



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)
Criminal Appeal 41 of 2008

JAMES KAMAU
WAWERU.....**APPELLANT**

VERSUS

REPUBLIC.....**RESPONDENT**

*(From the original conviction and sentence in Criminal Case No.8042 of 2004 of the
Chief Magistrate's Court at Thika by F. Nyakundi – Senior Resident Magistrate)*

J U D G M E N T

JAMES KAMAU WAWERU, the appellant, was convicted on 2 counts of Robbery with violence; 1 count of being in possession of a firearm without a firearm certificate; and 1 count of being in possession of ammunition without a firearm certificate.

For the offence of Robbery with violence, the appellant was sentenced to death; whilst for being in possession of a firearm and of ammunition, respectively, the appellant was jailed for 10 years.

In his appeal to the High Court, the appellant has raised two issues, namely;

- (a) There was no positive identification at the scene of crime. And even the Identification parade at which he was picked out was a nullity: it did not comply with the applicable rules.***
- (b) The prosecution did not prove the case against the appellant beyond any reasonable doubt.***

When canvassing his appeal, the appellant submitted that the police officer who conducted the parade should have taken steps to ensure that the scar on his ear was either concealed or not apparent.

Secondly, the appellant contended that it is normally not possible to get from the police cells persons of similar sizes, height and age, who would meet the requirements of a properly-conducted Identification Parade.

Thirdly, the officer conducting the parade is accused of having led the identifying witness to conclude that the suspect was definitely amongst the members of the parade.

The fourth issue raised by the appellant stems from the fact that he only has one neck. He therefore argued that it was wrong for the trial court to have convicted him for more than one capital offence.

It was his submission that as soon as the trial court had convicted him on one capital offence, the court ought not to have convicted him for the other offences.

The applicant also pointed out that the prosecution failed to lead evidence to prove that prior to committing the offences in question herein, he had been in prison custody, following conviction in an earlier case.

The appellant told this court that he had not been arrested inside the prison premises, in relation to the matters in issue in this appeal.

Ms Mwanza, learned state counsel, responded to the appeal by opposing it.

The respondent emphasized that the complainant identified his assailant during the robbery, as the incident took place at 11.30 a.m.

When reporting the incident, the complainant indicated that he could identify some of those who had attacked him.

Thereafter, the complainant picked out the appellant from a parade.

PW 3 arrested the appellant when the appellant was in possession of the gun which was stolen from **PW 1**, (the complainant).

PW 2 was with **PW 1** during the robbery. He too was robbed. And later, he too picked out the appellant from an Identification parade.

The respondent therefore submitted that the conviction and sentences were well-founded.

As a first appellate court, we have re-evaluated all the evidence on record. We have also given due consideration to all the submissions made before us.

First, it is notable that the offences were said to have been committed on 25th March 2004. The scene of crime was within the Industrial Area in Thika.

The particulars of the charge were that the appellant, jointly with other persons who were not before the court, robbed both **PW 1** and **PW 2**. At the time of the incident, the robbers are said to have threatened to use actual violence on the 2 complainants.

PW 1, BUNDI BARUTHI, was the complainant on Count 1. He said that he was talking to **EDWARD RICHU MWAURA (PW 2)** outside the gate to Metal Box Factory, Thika. The time was about 11.30a.m.

About 5 to 6 people were walking on the road, close to where the two men were talking. As many people were passing along that road, **PW 1** and **PW 2** did not take any particular interest in those men, until one of the said men suddenly stood behind **PW 1** and pointed a gun at his head.

PW 1 turned around to face that man. At that point, the other five men surrounded **PW 1** and **PW 2**.

The men ransacked the pockets of **PW 1** and **PW 2**, stealing money and a loaded pistol from **PW 1**; and money together with a mobile phone from **PW 2**.

After robbing the two complainants, the robbers went away, walking slowly.

Thereafter, the complainants reported the incident at the C.I.D. offices in Thika. Both **PW 1** and **PW 2**

told the police that they could identify 2 to 3 amongst those persons who had robbed them.

When **PW 1** was asked how he was able to identify the appellant, he said that the appellant had a twisted left ear and a mark on his face.

On his part, **PW 2** said that during the robbery, he noted that the appellant had a scar on his face and another on his left ear.

After the appellant was arrested, **PW 1** and **PW 2** were able to pick him out in Identification Parades.

PW 1 was also able to identify his pistol, by its serial number. The said pistol was said to have been recovered from the appellant when he was arrested.

