REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 323 OF 2007

EPHANTUS MUTAHI KAREGI..............APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 1596 of 2003 (Hon. R. Nyakundi, Senior Resident Magistrate) on 11th June, 2004)

JUDGMENT

This is the second time this honourable court is rendering a judgment in this appeal. The first judgment was delivered on 21st November, 2013 when the appellant's appeal was dismissed. When appellant escalated his grievances to the Court of Appeal, this latter court ruled that this appeal should be remitted back to this Court for hearing afresh as the previous bench which heard it was not properly constituted. It is against this background that the present determination is based.

The appellant was the 3rd accused person, amongst two others, in a criminal case in the magistrates' court here at Nyeri where they were charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (cap. 63).** According to the particulars of offence, on the night of 7th and 8th of June 2003 at around 1:30 AM at Kariguini village of Nyeri District within Central Province, jointly with others not before court and, while armed with a dangerous weapon, namely a pistol, the appellant and his co-accused robbed Paul Weru Waitere of cash amounting to Kshs. 7000/=, two CD players, two mobile phones (of alcatel and nokia makes) all valued at Kshs 50,000 and at or immediately before or immediately after the time of such robbery, they killed the said Paul Weru Waitere (herein "the deceased")

The appellant was convicted as charged and due to the gravity of the charge he was sentenced to death as by law provided; his two co-accused were, however, acquitted. The appellant was dissatisfied with the decision of the lower court and so he appealed against both the conviction and sentence on grounds set out in the amended petition of appeal as follows:

1. The learned trial magistrate erred in law and in fact when he found that the appellant was connected with the offence that had been committed on 8th March, 2003.

2. There was no adequate evidence to prove that the appellant was in possession of the pistol on 4th June, 2014 which possession led the learned magistrate in concluding that the appellant was involved in the offence committed on 8th March, 2003.

3. The learned magistrate erred in law in failing to observe that a period of 15 months was too long

to conclude that the appellant was involved in the offence committed on 8th March 2003 on the basis of the alleged possession of the pistol.

4. The learned magistrate erred in failing to consider that the defence of the appellant could possibly be true in view of the fact that crucial witnesses were not called.

5. The learned magistrate erred in failing to observe that the appellant was arrested on suspicions following a directive from Police Constable Thomas Muriuki that the appellant be charged once arrested.

6. The findings of the Court of Appeal in Criminal Appeal No. 323 of 2007 on the use of the pistol during the offences committed on 4th June, 2004 and 8th March, 2003 ought to apply in the present appeal.

7. The circumstances prevailing at PW11's gate and thereafter were not conducive to a positive identification of the appellant.

8. The conviction was against the weight of evidence.

In his submissions, the learned counsel for the appellant sought to have all these grounds, except for the sixth one, collapsed into a single ground and argued as such. In the counsel's view, all these other grounds revolved around the question of identification of the appellant; that is, whether the appellant was positively identified as the perpetrator of the crime visited upon the deceased.

In summary, the appellant's case was that the issue of identification of the appellant was not proved beyond all reasonable doubt. According to his learned counsel, the appellant was a victim of a road traffic accident and **David Wachira Magachi (PW11)** who hit him with his vehicle conspired with the police officers to charge the appellant as a cover-up for the accident. Secondly, although the appellant is alleged to have been located at the scene of crime with the help of a sniffer dog, the dog handler was not called to testify. Accordingly, so the learned counsel argued, the alleged identification of the appellant at the *locus in quo* was not free from possibility of error.

Again, counsel argued that the robbery against **David Wachira Magachi (PW11)** was sudden and in darkness; accordingly, the said **David Wachira Magachi (PW11)** could not have positively identified his attackers.

On the possession of the pistol, counsel urged that between 8th June, 2003 when the deceased is alleged to have been robbed and killed and 4th June, 2004 when the appellant was arrested in a second robbery incident, the weapon could possibly have changed hands on several occasions and assuming he was found in possession of the weapon in 2004, it did not thereby follow that he had it in 2003 when the deceased was robbed and killed in the first robbery incident.

Counsel also urged this court to invoke **section 60 (3) of the Evidence Act, cap. 80** and take judicial notice of the judgment of the Court of Appeal in **Criminal Appeal No. 402 of 2009 (Ephantus Muregi versus Republic)** in which the Court of Appeal determined the question of possession of the firearm which was linked to the murder of the deceased.

If it will help follow the arguments by the learned counsel for the appellant, it is necessary to point out at the very outset that the appellant was involved or allegedly involved in two robbery incidents. The criminal trial out of which this appeal arose was as a result of the first robbery incident in which, as noted, the deceased, Paul Weru Waitere was violently robbed and killed.

