REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL CASE NO. 382 OF 2008

(as consolidated with **no.372 of 2008)**

(Appeal from the judgment of Mary Murage [Chief Magistrate, Nairobi)

SAMUEL KIMANI KIMANJURI.....….….1ST APPELLANT

JOHN MWANGI NDUNGU.....2ND APPELLANT

VERSUS

REPUBLIC …….....……..RESPONDENT

JUDGEMENT

The appellants were convicted by Kiambu Senior Resident Magistrate of three counts of robbery with violence contrary to Section **296(2)** of the **Penal Code** and sentenced to death. The sentences in counts II and III were held in abeyance. The first appellant and 4th accused were jointly convicted of two counts of being in possession of a firearms and ammunition contrary to **Section 4(2)** of the **Firearms Act**. The first appellant was sentenced to serve seven (7) years imprisonment on each count while the 4th accused was given three years probation sentence.

The appellants were aggrieved by the judgment of the Senior Resident Magistrate and filed separate appeals which were consolidated. The first appellant who was represented by Mr. Gathii put forward sixteen grounds of appeal which we have summarized and condensed as follows:

1. That the appellant was not positively identified;
2. That the recovery of the firearm, ammunition and other exhibits was not in accordance with the law;
3. That the identification parade was not conducted in accordance with the law;
4. That the prosecution evidence was contradictory in material particulars;
5. That the ownership of the mobile phone was not established;
6. That the constitutional rights of the appellant were violated in that he was over-remanded in police custody.

Mr. Gathii expounded and argued the grounds of appeal.

The second appellant who was unrepresented filed his grounds followed by supplementary grounds and submissions. The grounds are condensed as follows:

1. That his constitutional rights under **Section 72(3)(b)** of the repealed constitution were violated;
2. That the evidence of identification was wanting;
3. That the prosecutions evidence was riddled with contradictions and discrepancies;
4. That the burden of proof was shifted to the appellant.

Ms Onunga for the State opposed the appeal in respect of both appellants on the following grounds;

a) That identification in respect of both appellants was positive and that the parade and recovery of the exhibits was done according to the law;

b) That the contradictions, if any were minor and were addressed by the trial court which still found that the case had been proved against the appellants to the standards required;

c) That the appellants failed to raise the issue of violation of their rights during the trial to accord the prosecution an opportunity to explain the delay.

d) That the ingredients of all the offences were proved.

Precisely, the facts of the case are that on the 4th June 2006 at around 9.50 p.m., PW1 was attacked at his petrol station by a gang armed with guns. They opened the safe and stole cash Kshs.215,782/= and other unknown amounts placed in envelopes. During the incident PW1 was assaulted and threatened with death as they demanded the keys to the safe of th complainant. He was bundled in a pickup and driven to Kambaa where he was searched and his cash, mobile phone and watch were taken. When he was released, PW1 reported the matter to Githiga Police post before going to Githunguri Police station.

During the same incident PW2 and PW10 who were on duty at the petrol station were also robbed of their cash and personal items by the same gang. The first appellant was arrested about eight days later and a pistol, an AK 47, a sub-machine gun and 28 rounds of ammunition recovered from his home. The first appellant led to the arrest of the second appellant and another suspect who later escaped from custody. In the house of the 2nd appellant, cannabis sativa and wrappers was recovered.

This court on appeal has a duty to evaluate the evidence and reach its own conclusion bearing in mind that it did not have the benefit of seeing the witnesses. This principle was laid down in the Court of Appeal case of **Okeno vs. Republic 1972 E.A. 32** and upheld in the case of **Arum vs. Republic Court of Appeal no. 85 of 2005** where the court held:

"The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence and see if there was some evidence to support the lower court's findings and 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 had the advantage of hearing and seeing the witnesses."

