REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL CASE NO.65 0F 2008

WANJIHIA MWAI.....APPLICANT

VERUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence of Death for the offence of Robbery Contrary to Section 296(2) of the Penal Code by Mr. M.K.K Serem Senior Resident Magistrate at Nyeri On 20th March, 2008 in Criminal Case No. 3449 of 2006.)

JUDGMENT

1. WANJIHIA MWAI the appellant was charged with the following offences;

COUNT 1

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.

The particulars as stated in the Charge Sheet were as follows:-

> ***"The Appellant on the 14th day of July, 2006 at Asian Quarters Estate in Nyeri Township within Nyeri District of the Central Province, while armed with a dangerous weapon namely a pistol robbed PURITY WANGUI of a VCD/CD/MP3/VCD Player Serial No.PS-930 AC/DC make Panasonic valued at Kshs.3,200/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said PURITY WANGUI."***

COUNT 2.

CONVEYING SUSPECTED STOLEN GOODS CONTRARY TO SECTION 323 OF THE PENAL CODE.

The particulars as stated in the Charge Sheet were as follows;

> ***"The Appellant on the 14th day of July, 2006 at Nyeri Township in Nyeri District within Central Province, having been detained by No. 740419395 Senior Sergent Benson Mbugua, NO. 820496682 Administration Police Constable John Wanguku and No.86006903 Administration Police Constable Peter Ndote as a result of the exercise of the powers conferred by Section 26 of the Criminal Procedure Code, had in his possession one VCD/CD/MP3/SVCD Player Serial***

No.PS-930 AD/DC reasonably suspected to have been stolen or unlawfully obtained."

COUNT 3.

BEING IN POSSESSION OF A FIREARM WITHOUT A VALID FIREARM CERTIFICATE IN FORCE ISSUED BY THE FIREARM LICENSING OFFICER, CONTRARY TO SECTION 4(1) OF THE FIREARM ACT CAP 114 LAWS OF KENYA.

The particulars as stated in the Charge Sheet were as follows;

"The Appellant on the 14th day of July, 2006 at Nyeri Township in Nyeri District within Central Province, was found in possession of one pistol Serial NO.76H36955 without a valid firearm certificate in force issued by the Firearm Licensing Officer."

COUNT 4

BEING IN POSSESSION OF AMMUNITIONS WITHOUT A CERTIFICATE, CONTRARY TO SECTION 4(1) AS READ WITH SECTION 4(3) OF THE FIREARM ACT CAP 114 LAWS OF KENYA.

The particulars as stated in the charge sheet were as follows:

"The Appellant on the 14th day of July, 2006 at Nyeri Township in Nyeri District within Central Provision, was found in possession of ammunitions without a valid firearm certificate."

2. The Appellant pleaded not guilty and the matter proceeded to full hearing, with the prosecution calling five (5) witnesses. He was found guilty, convicted and sentenced to death on the 1st count. The sentences on the other counts were held in abeyance.

3. The Appellant was aggrieved by the judgment and filed this appeal raising the following grounds;

i. THAT, the trial Magistrate erred in both law and fact while convicting him on the purported visual identification allegations by PW1 a single identifying witness in light of no prompt descriptive report evidence and the same having being made under cruel obtaining circumstances.

ii. THAT, the trial Magistrate erred in both law and fact while being impressed with his mode of arrest as was alleged by PW6 which was contradictory as evidenced in Cr. Case file NO.3446/06.

iii. THAT, the trial Magistrate erred in both law and fact while convicting him on charges that weren't proved to justify my conviction.

iv. THAT, the trial Magistrate erred in both law and fact while rejecting his defence without giving it due consideration in light of the prosecution case thus contravening Section 169(1) of the Criminal Procedure Code Cap 75 Laws of Kenya.

v. ***THAT, the trial Magistrate erred in law while not complying with 169(2) of the Criminal Procedure Code Cap 75 Laws of Kenya while sentencing me the appellant herein.***

4. The prosecution case was that on 14th July 2006 3p.m. PW1 (PURITY WANGUI) was with her physically challenged sister in their house at Asian Quarters Nyeri. They were in the sitting room but she left for the kitchen. While there her sister called her and informed her of a person knocking at the door. She peeped though the window but did not see anyone. The person knocked again and again. Her sister asked her to open the door which she did and the man pushed the door open knocking her down.

