REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

CRIMINAL APPEAL 298 & 299 OF 2008

DENIEL MAKUMI NYORO.....1ST APPELLANT

PAUL THUO MBURU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No.2709 of 2005 of the Chief Magistrate's Court

at Nairobi by T.N. Ngugi (Mrs.) –Senior Principal Magistrate)

J U D G M E N T

The appellants, **DANIEL MAKUMI NYORO** and **PAUL THUO MBURU** were convicted of 4 counts each, as follows;

(a) Robbery with violence **contrary to section 296 (2) of the Penal Code.** In that respect, they are said to have robbed the complainant, CARRIE NJERI WAITHUMA, of her motor vehicle, make TOYOTA STATION WAGON registration Number KAG 564A. They also robbed her of a pair of optical glasses; a Quartz wrist-watch; one flask; one umbrella; 20 cassette tapes; one cardigan; and cash 1,500/-.

That incident took place on 6th July 2001; along Muhuri Road, Kikuyu in Kiambu District.

(b) Preparation to commit a felony **contrary to section 308(1) of the Penal Code.** The particulars were that on 17th July 2001, at Kirasha Village, Lari in Kiambu District, jointly with another person who was not before the court, the appellants were found armed with dangerous weapons, namely pistols, an indication that they were so armed with an intention to commit a felony, namely robbery with violence.

(c) Being in Possession of firearms without Firearms Certificate. They were said to have had 3 pistols, make Baretta, body number 1257; Baretta, body number D36809; and Helwan body number A70VA.

(d) Being in Possession of Ammunition without firearms Certificate. They are said to have had 4 rounds of 7.65mm calibre and 8 rounds of 9mm calibre.

The offences in counts 3 and 4 were said to have been committed on 17th July 2001, at Kirasha Village, Lari. In other words, when the appellants were said to have made preparations to commit a felony, they had possession of the 3 pistols.

After conviction, the appellants were each sentenced to death, for the offence of Robbery with Violence.

For the offence of preparation to commit a felony, the appellants were each jailed for 4 years.

And for the offences of being in possession of firearms, and of ammunition, respectively, each appellant was jailed for 7 years.

However, the learned trial magistrate ordered the sentences of imprisonment to be held in abeyance.

The appellants have appealed to this court, challenging both their convictions and sentences.

At the hearing of the appeal, Mr. Oguk advocate represented the 1st appellant, whilst the 2nd appellant represented himself.

Each of the appellants raised serious concerns about their alleged identification. They pointed out that the complainant did not, in her first report, describe to the police, the persons who had allegedly robbed her.

In any event, the circumstances prevailing at the time of the robbery, were said to be anything but conducive for positive identification. The complainant, who was driving, was suddenly blocked by another vehicle. The persons in that other vehicle were armed with pistols.

They forced the complainant onto the rear seat of her own vehicle, and then drove around with her, for a considerable length of time. The complainant said that she was in the same vehicle with the robbers for about 3 hours.

During that time, although she felt threatened because of the guns which the robbers had, the complainant testified that she did identify the robbers positively.

And although she did not give to the police any description of the robbers, the complainant testified that 2 weeks after the incident, she saw a photograph in the “Daily Nation” newspaper, showing 2 of the persons who had robbed her. She promptly informed the police that those persons in the photograph are the ones who had robbed her.

The photograph had, apparently, been taken by a pressman, whose identity was not disclosed to the court.

When the police proposed to conduct an Identification parade for the 1st appellant, it is said that the appellant declined. His reason for declining was that his photo was already in the newspapers.

The appellants also submitted that the vehicle allegedly stolen from the complainant **(PW 1)** was never positively identified.

It was not clear what the exact make of the vehicle was. And the crack which **PW 1** relied upon to identify the vehicle as hers, was not visible in the photographs which were exhibited in court.

The issue of the vehicle’s identity was significant because when it was recovered, the vehicle did not have its registration plate, and it had been vandalized. That is why **PW 1** was only able to identify it from the scratch.

Meanwhile, as regards the firearms and ammunition, the appellants submitted that the same had no connection with them. That submission is founded upon the fact that when the guns and ammunition were recovered, the information was recorded in the OB; and the OB shows that those who were found in

possession thereof were persons other than the appellants.

In any event, the appellants pointed out that one of the pistols allegedly recovered from them, had been thrown into a bush by **PW 4**. In effect, the said gun did not fall into the hands of the persons who attempted to rob **PW 4**. And because **PW 4** testified that the robbers drove-off immediately thereafter, the appellants submitted that the gun cannot therefore have been in their hands even assuming that they were the persons who tried to rob **PW 4**.