In the second robbery incident which occurred almost a year later, **David Wachira Magachi (PW11)** was also robbed at gunpoint. The appellant was also charged for this robbery. It was alleged that the gun or pistol that was used in the first robbery incident was the same one that the appellant was found in

possession of during the second robbery. It is this weapon link that largely informed the decision to charge the appellant for the first robbery. The details of the two cases trials will become clearer in the course of the evaluation of the evidence.

The state opposed the appeal and its learned counsel submitted that the case against the appellant was proved beyond reasonable doubt. In particular, counsel argued that the appellant was positively identified and that he was found in possession of the murder weapon that was employed during the robbery against the deceased and his wife on 8th June, 2003.

As always in appeals such as this, it is necessary and indeed mandatory for this court to revisit the evidence on record and analyse it afresh before coming to the conclusion whether the trial court came to correct findings of fact and therefore whether those findings should be upheld. In expressing itself in that respect, this Court has to bear in mind that even though it is free to deviate from findings of fact of the trial court, it is this latter court that had the advantage of seeing and hearing the witnesses. As a matter of necessity, it is necessary for this court to make provision for this reality in its factual conclusions. **(See Okeno versus Republic 1972 EA 32).**

The prosecution evidence was basically circumstantial and it appears to have been solely the evidence on which the appellant's conviction turned.

On the fateful day when the robbery for which the appellant was charged took place, the deceased Paul Weru Waitere was asleep with his wife **Rosemary Wambui Waweru (PW1) (Rosemary)** in their house at Kariguini village. According to Rosemary's testimony, they were woken up at about 1.30 AM by loud bangs on the doors and windows of their house. Some of the robbers gained entry to the house while others remained outside. They demanded for money as they broke several doors in the house; however, before they broke the door leading to the bedroom in which the deceased and his wife were sleeping, the deceased opened it and gave them 100 United States dollars and Kshs 3,000/=. They also demanded for and were given cell phones belonging to the couple. Despite having taken the money and some other property, one of the robbers shot the deceased in the head at point blank. After the robbers left, the deceased's widow reported the incident to the police who came and collected the deceased and took him to hospital that same morning; unfortunately, he was pronounced dead on arrival at the hospital.

Rosemary admitted in her testimony that she couldn't identify any of the assailants. It was also her evidence that apart from an envelope containing the sum of Kshs 500 found discarded at Thandi, apparently in the same village from which they hailed, nothing else stolen from them was recovered. The envelope was traced to the complainants' home because their family members' names were written on it.

In these circumstances, the gun from which the fatal shot was discharged turned out to be not only the central prosecution evidence against the appellant but it was also the evidence that largely influenced the direction the lower court took. The testimony with regard to this gun which the learned trial magistrate concluded to have been the murder weapon was given by a host of witnesses who included a firearms examiner, the licensed owner of the gun before it was stolen, the government pathologist, the police officer who recovered the gun and the investigations officer.

According to the investigations officer, **Police Constable Thomas Muriuki (PW6)**, he proceeded to the complainant's home together with his colleagues, one of whom was corporal **John Mugo (PW9)** soon after it was reported that it had been attacked by robbers. Among the items they recovered from the deceased's house in the course of the investigations were a spent cartridge and a bullet head. Corporal Mugo dusted the scene for finger prints but the results were negative. He also took pictures of the deceased which he later presented as evidence in court.

The gun was recovered from a crime scene different from the one in issue in the trial against the appellant. **Corporal Kamau Kungu (PW7)** testified on the circumstances surrounding its recovery. It was his evidence that on the 4th day of June, 2004, one **David Wachira (PW11)** was accosted by robbers as he entered his home compound. He managed to hit one of the robbers with his vehicle as they tried to escape after robbing him. This particular robber whom he hit was armed with a pistol. He turned out to be

the appellant. Since he was injured so badly that his legs were broken he was arrested at the scene. The pistol with which he is alleged to have been armed was also recovered from the same scene not very far from where the appellant was lying. It was described by this witness as a ceska serial no. G 0661; it had a magazine and loaded with one round of a .9mm ammunition.

This robbery incident was the subject of a separate trial against the appellant in in **Nyeri Chief Magistrates' Court Criminal Case No. 921 of 2005** in which he was convicted of the offence of robbery with violence and sentenced to death. The conviction and the sentence were upheld by this honourable court but the Court of Appeal upset this decision and substituted it with a conviction for the offence of simple robbery contrary to **section 296(1)** for which the appellant was sentenced to 15 years imprisonment.