The two appellants were arrested on 12th June 2006 and arraigned in court on 30th June 2006. They stayed in police custody for seventeen (17) days before being charged in court. **Section 72** of the repealed constitution provided:

> ***"(3) (b) Upon reasonable suspicion of his having committed or being about to commit, a criminal offence;***
>
> ***and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he not brought to before court within twenty four hours of his arrest or from the commencement of his detention; or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable of suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person***

alleging the provisions of this subsection have been complied with.

5. ***If a person arrested or detained as mentioned in subsection (3)(b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless be is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.***
6. ***Any person who is unlawfully arrested or detained by another persons shall be entitled to compensation therefore from that other person".***

Although the first appellant was represented by a counsel, the issue of the extra-judicial incarceration was not raised during the trial. Neither did the second appellant raise it. The advantage of raising the issue during the trial is that the state will be accorded a chance to explain the delay in arraigning the accused persons in court. Raising the matter on appeal is a bit late in the day but the court has a duty to deal with the matter at any time it is brought before it it. It is important to mention that even where the accused persons do not raise the issue, the court has a duty to enforce the provisions of the law. In the case before us, the magistrate did not deal with the issue.

Having established that the appellants were remanded in police custody for seventeen (17) days which was three days over and above the fourteen (14) days allowed by the repealed Constitution, we now proceed to determine what the effect of that violation is.

We are aware that different judges in High Court of Kenya released accused persons and absolved them of the criminal charges on the basis that their constitutional rights were violated due to the extra-judicial incarceration. We disagree with the kind of reasoning which gave rise to those decisions given the provision of **Section 73(6)** of the repealed constitution which provides for a remedy of compensation in the event of violation.

It was held by the ***Court of Appeal in Criminal Appeal no. 50 of 2008 Julius Kamau Mbugua vs. Republic*** in a case with similar facts that the issue of extra-judicial incarceration has no bearing to the criminal charges facing the accused person. The accused has a remedy under **Section 73 (6)** which should be utilized in such circumstances. The court said:

> ***"Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention occurred long before the appellant was charged. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72(6). That is the appropriate remedy which the appellant should have sought in a different forum."***

We agree with the above reasoning of the Court of Appeal which is applicable in the case before us. The appellants urged this court to release them which we hereby decline to do for the foregoing reasons.

PW1 testified that he was a petroleum dealer in Ngewa, Githunguri in Kiambu county in the year 2006. He was accosted by a gang of three men armed with guns around 9.50 p.m. He had just closed the kerosene pump and entered his office at the station. He and his three workers and a customer were ordered to lie down in his office. He was later ordered to surrender the keys to the safe from where the thugs took Kshs.215,782/= and other amounts in form of coins in envelopes. He surrendered the keys of his vehicle to the gang on demand and threats to his life. The vehicle was registration no. KAS 436x Nissan Pick-up. He was driven in his car and abandoned at Githiga area. He subsequently made a report at Githiga police post. Later he proceeded to Githunguri Police station. His phone, watch and cash were taken by his assailants before he was abandoned. PW1 said he was able to identify the man who drove his pick-up. However, during the parade, PW1 did not identify any of the suspects. PW2, a tyre repairer at the petrol station, was standing at the super fuel pump when he saw five men pass him and enter the

office of PW1. The last man in the group was armed with an arm length gun and he ordered PW2 to lie down. He ransacked him and removed cash Kshs.3,550/= from his pockets and a nokia phone model 3210. He was then ordered to lie under a Nissan Matatu face up. In that position, PW2 could hear the gang giving orders in the office. There was electricity light fixed on a post near where he lay which lit the scene. A man wearing a grey suit came and ordered PW2 to lie on his belly with face down which the witness obeyed. He heard PW1 being ordered to go by the gang who said "let's go!". The thugs then left the scene and all went quiet. As he lay under the vehicle with his face up, PW2 was able to identify the first appellant as the man who was ordering him around. The phone of PW1 was recovered in possession of the first appellant. PW1 describes the appellant as the one who was clean shaven and wore a suit during the incident. When he was later shown a kaunda suit recovered from the house of the first appellant by the police, PW2 identified it as the one the first appellant wore during the incident.