5. He entered holding a pistol and pointed it at her as her sister screamed. He ordered her to stop screaming. He then locked the door and remained with them. He forced her to take her sister inside a room. He was taken to the mother's bedroom which he ransacked for money. He continued demanding for money with threats of shooting her. He took away the VCD machine in the room. He twisted her right hand. He was however unable to take away the T.V.

He even wanted to rape her but when her sister cried he did not and left locking them in one room.

6. She stated that the Appellant was dressed in a faded jeans jacket, (black in colour), navy blue cap with yellow writings. She was able to identify him as a young and tall man.

Later she opened the window and shouted for help and an old man assisted them. She called the mother and informed her of the incident.

She identified the VCD (Exhibit 1), CD disk case winner (Exhibit 2), carton for the VCD (Exhibit 3) and navy blue cap with yellow writings (Exhibit 4), receipt for the VCD (Exhibit 5).

7. The police invited her to an identification parade but the Appellant declined to participate. Upon receipt of the report PW2 (Nancy Wanjiku Wanjohi) who is mother to PW1, came home and saw scatted things at the scene. She called the police and reported on 17th July 2006 she recorded her statement. She was also informed of the recovery of the VCD and she took the receipt to the station. She identified Exhibit 1, 2 and 5.

8. PW5 (Francis Githinji Hiuhu) was robbed of his pistol make browning Serial No.76H36955, on 9th June, 2005 9.30p.m at his gate by three robbers, whom he did not identify. He identified the pistol in Court (A) as his missing one. He also produced its permit as Exhibit 11.

9. The ballistic expert PW3 (SP Johnstone Mwongera) confirmed that Exhibit A was in a working condition and a firearm under the Firearms Act same to the four rounds of ammunition which were test fired.

He produced the cartridges and fired bullets as Exhibit B1-B4, Report Exhibit 6; Memo Exhibit 7.

10. PW6 (Benson Mbugua) was on foot patrol at Gakere road Nyeri with APC Wangilo and APC Ndolo. He said they met two men and one was carrying a green paper bag. They stopped the one with the luggage. They recovered a VCD from him and took him to his house in Majengo Nyeri. He pulled out a pistol NO.7636955 and APC Ndolo took it and recovered four (4) live bullets. They arrested the person who is the Appellant and took him to Nyeri Police Station and he was charged.

In cross-examination he said the Appellant pulled out the pistol from his coat.

11. PW4 (Lawrence Wamugunda) was on duty at Nyeri CID Office when he received the Appellant from three Aps attached to former DC's office Nyeri. He was brought with Exhibit 1-5, A, B1-B4. Investigations commenced and PW1 identified the Appellant at an identification parade. Later they took the Appellant to his home in Tumutumu where 15 caps, two car batteries, two mobile phones and other items wee recovered. PW1 identified the cap Exhibit 4. The pistol was taken for examination.

12. The Appellant in his sworn defence denied the charges. He testified that on 14th July 2006 at 1.00pm he went to Mathari Hospital from Tumutumu to see his sister who was admitted there. She later died. He came to Nyeri town and went to Karatina stage. He went to a shoe shiner and while there a man came there with a green paper bag and he was wearing a grey jeans jacket. The man left the green paper bag there and ran away towards Majengo. Three people dressed in green clothes came there and they were drunk. One was Wanguko and another Ndolo both whom were police officers.

13. That the three men asked if they knew the runaway man. He told them he did not know him and he was arrested, handcuffed and searched. The shoe shiner was not arrested but he was taken to Nyeri Police

Station. The police carried the paper bag which had the VCD, which was not his. He denied being in possession of the VCD and/or the pistol.

