did not render the trial a nullity. It neither breached any of the Appellant’s rights, constitutional or statutory. The error is curable under Section 382 of the Criminal procedure Code.

The Appellant also submitted that Section 169(1) of the Criminal Procedure Code was not complied with. The provision provides for four constituent parts of a judgment which must be adhered to. First, is this that the judgment must set out the points for determination. In this case, the trial magistrate indicated that she would determine whether the prosecution had proved the case beyond a reasonable doubt which clearly constitutes a point for determination. The second thing that is each judgment must set out its decision. In this case, the trial magistrate found the Appellant guilty in all the counts while acquitting his co-accused. It further requires that reasons for arriving at the decision be articulated which was done in this case with the trial magistrate analyzing the evidence before reaching the decision. Finally, the judgment must be dated and signed. The judgment was dated 31st August, 2010 and signed accordingly. Hence, the appellant’s submission under this head is baseless.

On identification, the Appellant submitted that his identification was doubtful as none of the complainants gave a description of the assailants in their respective initial reports. He submitted that this rendered any subsequent identification a nullity. He relied on **Ntelejo Lokwam v. Republic[2006] eKLR** where it was held that:

**“In the absence of a description being given to the police when the first report was made after the robbery had taken place, it would be impossible for an independent tribunal evaluating that evidence to arrive at a determination that the complainant had in fact made a positive identification of the appellant which identification confirmed the appellant in an identification parade conducted by the police.”**

The importance of a first report was set out in the locus classicus case of **Tekerali s/o Korongozi & others v. Regina[1952] EACA 259**, to wit:

**“Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishments or the deliberately made-up case. Truth will often come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.”**

In this particular case, the initial report as set out in the occurrence book(OB) entry number 03/07/01/2009, a certified copy of which was filed in this appeal, did not indicate a description of any of the robbers. The complaint was made by PW1 who later took part in an identification parade in which he identified the Appellant. Concurring with the holding in the **Ntelejo case (supra)**, I hold that in the absence of the description of the Appellant the identification at the parade was evidently watered down. Furthermore, after the parade the Appellant made a remark to the effect that PW1 had seen him on the previous day at the CID office which further calls into question the identification.

The Appellant was also positively identified by PW2 at the parade and did not question the manner in which the parade was conducted or allege that the witness had previously seen him. She testified that the matter was reported at Kilimani Police Station on the night in question. The initial report was never brought and he did not bring up issues relating to the initial report. However, the Appellant and PW2 were connected, according to the prosecution, through her phone. The phone in question, a Motorola W220 was stolen during the incident and PW9 and PW10 both testified that with the help of Safaricom they traced the phone in question to the 2<sup>nd</sup> accused who was the Appellant's wife and learnt that she got it from him. This notwithstanding, it is trite that possession of a recently stolen item can lead to the conclusion that the Appellant was connected to the offence. This could form a probable cause to submit him to an identification parade to establish whether he was among the robbers or simply a handler of stolen goods.

PW2 lacked ownership documents and had to physically identify the phone using conspicuous scratch marks. However, that fact that the Appellant was arrested on 15<sup>th</sup> January, 2009 is incompatible with the evidence of PW2 that she was called to identify the phone on 20<sup>th</sup> January, 2009. This finding leads to serious questions about how the phone was found pointing to a scenario that the phone may have been planted on her.

I also find the evidence of PW7 telling. He was called to take part in an identification parade but this was never to be. He testified that he was shown photographs in which he identified one of the robbers but not the Appellant. This particular piece of evidence leads this court to question the propriety of the dock identification by the witnesses as doubts abound that the witnesses were treated similarly which had the effect of rendering any form of identification untenable. It is trite that no witness ought to see the suspect before an identification parade is conducted. Doing the contrary implies that the witness would be but rubber stamping an-already concocted evidence. In view of the shaky identification of the appellant, I am unable to uphold the convictions in counts I to VI.

The Appellant was also convicted in counts 7 and 8 which related to offences under the Firearms Act, namely possession of a firearm without a firearm certificate contrary to Section 4(2)(a) and being in possession of ammunition contrary to Section 4(2) respectively. The evidence relating to the offence was adduced by PW9 and PW10 who testified that they arrested the Appellant and found him in possession of a Carl Walther Pistol serial number 213303 which had a magazine with one round of 7.65 calibre ammunition. The evidence of PW9 was that they relied on the informant to arrest the Appellant opposite the KWS entrance at around 1600hrs on 15th January, 2009. In cross examination he stated that his statement indicated that they arrested the Appellant at 1830hrs and further that although they did not make an inventory evidencing the recovery they drew a certificate of search. PW10 testified that they arrested the Appellant outside the KWS gate and after a search found the gun and ammunition. In cross examination, he stated that they did not fill a search certificate and that there were no members of the public at the sight when the recovery occurred. Unfortunately, the alleged search certificate was never produced as evidence. Neither was an inventory of the recovered exhibits prepared nor adduced as evidence. In the absence of these crucial documents, the chain custody of the evidence in question could not be sufficiently ascertained. This again casts doubt on whether the exhibits were recovered from the appellant. I do accordingly find that the conviction was not safe in respect of the two counts.

In the upshot, the appeal herein is allowed. The prosecution did not prove their case beyond a reasonable doubt. I quash the conviction, set aside the sentence and order that the appellant be forthwith set free unless otherwise lawfully held.

*Dated and Delivered at Nairobi This 27<sup>th</sup> Day of July, 2017*

**G. W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

- 1. G. Kamau Advocate for the Appellant.*
- 2. Miss Sigei for the Respondent.*