PW3 was an administration police officer attached to District Officer's office at Githunguri. His evidence was that he and his colleagues including one Senior Sergeant Muruai were informed of the robbery that had taken place. He got information that some suspicious characters had congregated at the home of one Kiarie (the first appellant). He proceeded there with his colleagues and members of public just to find that the men had dispersed. Later on he went to Kambaa matatu stage acting on information where they found the first appellant who led them to his home. The house was locked and the appellant picked keys from the next house and opened. Upon conducting search in the house, a revolver S/no. BF 02108 was recovered. Outside the house was an AK 47 rifle S/no.KR133233 wrapped in a paper and a green sweater. The guns were recovered after digging out some mounds of soil outside the house. The AK 47 rifle was loaded with 17 rounds of ammunition of 7.62 mm calibre while the sub-machine gun had 11 round in its magazine. The first appellant attempted to flee after recovery of the revolver but was restrained.

The first appellant led the officers to the house of the second appellant who was found in his home sorting out some cannabis sativa in a tray. He was arrested and the drug taken as exhibit including nine packets of wrapping material. The first accused led PW3 to arrest another man who later escaped from police custody.

The two appellants were taken to Githunguri police station where the matter was investigated. PW4 is the officer who conducted the identification parade where PW10 identified the second appellant as the man who ordered him to lie down and later robbed him of his property.

The firearms examiner PW5 produced his report to the effect that a Smith Wesson Revolver S/no. BFD 2108 and assault rifle S/no.UG4804 and sub-machine gun S/no.133233 were firearms and that the 28 rounds of ammunition were ammunition as defined by the Firearms Act Cap 114. By testing the guns using the ammunition recovered and conducting microscopical comparison of the guns and catridges, PW5 confirmed that the Assault rifle Romanian AKM S/no. 4804 was used in the robbery.

PW6 accompanied PW3 CI Macharia and other officers to the home of the first appellant and that of the second appellant. The exhibits including the guns, the canabis sativa and wrappers were recovered by the team in which he participated. He searched the person of the first appellant and recovered the Nokia phone which was later identified by PW2 as his property.

PW10 testified that he was working at the service station at the car wash section. As he was walking out of the petrol station he met a man who ordered him back to the office. Together with PW1 they were ordered to lie down and were robbed of cash and personal items. This was after the gang had taken cash from the safe at PW1's office. PW10 told the court that he later identified the man who pushed him back to the office as the 2nd appellant in an identification parade. PW7 conducted the identification parade where PW2 identified the first appellant as the man who ordered him to lie under the Nissan van and robbed him of his cash and Nokia phone.

PW11 was the investigating officer who told the court that he visited the scene and recorded the statements of the witnesses. After the suspects were arrested by his colleagues, he made arrangements for the conducting of the identification parades. He said that he took clothes from another prisoner and gave

them to the first appellant to change before the parade was conducted. He and a colleague went to the house of the first appellant where they recovered clothes the first appellant wore during the incident. PW11 forwarded the firearms, ammunition and cannabis sativa to the firearms examiner and the Government chemist respectively for examination and analysis.

The appellants denied the offences in their unsworn statements of defence. The first accused said he was arrested at a local trading centre where he was having lunch. He was taken to his house by the officers who set the police dog loose on him. It is at the police station that he was shown the cache of arms and told that it was recovered from his residence.

The second appellant said that he was arrested from his home by three officers who released their dog on him demanding that he produces guns. He was then handcuffed and arrested.

In her judgment, the trial magistrate found that the two appellants were positively identified by PW2 and PW10 respectively and that the evidence of recovery of PW2's phone and the cache of arms further corroborated the evidence of identification. The magistrate also found the evidence of PW3 and PW6 as to recovery of the items coupled with the firearm's examiner's report sufficient to sustain a conviction in counts IV and V.