The circumstances in which the appellants were arrested were also an issue of concern.The appellants submitted that there were inconsistencies in the evidence about how they were arrested.

Finally, the trial court was faulted for failing to give due consideration to the alibi defences which were put forward by the appellants.

In answer to the appeal, Mr. Mulati, learned state counsel, submitted that **PW 1** identified the appellants positively, during the 3 hours when she was forced to remain in their company, as they drove her around, in her car, after car-jacking her.

The respondent also pointed out that there is no real distinction between a Toyota Station Wagon (as cited in the charge sheet), and a Toyota Corolla as seen in the photograph of the vehicle which the complainant identified as the vehicle that she had been robbed of.

As regards the appellants' defences, the respondent described the same as an after-thought.

On the question of the mode of arrest of the appellants, this court was told that the appellants were arrested when the police stopped the motor vehicle KXE 030, a Peugeot Saloon. The police stopped it because they had received radio communication that it had been stolen.

When the police wanted to search the vehicle, one of the 3 occupants of the said vehicle resisted. He drew a gun and fired at **PW 6**. As fate would have it, the bullet missed **PW 6**, who quickly responded by shooting dead, the person who had just tried to kill him.

As that commotion was going on, the other 2 occupants of the vehicle fled into a maize shamba nearby. But they were pursued and arrested.

Thereafter, the vehicle was searched, and the police recovered firearms and ammunition.

Being the first appellate court, we have re-evaluated all the evidence on record. We have drawn our own conclusions, whilst bearing in mind the fact that we did not observe the witnesses when they testified.

The first issue we wish to address concerns the assertion by the appellants, that the complainant made it clear that she was not robbed of her vehicle.

That issue arose from an answer given by **PW 1**, at the tail-end of her cross-examination by the 1st appellant. The record reads as follows;

> ***"It's true that I was nearly robbed of my car."***

We perused the original hand-written record and ascertained that the typed record has a typographical error. The answer, in the original hand-written record reads as follows;

> ***"Its true that I was really robbed of my car."***

PW 1 said that she was able to identify her attackers because she had been with them for 3 hours. However, she did not state so, in her statement.

PW 1 explained that she was not asked either about the description of the robbers, or whether or not she could identify them if she were to see them.

PW 2, JOHN MWAITHA GATUKU, was a businessman. He operated a business called "Muthire General Tyres", at Githunguri.

On 15th June 2001, **PW 2** changed for the 1st appellant, the tyres and reams of his vehicle. The 1st appellant's vehicle was a Fiat.

On that date, **PW 2** changed 3 tyres and reams for the vehicle, whose registration started with KNS. **PW 2** could not recall the rest of the registration.

The tyres were changed from a Toyota to the Fiat.

PW 2 then sold the old reams at Kshs.250/- each, and the money was given to the 1st appellant.

PW 3, JONATHAN NGUGI NDUMBU sold 3 reams, which he was given by John Waweru. He sold them at Kshs.250/- each, and then gave the money to John Waweru.

PW 4, JOHN SENEWA KAURAI, was a businessman who lived in Kiserian, Ngong.

On 16th July 2001, he was driving his vehicle, a Peugeot 305, Registration Number KXE 030, when his vehicle was suddenly blocked by another vehicle. One young man ordered **PW 4** to return to his car, pointing a gun at him.

As **PW 4** struggled with the young man, another man entered **PW 4's** car, whilst a third man started searching him. **PW 4** gave out his Erickson phone and Kshs.6,000/-.

PW 4 had a gun in his jacket. When the thug searching him felt the gun, he ordered his accomplice to shoot **PW 4**. Luckily, **PW 4** grabbed the hand of the thug holding the gun.

Meanwhile, **PW 4** removed his own gun, which he threw into the bush.

The thugs then drove-off with PW 4's vehicle.

2 days later, **PW 4** saw his vehicle on the television. The story on the television was that the vehicle was recovered in Kiambu. **PW 4** went to Kiambu Police Station where he identified his car.

PW 4 testified that he identified the 2 appellants as part of the gang that robbed him.

When asked about the time when the incident happened, **PW 4** said it was 8.00p.m. But he also added that there was electricity light from the town.

When the appellant was shown the statement he had recorded, he confirmed that he did not describe the appellants to the police.

PW 4 also said that he had been robbed about 500 metres from Ngong Town.

PW 5, WILLIAM GICHULI GUNJIRI was a police officer. He received 3 pistols from the police officers who went to the scene where the appellants were arrested. The arrest was on 17th July 2001.