14. When the appeal came for hearing before us, the Appellant presented the Court with written submissions. The submissions mainly expound his grounds of appeal. He faults his identification by PW1. He also cites contradictions in the testimony of the witnesses. One such contradiction was the Serial No. of the pistol. He submits that it appeared there were more than one pistol recovered.

15. That the prosecution case was not proved to the required standard to sustain a conviction. To his submissions was attached the judgment in Nyeri Court of Appeal Cr. Appeal No.325 of 2011 **WANJIHIA MWAI ALIAS FRANCIS WANJIHIA VS. REPUBLIC.**

The subject of the Robbery in the above mentioned appeal was a pistol Serial No. 76436955 which is also the subject in the present appeal.

He also raised the issue of a single identifying witness.

16. Mr. Njue for the state in opposing the appeal submitted that;

> *i.* The circumstances for positive identification were favourable as the incident occurred during the day. That the evidence of PW1 was water tight.
>
> *ii.* He further stated that Nyeri Court of Appeal CRA No.353 of 2011 only dealt with the issue of recent possession of the pistol hence the acquittal. That in this case the Appellant was identified; recovery was on the same day and he was also found in possession.

The differences in time that he wanted to rely on are curable under Section 382 Criminal Procedure Code said Mr. Njue.

Finally he submitted that the Learned Trial Magistrate well considered the Appellant's defence and correctly arrived at the judgment he did.

17. This is a first appeal and this Court is enjoined to re-evaluate and re-consider the evidence on record exhaustively arrive at its own conclusion. We are also alive to the fact that we did not see nor hear the witnesses.

In **KIILU VS. REPUBLIC (2005) 1KLR 174 the Court of Appeal** stated thus:

> ***i. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ii. ***It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.***

The Court also stated in **SIMIYU & ANOTHER VS. REPUBLIC (2005)1 KLR 192** as follows:

> *i.* ***It is the duty of the first appellate Court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice. It is not enough for the first appellate Court to merely scrutinize the evidence to see if there was some evidence to support the trial Court's findings and conclusions.***

18. We have exhaustively considered the evidence adduced in the Court below, the grounds of appeal and

the submissions by both the Appellant and the state.

We find the following to be the issues falling for determination;

i. Whether there was a Robbery with Violence at the complainant's home.

ii. Whether the Appellant was identified as the robber.

iii. ***Whether the Appellant was found in possession of the pistol and the VCD***.

19. **Section 295** of the **Penal Code** defines Robbery as follows**:**

"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".

Section 296 (2) of the **Penal Code** defines Robbery with Violence as follows:

"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 shall be sentenced to death".

It is therefore clear that any one of the circumstances outlined in Section 296(2) Penal Code qualifies for a Robbery with Violence.

20. From the evidence of PW2 and PW3 it's been established that a theft of a VCD occurred in their house on 14th July 2006. That the attacker was armed with a pistol with which he threatened PW1. PW1 also explained how her right hand was twisted by the attacker causing her pain. The attacker had also threatened to rape her by ordering her to remove all her clothes. We therefore find that the offence of Robbery with violence was proved.

21. **Issue No. (ii): Whether the Appellant was identified as the robber.**

The robbery herein took place during day time and in a residential house. PW1 stated that it took 15-20 minutes, and the attacker was not known to her prior to this incident. It can therefore not be said to have been a case of recognition.

22. In her testimony PW1 told the Court that she had been called to an identification parade at Nyeri police station but the appellant declined to attend the said parade. However the Investigations Officer PW4 (Lawrence Wamugunda) in his evidence at page 43 lines 4-8 states as follows:

"Purity Wangui (PW1) came to Nyeri Police Station for an identification parade and positively identified the accused person herein and picked him out from the parade".

Further in cross-examination at page 44 lines 11-12 he states,

" The complainant positively identified you and also the property herein".

At page 45 lines 15-18 still in cross-examination he states

"An identification parade was conducted and PW1 identified you. The parade forms were filled and kept in the police file".