Corporal Lawrence Wamugunda (PW5) forwarded the pistol to the ballistics expert for examination. He also forwarded the bullet head and the spent cartridge recovered from the deceased's house to the same expert for analysis. He later collected these items from the ballistics expert and presented them to the trial court where they were admitted in evidence.

The ballistics expert himself, **Johnson Musyoki Mwongela(PW3)** examined the pistol together the cartridge and the bullet head that had been recovered from the deceased's house. He established that the pistol was of Czech make and it was .9mm caliber pistol. It was designed to fire 9x19 mm ammunition and that it was in good working condition; as a matter of fact, he test-fired it. In his opinion, the pistol was not only a firearm as defined under the **Firearms Act Cap 114** but it was also the pistol from which the cartridge and the bullet recovered from the deceased person's house were fired.

That the deceased died from a bullet shot in his head was also put beyond peradventure. His wife, Rosemary (PW2), testified that the deceased was shot by one of the robbers in her presence and because of the close range from which the deceased was shot, the fatal bullet and its cartridge were recovered from the shooting scene.

More crucially, the pathologist, **Dr Geoffrey Zambezi Mutuma (PW8)** who conducted the post-mortem on the deceased's body established that there was a bullet wound on the deceased's right orbital region and the bridge of his nose. It was at this point that the bullet entered the deceased's head. According to the pathologist, it exited at the occipital region. As a result of the shot, there was haemorrhage in the brain region. With these findings, the pathologist formed the opinion that the cause of the deceased's death was a gunshot to his head.

This evidence linked the appellant with the robbery at the deceased's house on the dawn of 8th June, 2003.

Before convicting the appellant, the trial court had first to establish, as it had to, whether the offence of robbery with violence as understood under **section 296(2)** of the **Penal Code** had been committed. This it did and indeed there was sufficient prosecution evidence that the deceased and his wife were robbed in circumstances that fit the description of this sort of crime.

The offence of robbery is defined in **section 295** of the Penal Code though the ingredients of a crime of robbery with violence and the penalty thereof are prescribed in section **296(2)** of the Code. Section 295 thereof states;

> ***295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***

This offence, which is usually referred to as 'simple robbery' gravitates towards the more serious offence of aggravated robbery or robbery violence if the robbery is committed in circumstances spelt out in section **296(2)** of the Code; that section states:

296 (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 robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

It follows that for one to be convicted of this offence it must be proved beyond reasonable doubt that that the complainant was not only robbed but also that at the time of the robbery:

(a) The accused was armed with any weapon or instrument that may deemed to be dangerous or offensive; or,

(b) The accused was in the company of one or more persons; or,

(c) Immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to any person.

The evidence that the deceased and his wife were robbed violently of money and personal effects was not controverted. As a matter of fact, though any of the three ingredients of the offence of robbery with violence would have been sufficient to establish this offence, all of them were proved to exist. The deceased's assailants were armed, in this case with a pistol; they were also several of them; and, finally, they visited violence, which turned out to be fatal, against the deceased. In the absence of any evidence to the contrary, I must agree with the learned magistrate that indeed the offence of robbery with violence was proved beyond all reasonable doubt.

The connection between the appellant and this offence was, as noted, based on circumstantial evidence and therefore what I have to consider at this stage is whether that evidence was sufficient enough to sustain a conviction. **Section 164** of the **Evidence Act, cap. 80** makes reference to this sort of evidence. It states as follows:

164. Circumstantial questions to confirm evidence

When a witness the truthfulness of whose evidence it is intended to confirm gives evidence of any fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which the fact occurred, if the court is of opinion that such circumstances, if proved, would tend to confirm the testimony of the witness as to the fact to which he testifies.

According to this provision of the law, where there is proof of circumstances that tend to confirm the evidence of a witness as to the existence of a particular fact, the court may rely on such evidence of circumstances that may have been observed at or near the time or place the fact in issue occurred. If the circumstances are proved beyond reasonable doubt, the court may convict in the absence of direct evidence; however, circumstantial evidence must be narrowly examined before drawing any inference of guilt on the part of the appellant. The court must be satisfied that the circumstances are such that no other inference can be drawn from them other than that of guilt on the part of the accused person. The leading decisions on this issue are **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715.**

In **Republic versus Kipkering Arap Koske & Another**, the Court of Appeal for Eastern Africa, quoting Wills **on Circumstantial Evidence,** held as follows:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.