On the next day **PW 5** went with the 2 appellants to their respective houses, where he conducted search. At the house of the 1st appellant, the police recovered **PW 1's** vehicle.

The investigations conducted by **PW 5** also showed that the appellants had robbed **PW 1** of her

vehicle. When **PW 1's** vehicle was traced, at the Kiambu Police Station, it had no tyres.

According to **PW 5**, the tyres from **PW 1's** vehicle had been removed by SAITOTI (a businessman who sold vehicle tyres). Saitoti then fixed those tyres on the 1st appellant's vehicle Registration Number KNS 487.

The 1st appellant's taxi was traced, and the tyres removed, as the police believed that the tyres were from **PW 1's** vehicle.

Curiously, however, when **PW 1** was shown the tyres which the prosecution had brought to court, she said that those tyres were not hers.

PW 6, ALEX MUREITHI, was a police officer. On 17th July 2001, he was on foot-patrol along Thika fly-over, at Kamae, when a vehicle Registration KXE 030 was spotted. That vehicle had been reported stolen.

The police stopped the vehicle, and ordered the 3 occupants out. The police then ordered the driver to open the boot.

When **PW 6** was about to search the boot, one of the 3 men from the car, shot at him. When the bullet missed **PW 6**, the officer responded by shooting the man dead.

The other 2 men ran into a maize plantation, but they were pursued and arrested.

According to **PW 6**, the 1st appellant was seated in the vehicle, on the back seat, whilst the 2nd appellant had been seated in the driver's seat, driving.

During cross-examination, **PW 6** denied that the 1st appellant was only arrested because he protested at the act of the police shooting dead, a man who had come from the vehicle KXE 030, and who had surrendered.

PW 6 also denied that the 1st appellant had been driving his own vehicle, registration KNS 487, a Fiat.

And when cross-examined by the 2nd appellant, **PW 6** said that when that appellant was driving, he was wearing a long white robe, like those normally worn by Muslims.

However, when the 2nd appellant was arrested, he had discarded the said robe. But the police did not recover the robe from the maize plantation.

PW 6 denied the 2nd appellant's contention that he (the said 2nd appellant) was arrested in a shamba where he was buying Kales (sukuma wiki).

PW 7, INSPECTOR CHARLES MARANGU, testified that the 2nd appellant declined to participate in an Identification parade because he had been photographed before the parade as conducted. The photo in issue had been taken by press people.

PW 8, PC RICHARD CHESOI KOMEN, was attached to the Scenes-of-Crime section, at the CID Headquarters.

On 17th July 2001, at about 3.30p.m, he took photos at Kamae area, where the vehicle, Reg. KXE 030 was recovered.

[For the record, although the typed record of proceedings reads "KXE 630"; the hand-written proceedings show that the registration was "KXE 030"]

PW 8 did not take photos of the alleged suspects, at the scene.

PW 9, MBOGO DINALD MBOGO, was a forensic Ballistics Expert. He examined 3 firearms, as follows;

(a) Eiber Pistol No. 1257

(b) Hewan Pistol

(c) Baretta Pistol No. D.36809

All of them were in good general and mechanical condition, and were capable of being fired.

PW 10, GEORGE AMINGA, used to work at the CID headquarters. He photographed a white Toyota Corolla.

After **PW 10** testified, the prosecution closed its case.

And when the appellants were put on their defences, they each gave sworn testimonies. Each of them gave an alibi.

Having given due consideration to the said defences, we find that the same were not mere after-thoughts as the respondent submitted before us. The defences were in line with the questions which the appellants first raised when they were cross-examining **PW 6**.

PW 6 was cross-examined on 2nd May 2007. Thereafter, it was not until 28th January 2008 when the 1st appellant gave his defence.

And the 2nd appellant gave his defence on 26th February 2008.

Each of the appellants also called witnesses who corroborated their respective alibi.

The 1st appellant was allegedly hired at about 3.00p.m. on 6th July 2001. He drove his taxi to Gathanji village, near Githunguri. His customer was going to discuss with his in-laws about his wife having run back to her parents.

The 1st appellant waited for the customer, within the home, until about 5.00p.m, when the customer's brothers-in-law became unruly, due to drunkenness. It is then that the 1st appellant drove back to Githunguri Township.

In effect, if the 1st appellant was speaking the truth, he cannot have been at Ngong, where **PW 1** was car-jacked.

But he was definitely at Kamae area when he was arrested! He only says that the reason for his arrest was his loud protestations to the police, for shooting dead a person who had surrendered.