23. This was a very material contradiction in the prosecution case which the Learned Trial Magistrate

ought to have noted. Even the prosecutor did not re-examine PW4 over this, considering that PW1 had denied identifying the Appellant on any identification parade. Furthermore there is no officer who testified as having conducted the identification parade and filling any forms, as alleged by PW4.

24. The evidence of PW1 on identification therefore remained as dock identification. In the case of **Ajode Vs. Republic (2004) 2 KLR 81 the Court of Appeal held thus:**

> ***"It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade."***

Further in **Murage Vs. Republic (2006)1 KLR 63 it was held as follows:**

> ***"A dock identification is worthless without an earlier identification parade. In the circumstances, the conviction of the 1st appellant in the absence of any other evidence was unsafe".***
>
> **(i)** In **Kiarie Vs. Republic (1984) KLR 739 the Court of Appeal held thus;**
>
> ***"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken".***

PW1 had also told the Court that she did not know how the Appellant was arrested. She was not the one who had led the police to arrest him.

25. In view of the contradictions in the evidence of PW1 and PW4, plus the omissions cited we do find the identification of the Appellant in the dock without any other supporting evidence to have been worthless.

Issue No. (iii); Whether the Appellant was found in possession of the pistol and the VCD.

26. PW6 (Benson Mbugua) was one of the three Aps who arrested the Appellant and the only one who testified. His evidence is that as they patrolled they met two men. One was carrying a green paper bag and they stopped him, and he was the Appellant. They recovered a VCD from him and took him to his house in Majengo Nyeri. He pulled out a pistol and APC Ndolo took it and recovered four live bullets. The Appellant denied all these.

PW4 the Investigating Officer who received the Appellant at the station said the Appellant was brought with the pistol, four rounds of ammunition and one video deck in a yellow paper bag, contrary to what PW4 had said that the video deck was in a green paper bag. Green and yellow are totally different colours.

The Blue cap with yellow strips (Exhibit 4) was not one of the items the Appellant was taken to Nyeri Police Station with. PW4 said this was recovered later from his house at Tumutumu and not Majengo after PW4 and others took him there. It is even surprising that PW1 identified it yet the Appellant was not in possession of it.

27. The evidence that the prosecution relied on to link the Appellant to this Robbery and the other offences was the recovery of the VCD and the pistol Serial No. 76H36955. In the case of Eric Otieno Arum Vs. Republic – (2006) 1 KLR 233 the Court of Appeal set down what the Court should be satisfied with before relying on the doctrine of recent possession to found a conviction. It stated thus;

> 1. Before a Court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, there must be positive proof;
>
> ***(a) that the property was found with the suspect;***

(b)that the property was positively the property of the complainant;

(c) that the property was stolen from the complainant;

(d)that the property was recently stolen from the complainant.

2. The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

3. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and any discredited evidence on the same cannot be suffice, no matter from how many witnesses.

4. In case the evidence as to search and discovery is conflicting, then the Court can rely on the adduced evidence after analysing it and accepting that it considers it to be correct and an honest version.

28. For the purposes of this case we are concerned with holdings Nos. 1a, 3 & 4. Besides the contradicting evidence by the prosecution considered alongside the sworn defence by the Appellant this Court was presented with a judgment of the Court of Appeal in Nyeri Court of Appeal **Criminal Appeal No. 325 of 2011 Wanjihia Mwai alias Francis Wanjihia Vs. Republic.** This was an appeal arising from a judgment of a two judge bench vide Nyeri **HCRA NO. 233 of 2007 Wanjihia Mwai alias Francis Wanjihia Vs. Republic.**

29. It related to the recovery of the same pistol the subject of this appeal. To our mind since the recovery was one and the same then the evidence adduced on the recovery and possession in Nyeri CM Criminal Case No. 3449/06 (the subject of this appeal) and Nyeri CM. Criminal Case No.3446/06 (the subject of Nyeri Court of Appeal Criminal Appeal No. 325/11) should be the same.