At the scene, there was electricity light which PW2 and PW10 said was bright enough to aid them in seeing and identifying the appellants. PW2 described the place where he lay as being only one feet away from the post on which the electricity light was fixed which lighted the scene. PW2 was confronted by the first appellant and ordered to lie under a vehicle. He said he lay with his face up and could see what was happening before he was ordered to lie on his stomach. The first appellant joined his colleagues in PW1's office where PW2 kept hearing the gang giving orders. The first appellant's second encounter with PW2 is when he ordered him to lie on his stomach with face down. PW2 waited for the gang to leave. The gang used PW1's vehicle to flee from the scene. PW2 heard PW1 being ordered to give the car keys and to board the vehicle. Although the intensity of the light was not given, the description of the scene and the lighting in relation to the events and the subsequent parade identification leaves no doubt the PW2 identified the first appellant. The allegation by the defence that the first appellant wore blood-stained clothes during the parade was cleared by the explanation of PW11 that he had ensured the first appellant had changed his clothes before the parade. Although the appellant alleged that the parade members were of different in heights and appearances, no details were given to demonstrate this contention. The investigation officer PW11 and the parade officers PW7 denied in cross-examination that the first appellant stood out and was easily identifiable. The magistrate believed the witnesses and found that the parade was conducted in accordance with the law.

PW2 identified his Nokia phone by the model and a scratch that it had. PW2 explained that he had lost the receipt of the phone and did not know the IMI number of the phone. He identified the phone in court. The phone was found in the trouser pocket of the first appellant only eight (8) days after the robbery. In his defence, the appellant did not explain how he came into possession of the phone. The evidence of recovery by PW3 and PW6 was well corroborated in material particulars.

It is PW10 who identified the second appellant in the parade. He said the appellant met him leaving the petrol station and got hold of him and ordered him back to the office. The office was lighted with electricity light according to the witness. He said he was able to identify the appellant when he “arrested” him and pushed him back and during the second encounter when he was robbed by the same person. The witness said that the petrol station was lit and that the office was also lit. The magistrate found no possibility of mistaken identity on the basis that the scene was well lit and that PW2 and PW10 only came face to face with only two of the robbers. Given the small number of the assailants who directly confronted, it was easy to identify the two and the roles they played. We agree with this reasoning of the trial magistrate.

The appellants were armed as they attacked and robbed the complainants and were in the company of others. They used threats to get the money and other property from the complainants. The ingredients of the offence of robbery with violence under **Section 296(2)** were proved beyond any reasonable doubt as

set out in the case of **Johana Ndungu vs. Republic (Cr. Appeal No. 116 of 1995).** The court explained the various elements or ingredients which must be proved under **Section 296(2)** of the **Penal Code** and any of which, if proved, then would be no discretion on the part of the trial court but to convict under **Section 296(2)**. The court took the matter further in the case of **Juma vs. Republic [2003] of R. A. 471** where it held that where the prosecution is relying on an element or ingredient of being armed, it must be stated that in the particulars of the charge that the weapon or instrument which the appellant was armed was a dangerous or offensive one.

The charge sheet gives the amount of money stolen as Kshs.375,000/= while PW1 puts the figure at Kshs.215,782/=. In the evidence of PW1, he explains that Kshs.215,782/= was the amount removed from the safe. He added that money in coins kept in envelopes which he was not able to say how much it was, was also stolen. At the time PW1 was being abandoned at Kambaa, he was robbed of further cash, phone and wrist watch. All the stolen money amounted to a figure over Kshs.215,782/=. It could as well be Kshs. 375,000/= which figure we suppose was an estimate given to the police by PW1. The first appellant was represented by a counsel who cross-examined PW1 who did not put any question to the witness regarding the amount of cash taken from him. The witness explained that the money was stolen at three different times in the course of the same incident. For this reason we do not find a contradiction on the amount stolen. Even assuming there was such a contradiction it does not affect the substance of the case or the credibility of the witness provided the ingredients of the charge are proved.