In **Simon Musoke versus Republic**, this principle was extended when the same court cited with approval

a passage from the decision of the Privy Council in **Teper versus Republic (1952) AC 480** where it was held at page 489 that: -

> ***It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.***

As far as the prosecution case against the appellant is concerned, I would consider the following evidence to constitute the inculpatory facts incompatible with the innocence of the appellant or otherwise incapable of explanation upon any other reasonable hypothesis than that of the appellant's guilt. First, the evidence of **Rosemary Wambui Waweru (PW1)** that her husband was shot during the robbery; second, the evidence of the investigations officer, police constable **Thomas Muriuki (PW6)** that he recovered a bullet head and a spent cartridge from the scene where the deceased was shot; third, the evidence by the pathologist, **Dr Geoffrey Zambezi Mutuma (PW8)** that the deceased died of a gunshot wound in the head; fourth, the evidence of **corporal Kamau Kungu (PW7)** that the appellant was found in possession of a ceska pistol serial no. G0661 after the robbery at the deceased's house; and finally, the evidence by **Johnstone Musyoki Mwongela (PW3)**, the ballistics expert that the bullet and the cartridge which were recovered from the deceased's house were discharged from the pistol that the appellant was found in possession of.

It was submitted on behalf of the appellant that possession of the killer weapon by the appellant was not proved beyond reasonable doubt and that when the Court of Appeal considered this issue in an appeal arising from a separate case in which the appellant had been charged with robbery with violence, it found for the appellant and doubted whether there was any pistol at all or whether indeed the appellant was found with it.

The case in which the question of possession of the firearm in issue first arose was, as noted, **Chief Magistrates Court Criminal Case No. 921 of 2005** in which the appellant was charged and convicted of the of the offence of robbery with violence. He was alleged to have robbed **David Wachira Magachi (PW11).** He was also charged of being in possession of a firearm without a valid licence contrary to **section 4(1)** of the **Firearms Act.** The appellant was also convicted of this particular count though his sentence was held in abeyance in view of the death sentence meted out against him for the capital offence of robbery with violence.

Magachi (PW11) testified in that case as the complainant. He also testified in the trial out of which this appeal arose and stated that on 4th June, 2004 at about PM he was accosted by robbers as he drove into his compound in Muhito location, in Mukurweini. One of the robbers was armed with a pistol. As the robbers escaped after robbing him, he pursued them in his vehicle on what he described as a farm road and managed to hit the one who was armed and who later turned out to be the appellant. He did not stop but went straight to the police at Mukurweini police station to report the robbery incident. He arrived back at the scene accompanied by police officers and a sniffer dog after about fifteen minutes. With the help of a sniffer dog the appellant was located 30 metres from where he had been hit. He appeared to have sustained broken legs. A pistol was picked from the same spot where the appellant had been hit.

As earlier noted, the Court of Appeal in its judgment in **Nyeri Criminal Appeal No. 402 of 2009** quashed his conviction on both counts of the offence of robbery with violence and possession of a firearm without a licence. According to that Court the prosecution evidence on the identity of the pistol allegedly recovered from the scene was contradictory. Various prosecution witnesses gave contradictory serial numbers purporting to refer to the same pistol. While a police officer who testified as the first prosecution witness indicated the serial number of the pistol as 40661 the ballistics expert referred to serial number G0661. The number given in the charge sheet was 0661. Because of these variations the court held that there was doubt on either the identity of the pistol recovered at the scene or whether a pistol was recovered at the scene at all. The court gave the appellant the benefit of the doubt and it is for this reason that the appellant's conviction for the offence of possession of a firearm without a licence was quashed. It followed that since the gun with which the appellant had been accused of having pointed at the appellant at the time of the robbery was removed from the equation, the charge of the offence of robbery with

violence fell by the wayside too.

But then it was established and the Court of Appeal appears to have accepted the finding that the complainant was robbed by more than one person. I might be mistaken but as far as I understand the evidence upon which the Court made its decision, one of the robbers pointed a gun at the complainant while the other ransacked his pockets. The appellant was held not to have been the one who ransacked the complainant's pockets but he was, nevertheless, held to have been culpable for the offence of robbery.

In quashing the conviction of the offence of robbery with violence and substituting it with that of simple robbery the Court of Appeal upheld the lower court's and this court's finding that the appellant was properly identified as having robbed the complainant because the injuries he sustained were consistent with injuries one would sustain if he was ran over by a vehicle. With this finding, it is not open to the learned counsel for the appellant to seek to regurgitate the issue of whether the appellant was located at the scene of crime with respect to the second robbery incident against **David Wachira Magachi (PW11).** The issue of whether the dog-handler should have been called and whether or the appellant was positively identified in the trial in which **David Wachira Magachi (PW11)** was the complaint is res judicata.

