



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CRIMINAL APPEAL NO. 130 OF 2008**

**JACKSON KAYANGE**  
**MIYALO.....APPELLANT**  
**VERSUS**  
**REPUBLIC .....**  
**.....RESPONDENT**

*(From the ruling in Criminal Case No. 1071 of 2007 of the Chief Magistrate's Court at Kiambu by D. Mulekyo (Mrs) – Senior Resident Magistrate)*

**JUDGMENT**

The appellant, **JACKSON KAYANGE MIYALO**, was convicted on 2 counts of Robbery with violence contrary to **section 296 (2) of the Penal Code**; **One (1) count of Being in Possession of a Firearm without a Firearm Certificate contrary to section 4 (2) (a) of the Firearm Act**; and one (1) count of Being in Possession of Ammunition without a Firearm Certificate **contrary to section 4 (2) (a) of the Firearm Act**.

For the offences of Robbery with violence he was sentenced to death. For the offences of being in possession of a firearm and of ammunition, respectively, the appellant was imprisoned for 7 years, on each count. However, the trial court ordered that the sentences of imprisonment would stand suspended pending the execution of the 2 death sentences.

Being aggrieved with the convictions and the sentences, the appellant lodged an appeal to the High Court. He has raised 4 issues in his appeal, and the same can be summarized as follows;

- (1) The purported visual identification was not free from error or mistake. In any event, the alleged identification was not supported by a first report.**
- (2) The charges were defective.**
- (3) The evidence tendered by the prosecution was contradictory and inconsistent.**
- (4) The Defence of the appellant was formidable and plausible. It should not have been dismissed.**

When canvassing the appeal, the appellant submitted that the trial court failed to analyse the evidence of the alleged identification.

The incident was sudden, causing **PW 1** to become confused. As **PW 1** conceded that he became confused, the appellant said that he could not have positively identified his assailants.

The confusion of **PW 1** was attributed to the fact that one of the robbers was armed with a gun, and because the said robber threatened to harm him.

The appellants also pointed out that both **PW 1** and **PW 2** were so confused that even when the robbers released them at a busy matatu stage, the two witnesses failed to seek the assistance of the members of the public, to arrest the said robbers.

Thereafter, **PW 1** and **PW 2** are said to have gone about their regular chores, instead of reporting the incident to the police.

And when they eventually reported the incident **PW1** and **PW 2** are said to have failed to describe the robbers. It was the appellant's submission that the failure to describe the suspects made it impossible for the court to know the basis upon which the witnesses originally identified the suspects.

Although the learned trial magistrate warned himself about the danger of convicting an accused on the evidence of a single identifying witness, the appellant argued that the magistrate still got it wrong because he failed to take into consideration the difficult circumstances, the confusion of the witnesses and the failure to describe the suspect in his first report.

As regards the charge, the appellant said that it was defective because the evidence tendered did not tally with the particulars of the charge. In particular, the charge sheet cited the scene of crime as KAHAWA WEST, but **PW 4** said that the robbery was at KAMAE KIWANJA ROAD.

Secondly, the charge sheet cited the use of one gun, but the victims talked of 2 guns.

Thirdly, the charge sheet cited the loss of a mobile phone, but the complainant did not talk about losing a phone.

Fourthly, the serial number on the pistol which was exhibited in court was different from the one cited in the charge sheet.

Finally, the inconsistencies cited by the appellant include;

- (a) The difference in the Force Number of the police officer who handed over the firearm to the Ballistics Expert; from the officer who testified in court, alleging to be the one who had done so.**
- (b) PW 6 said that the appellant was escorted to the police station before 10.00a.m; yet PW 3 and PW 4 said that the appellant was arrested at 12.00noon.**
- (c) PW 3 said that the appellant was collected by the OCS, Kiamumbi Police Station; but PW 6 said that the appellant was escorted to that police station by APs.**

Having re-evaluated all the evidence on record, we note that the incident took place on 3<sup>rd</sup> May 2007, at about 9.00a.m. Clearly therefore, the robbery took place in broad daylight.

At the time, **PW 1** was driving from his house at Kiwanja, which is located behind the Kenyatta University. He was accompanied by his wife (**PW 2**).

He was driving along a dirt road, leading to Thika Road.

After crossing a railway line, and when **PW 1** reached a sharp corner, he saw one man standing in the middle of the road, pointing a gun at **PW 1**.

**PW 1** stopped, and that man marshalled him onto the rear seat of the car. Meanwhile, another gun-man appeared and took over the driving of **PW 1**'s car.