PW2 gave the figure of Kshs.3,250/= stolen from him and later gave figure of Shs.3350.= while the charge sheet gives Shs.3250/=. For his meagre difference, the explanation can only be explained as a typographical error which is not material to the case and cannot be blamed on the complainant in count II.

On the allegation that the trial court shifted the burden of proof to the accused persons, the particulars were not given. However, we have perused the judgment and find no such trend. The magistrate considered the prosecution's evidence and the defence of the appellants in a balanced way with the prosecution bearing the burden of proof.

We find the convictions in counts I, II and III safe and the sentences lawful and uphold them accordingly.

On counts IV and V, the evidence of PW3 and PW6 as to the recovery of the guns and ammunition was corroborated by PW8 the officer in charge of Githunguri police station who joined PW3 and PW6 as the recovery exercise was going on. He confirmed that the guns recovered from the first appellant's house and compound were an AK 47 rifle loaded with seventeen (17) rounds of ammunition, a revolver and a submachine gun loaded with eleven rounds of ammunition. PW3 and PW6 were accompanied by other police officers during the recovery exercise. The officers worked as a team and any recovery was the work of that team. When PW3 says he recovered one item and PW6 says he also did, there is no contradiction in such a statement because the officers carried out the exercise. The most important thing is to establish recovery and how it was achieved. This was sufficiently done by the two witnesses with corroboration from PW8's evidence.

The first appellant contended that the ballistic expert PW5 gave different serial numbers of the guns in his reports as opposed to what was in the charge sheet. In the charge sheet count IV, the serial no. of the AK 47 rifle is given as UG 4804/2000 and while the ballistic experts indicated the serial number as UG4804. The only difference is that the report does not include the last digits 2000. The sterling packet in the charge sheet is serial no. KR 133233 and in the ballistic report, it is indicated as KR 133233 which is exactly the same numbers. The revolver's serial number in the charge sheet is BDF 2108 which is the same serial number in the report of PW5. PW3 gave the same serial numbers in his evidence as those in the charge sheet. The exhibits which were recovered by PW3 and PW6 were produced in court and physically identified by the witnesses. PW8 who was present at the scene of recovery also identified the exhibits. The investigating officer prepared the exhibit memo and sent the guns and ammunition for examination. The exhibits were later returned to him together with the report. There was no doubt that the 3 guns which were recovered were the one sent to PW5 for examination and that they were the exhibits produced in court and identified by all the witnesses who dealt with them. The serial numbers of the guns were complete as they appear in the ballistic expert's report. The omission of the last digits 2000

does not affect the number and identity of the gun. We take judicial notice that a car registration number is sufficient to identify the car even in the absence of the year of manufacture. There was therefore contradictions in the serial numbers, but omission by one witness (PW5) of the last 3 digits in respect of the AK 47 rifle is insignificant. We are satisfied that the identity of the guns is not therefore question.

It was also argued that the inventory for the exhibits recovered was not produced in court or that it was not prepared at all. This is the correct position as the proceedings show. What is the effect of failure to prepare an inventory by the officer who recovers the exhibit? In our considered opinion, the omission is not fatal to the prosecution's case provided the exhibits recovered have been produced in court and properly identified.

The defence of the first appellant in respect of counts IV, and V was a mere denial which does not in any way affect the overwhelming evidence of PW3, PW6 and PW8. PW5 confirmed that the guns and the ammunition were firearms and ammunition as described in the **Firearms Act Cap 114**. The magistrate found the evidence ***"not only overwhelming but credible"***. We are in agreement that the offences in counts IV and V were proved beyond any reasonable doubt against the appellants. We find the convictions safe and the sentences lawful and uphold them accordingly.

The appeals are dismissed.

F. N. MUCHEMI **G. ODUNGA**

JUDGE **JUDGE**

Judgment dated and delivered on the **3rd** day of **December 2013** in the presence of the appellant and Mr. Gathii for first appellant and the State counsel Mr. Konga in open court.

F. N. MUCHEMI

JUDGE