I must state however, as far as the pistol or gun is concerned, unlike in the trial whose judgment was upset by the Court of Appeal, I find the evidence with regard to the identity of the pistol in the trial whose judgment is the subject of this appeal to be consistent in every material respect. The licensed owner of the gun **David Ole Chege (PW4)** testified that sometimes between the 29th March, 2003 and 30th March, 2003 his house was broken into and amongst the properties he lost was his pistol loaded with fifteen rounds of ammunition. He was then a District Officer in Kerugoya where this theft took place. He testified that the pistol was of ceska make and was serialised as No. G0661. Sometimes later, in 2005, he was called by the Criminal Investigations Department at Kirinyaga where he had reported the loss of the gun and informed that it had been recovered. He identified the gun exhibited in court as the one that had been stolen from his house.

Senior Sergeant Paul Ndegwa (PW10) confirmed that while he was attached to Armory District Headquarters at Kirinyaga, he issued **Ole Chege (PW4)** with a ceska pistol No. G0661. He reported it to have been stolen on 30th march, 2003. He also confirmed that the pistol in court was the same one he had issued Ole Chege with.

The officer who recovered the pistol at the spot where the appellant had been hit, **corporal Kamau Kungu(PW7)** was also categorical that the pistol he recovered was of serial number G0661. Finally, the ballistics expert also testified that the pistol he received for examination was of this particular serial number and was the one exhibited in court.

It is thus apparent that the evidence in respect of the pistol in issue in the trial against the appellant was consistent as amongst all the witnesses whose evidence touched it in one way or the other. In the face of such evidence I respectfully disagree with the learned counsel for the appellant that merely because the Court of Appeal doubted the appellant's possession of a firearm in his trial in **Nyeri Chief Magistrates Court Criminal Case No**. **921 of 2005**, this court should make a similar finding. The evidence in the previous trial was markedly different from the evidence in the trial out of which the present appeal arose. It follows that there could not have been any basis to make similar findings of fact in the two cases.

None of the testimony of the rest of the witnesses could be said to provide co-existing circumstances which would weaken or destroy the inference of guilt on the part of the appellant. Neither can it be said to have been sufficient even on a balance of probabilities to provide any reasonable hypothesis of the appellant's innocence. I need only mention them and refer to their evidence only because this court is the first appellate court and in that regard, it has to evaluate all the evidence presented at the trial.

The evidence of **Paul Gitonga Wahome (PW2),** for instance only confirmed that he found the deceased murdered when he went to his home soon after the robbers left. **Chief Inspector Aphod Nyaga's (PW2's)** evidence on the other hand was restricted to the two accused persons who were charged and tried together with the appellant but were acquitted. His evidence had nothing to do with the appellant; as

a matter of fact, he admitted that he did not know the appellant.

Counsel for the appellant also argued that within a space of one year, the pistol with which the appellant was found in possession of may have exchanged hands. Here again I have to respectfully disagree with the learned counsel for the sole reason that a pistol is not a common commodity that would ordinarily exchange hands within a short period of time. Of course, what amounts to a short period or a long time will depend on the peculiar circumstances of each case and more particularly, on the nature of the article; in the circumstances of this case, I reckon that a period of one year is short enough for weapon like a ceska pistol not to have exchanged hands.

The appellant's defence on the other hand does not appeal to me to have been sufficient enough to cast any doubt on the prosecution evidence. He gave sworn evidence and stated that he was in business of selling tobacco snuff. On 27th June, 2003 was he was picked up by the police while he was waiting for a vehicle at a bus stop. The police officers, according to his evidence, found on him the sum of Kshs 20,800/=. They asked him to give them part of this money but he declined. It is then then that they arrested him and charged him with the offence for which he was subsequently tried and convicted.

I am minded that the burden is always on the prosecution to prove its case beyond all reasonable doubt and the conviction of an accused person is not dependent on the strength or weakness of his defence. However, looking at the evidence in its entirety, I am satisfied with the learned trial magistrate's finding that the appellant's testimony did not create any doubt in the mind of the court that he was one of the robbers who robbed and murdered the deceased in the early hours of 8th June, 2008. I am therefore not convinced that the appellant's appeal has any merits and it is hereby dismissed.

Signed, dated and delivered in open court this 29th September, 2017

Ngaah Jairus

JUDGE