**PW 1** and **PW 2** were robbed of cash and a mobile phone.

Thereafter, the vehicle was driven to a matatu stage at Kahawa Wendani, where the robbers

alighted. They ordered **PW 1** and **PW 2** to proceed with their journey.

According to **PW 1**, he was so confused that he did not immediately go to report the incident. Instead, he drove all the way upto Kapsokwony in Mt Elgon region.

Eleven (11) days after the incident, **PW 1** was back in Nairobi, and was taking his car to Kahawa West, for repairs.

He saw the 2 persons who had robbed them, and he then reported to the APs at the Kahawa West Chief's Camp.

2 of the officers joined **PW 1** in his vehicle, and he drove back to the area where he had seen the suspects. He then pointed out the suspects to the APs, who trailed them on foot. Later, the APs arrested the appellant, but his colleague escaped.

When the appellant was searched, a pistol was recovered.

The APs then called the police, who went and collected the appellant from the Chief's Camp.

**PW 2** corroborated the evidence of her husband (**PW 1**). She confirmed that the robbers had 2 guns.

Both **PW 1** and **PW 2** testified that they had identified the pistol which was recovered from the appellant.

**PW 3** is an Administration Police Officer. On 14<sup>th</sup> May 2007 he was at the Kahawa West AP Post, when **PW 1** reported having seen the 2 men who had robbed him and **PW 2** on 3<sup>rd</sup> May 2007.

He arrested the appellant and recovered from him, a pistol and a magazine loaded with 3 rounds of ammunition.

**PW 3** then called the OCS of Kiamumbi Police Station to collect the suspect. He handed over the suspect and the exhibits.

**PW 4** was another Administration Police Officer. He was with **PW 3** when **PW 3** arrested the appellant.

He said that it is the OCS Kiamumbi Police Station who escorted the appellant to the police station, from the Chief's Camp.

**PW 5**, a Firearm Ballistics Expert, received and tested a US Colt revolver 45. He found that it was a firearm capable of being fired.

The said revolver bore the **Serial Number 153936**.

He also verified that the 3 rounds of ammunition were live; in other words, they were capable of being fired.

**PW 6** was attached to the Kiambu Police Station when the appellant was taken there, under escort, on 14<sup>th</sup> May 2007.

**PW 6** said that it was **PW 4** and Cpl. Muho who escorted the appellant to the police station.

From the foregoing, it is clear that the firearm cited in count 3 was not the same one which the Ballistics Expert examined. The charge sheet says that the appellant was arrested with a **US Army Colt Serial No. 304334**, whereas the Ballistics Expert examined a **revolver Serial No. 153936**.

Those serial numbers are completely different. They cannot possibly be referring to the same gun.

As the ammunition that **PW 5** tested was from a gun other than the one that the appellant was in possession of, the said ammunition cannot be same as those in the Colt Serial Number 304334.

In effect, the evidence relating to counts 3 and 4 did not support the charge.

Meanwhile, as regards other issues raised by the appellant, we note that, by his own admission, **PW 1** was confused. As a consequence, he did not report the incident until 11 days after the incident.

His said confusion led to him not even seeking assistance at the matatu stage where the robbers handed back the vehicle to him.

Whereas we note that **PW 1** insisted that he had seen the two robbers clearly during the robbery, the extent to which **PW 1** was confused cannot allow us to conclude that the identification was so positive that there was no room for a mistake.

Had we arrived at a different conclusion, we would have held that **PW 1** need not have described the robbers to **PW 3** and **PW 4**, because he led those 2 Administration Police Officers immediately to where the alleged robbers had just been seen by him.

On the part of **PW 2**, she was not present when the appellant was arrested. Consequently, the police ought to have conducted an Identification Parade, to enable them and the court verify whether or not the appellant had been identified by **PW 2**. Regrettably, no such parade was conducted. Therefore, we shall never know for certain whether or not **PW 2** did identify the appellant positively, during the robbery.

The question as to whether the appellant was escorted to the Police Station by the OCS personally, or if he was escorted by one Administration officer and one regular police officer, is not, of itself, significant.

But that discrepancy in evidence, taken together with the other discrepancies do add up to a point that we find that it would be unsafe to uphold the conviction.

Accordingly, we allow the appeal. The conviction is quashed and the sentences are set aside. We order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

**Dated, Signed and Delivered at Nairobi, this 14<sup>th</sup> day of February, 2012**

.....  
**FRED A. OCHIENG**  
**JUDGE**

.....  
**L.A. ACHODE**  
**JUDGE**