On his part, the 2nd appellant was also arrested at the place where the police recovered the vehicle KXE 030. But he says that he was only in that area as an innocent citizen, who was buying sukuma wiki (kales) from the shamba where he was found.

Were the appellants' victims of mistaken identity, as they allege, or are they simply trying to escape from justice by spinning yarns?

The law states that when an accused person puts forward an alibi as his defence, he does not need to prove it. The burden of proof rests on the prosecution to disprove the alibi.

In this case, the prosecution had a considerable amount of time between the time when the appellants first made known their line of defence, and the time when they eventually testified. If the defences were a sham, the prosecution should have been able to disprove the same. However, the prosecution does not appear to have made any serious effort to disprove the alibi.

Secondly, because the complainant denied ownership of the tyres allegedly removed from her car and then fitted on the 1st appellant's vehicle; and also because, in any event, the said tyres were actually fitted on the 1st appellant's vehicle about 3 weeks before **PW 1** was robbed of her car, **PW 2's** evidence actually dented the prosecution case.

It is not clear whether the 1st appellant declined to participate in the Identification Parade, or it was the officer who was supposed to conduct the parade who decided against proceeding with it.

However, it is clear that **PW 1** had not either described her attackers in her first report to the police, or even told the police that she could identify them if she saw them again.

She testified that she identified them when she saw a photograph in the newspaper. The said photo may have helped **PW 1** to recall what she had seen earlier.

But once the photographs of the suspects were published in the local daily newspapers, which were seen by the alleged eye-witness, an Identification parade would not have been useful. We so find because even if the eye-witness then picked out the suspects, the court could not be sure whether it was because the witness had seen the suspects photo in the newspaper, or if the identification was because the witness had definitely seen the suspect when the offence was being committed.

We appreciate that newspapers have an important role to play in providing us with information. In that regard, newspapers will sometimes report about suspects who had been arrested after they had allegedly committed criminal offences.

If the newspaper carried the photographs of such suspects, it may later give rise to possible objections to Identification Parades for such suspects.

It may be prudent for newspapers and the electronic media to always remain alert and sensitive to reporting which may later jeopardize a prosecution, or may otherwise prejudice a suspect who was later charged with a criminal offence.

The views we express herein are not limited to the publication of the photographs or pictures of suspects. The views extend to what is commonly termed "Investigative journalism", which sometimes provides the public with details of information gleaned from the investigations being conducted by law enforcement agencies.

Another issue relates to the identity of the vehicle which was stolen from **PW 1**. In the charge sheet, it is said to be a 'TOYOTA STATION WAGON".

This court takes judicial notice of the fact that the car-makers "Toyota" make numerous models under their stable. In other words, Toyota is not synonymous with "Toyota Corolla". There are other models of Toyota, such as "Corona", "Camry", and "Land Cruiser", to name a few.

Of course, when the make of the car is combined with the registration number thereof, that would most probably provide sufficient particulars to enable everybody interested, to pick out a particular vehicle.

But in this case, the stolen vehicle was vandalized, and its registration plate removed. The complainant was only able to identify the shell as that of her car because it had a crack. But the photos which were exhibited in court did not show the crack which **PW 1** had used to identify the car. Therefore, the trial court never verified the identity of the vehicle.

The prosecution could easily have proved that the vehicle was the one cited in the charge sheet by exhibiting the log-book, and linking the particulars of the engine and chassis to those on the shell that was recovered.

As regards the firearms, **PW 4** said that he threw his pistol into the bush. He then pushed the thug into their car, and the vehicle drove-off, leaving **PW 4** lying on the ground. There was no evidence that the robbers either retrieved the gun before they drove-off, or that they returned to the scene to collect the gun.

Therefore, there is no explanation at all about how **PW 4's** gun allegedly ended up in the hands of the appellants, even if we were to assume that the appellants were the persons who had robbed **PW 4** of his vehicle.

Furthermore, the first report, in the OB, after the guns were recovered showed that the appellants' were not named as some of the 3 people from whom the guns were recovered.

One of the 3 persons was shot dead at the scene. The other 2 were named as **JAMES GICHERI MWANGI** and **JAMES MBURU MWANGI**. Therefore, it would appear that the OB supports the appellants' defences.

In the circumstances, we find merit in the appeal. We quash the convictions and set aside the sentences. We order that the appellants be set at liberty forthwith unless they are or either of them is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi this 30th day of April, 2012.

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FRED A. OCHIENG **L.A. ACHODE**

JUDGE **JUDGE**