30. This is what the Court of Appeal in Nyeri Criminal Appeal No. 325 of 2011 had to say about the alleged recovery of this pistol:

1. ***The second gap in the prosecution's case is that both PW2 and PW3 testified that it was APC Ndote who hit the appellant and the pistol fell. This office was not called to testify. We appreciate that under Section 143 of the Evidence Act, the prosecution need not call any given number of witnesses; however, the issue in this case relates to how the pistol was recovered, from whom and whether it was in the exclusive possession of the appellant. The testimony of PC Ndote would have been material because the testimony of PW2 and PW3 is contradicted by the testimony of DW2 as to how and from who was the pistol recovered. In his testimony, DW2 stated that when the police arrested the appellant at the shoeshine place, the pistol was found inside the polythene bag which had been left by an unidentified person who disappeared. The testimony of DW2 on this was not challenged despite him having been put under intense cross-examination. No explanation was given as to why APC Ndote did not testify. An adverse inference stands to be drawn from the failure of APC Ndote to testify.*** In **Bukenya & Another Vs. Uganda (1972) EA 549,** the predecessor of this Court held that,

"The prosecution was duty bound to make available all necessary witnesses to establish the truth, even if their evidence may be inconsistent to its case. Otherwise failure to do so may in an appropriate case lead to an inference that that the evidence of the witness who was not called to testify would be adverse to the prosecution's case".

In the instant case, the evidence against the appellant is not overwhelming and in the absence of the testimony of APC Ndote, the prosecution's case is not adequate to meet the standard of proof beyond reasonable doubt. There is no direct and credible evidence of possession and recovery of the pistol from the appellant.

2. The third gap in the prosecution case relates to hearsay evidence. The evidence given by PW2 and PW3 is that the pistol was found in possession of the appellant, the record shows that this evidence is hearsay. Both PW2 and PW3 testified that " the accused tried to remove his pistol which was on his left side and APC Ndote noticed the action and hit him". The inference is that PW2 and PW3 did not see where the pistol came from and they cannot testify that it was from the left side of the appellant. It is only the evidence of APC Ndote that can prove whether the appellant had the pistol or if it was on the appellant's left side. We find that the testimony of DW2 could only be challenged by the testimony of APC Ndote who was not called to testify. We find that the learned Judges erred in law in using the hearsay evidence to draw an inference that the prosecution had proved beyond reasonable doubt that the pistol was recovered from the appellant. Due to these gaps, we find that the prosecution did not establish beyond reasonable doubt that the pistol was in the exclusive possession of the appellant.

31. The Court of Appeal having made a finding on the recovery of the pistol which is the same one we are dealing with, we are accordingly guided that the prosecution did not establish beyond reasonable doubt that the pistol was in the exclusive possession of the Appellant.

32. The same applies to the recovery of the VCD in either a green or yellow paper bag. The only witness who testified on recovery was PW6 yet they are said to have been three Aps. The Appellant gave a sworn defence explaining that the person who dropped the green paper at the shoe shiner's place where he was having his shoes polished left and disappeared, in the crowd.

33. This remained PW6's word against that of the Appellant. The prosecution had witnesses it could have called but it chose not to. In the case of **Bukenya & another Vs. Uganda (1972) E.A 549** *(supra)* the Court of Appeal stressed on the need to avail all necessary witnesses to assist the court in reaching a determination.

34. We find this case to be one where the prosecution deliberately avoided to call the other two AP's who may most likely have given evidence that contradicted that of PW6. See **Juma Ngodia V R 1KAR 454.** The contradictions and the gaps in the prosecution case have made us have a doubt as to the guilt of the Appellant. The Appellant shall have a benefit of that doubt.

35. The result is that the Appeal is allowed. We quash the conviction on all the four counts; and the death sentence on the 1st Count is set aside. The Appellant shall be set free forthwith unless otherwise lawfully held under a separate warrant.

Signed, dated and delivered in open court this 15th day of December, 2015

HEDWIG IMBOSA ONG'UDI NGAAH JAIRUS

JUDGE **JUDGE**