The person who arrested the appellant is **CO II JULIUS NDOLO (PW 3)**. At the material time **PW 3** was attached to the Thika Prison. On 18th August 2004, at about 3.00p.m, **PW 3** was on duty. His duties included security at the prison and supervision of staff who were his juniors.

As he was standing near the Prison Dispensary, **PW 3** saw the accused as he was being allowed to enter through the prison gates.

PW 3 had known the appellant before that date because the appellant had previously been imprisoned at the Thika Prison.

PW 3 noted that something was protruding from the left side of the appellant's waist. The thing looked like a weapon.

When the appellant was handing over some items to the prisoner whom he had come to visit, **PW 3** got hold of him and removed the suspicious looking item. It turned out to be a pistol. Therefore, **PW 3** promptly arrested the appellant.

A search on the appellant yielded a police "Head badge". The appellant failed to explain to **PW 3** his reasons for being in possession of the said police badge.

PW 3 called the OCS, Thika Police Station, and handed over the appellant to him. **PW 3** also handed over the loaded pistol and the police badge.

PW 4, SUPT. JOSEPH MWENJE, corroborated the testimony of **PW 3**. He re-arrested the appellant from **PW 3**, and escorted him to Thika Police Station.

Later, the appellant led **PW 5** to his (the appellant's) kiosk which was located within the Jua Kali area. At the kiosk, **PW 5** recovered a "Smoke Police Jacket", which formed the basis of the charge in count 6.

PW 5, PC DAVID NJOGU, was on duty at the C.I.D. office in Thika, when **PW 1** and **PW 2** reported about the robbery incidents they had gone through.

It was the testimony of **PW 5** that both **PW 1** and **PW 2** told him that they could identify at least one of the robbers. They said that the robber had a cut/scar on his left ear.

Having received that information, **PW 5** circulated it to other police officers.

Later, after the appellant was arrested **PW 5** called **PW 1** and **PW 2** to the station, where **PW 1** identified the pistol which had been recovered from the appellant.

PW 5 also testified that after the appellant had been identified by the complainants at two Identification parades, he (**PW 5**) verified that the appellant's features matched those that the complainants had given to him when they first reported the incident.

PW 6, JOHNSTONE MUSYOKI MUNGELA, is a firearms examiner. He testified that the pistol he examined was a firearm which was serviceable and capable of firing ammunition. He also verified that the ammunition inside the firearm were live ammunition.

PW 7, STANLEY NASUBO, was the Deputy DCIO, Thika Police Station.

On 1st September 2004, he conducted an Identification Parade at which the appellant was identified by **PW 2**. The appellant signed the parade form acknowledging that he was satisfied with the manner in which it was conducted.

When the appellant was placed on his defence, he gave an unsworn testimony. He said that he was arrested on 16th February 2004, outside Maathai Supermarket, Thika.

He said that the police officer who arrested him then took him into the Thika Prison, where **PW 3** questioned him at length.

According to the appellant, **PW 3** conducted a search and then said that he had recovered a firearm on the appellant. But the appellant denied having had any firearm.

Having re-evaluated all the evidence on record, we note that although the appellant asserted in his defence, that he did not have any firearm, when **PW 3** gave evidence, the appellant declined to ask him any questions during cross-examination. That implies, and we so hold, that the defence put forward by the appellant was nothing but an afterthought.

As regards the identification of the appellant, we note that **PW 1** made it abundantly clear that it was easy to identify someone, especially if the person has marks. In this case, the appellant had a mark on his face and on his left ear.

Secondly, the incident took place in broad daylight, at about 11.00a.m.

The learned trial magistrate noted, on the record, that the appellant had a scar on his left ear.

Both **PW 1** and **PW 2** had described the appellant in their first report to **PW 5**.

There is nothing on record to show that either the physical mark on the appellant was made more apparent or that the parade officer did anything which drew attention to the appellant's features. We believe that that is why even the appellant appended his signature to the parade form, signifying his satisfaction with the parade.

In the result, we are satisfied that the evidence adduced against the appellant was overwhelming. The evidence proved beyond any reasonable doubt that the appellant robbed **PW 1** and **PW 2**, and also that the appellant was in possession of a firearm and ammunition without the requisite Firearm Certificate. We find no merit in the appeal. It is therefore dismissed. We uphold both the conviction and the sentences, save for the death sentence on the second count of Robbery with violence. The reason for so doing is that every person has only one life. Therefore, if the death sentence on count 1 was executed, there could not be another execution of the death sentence on count 2.

In the same breadth, once the death penalty is given effect, it would not be possible to have the appellant serve the custodial sentence at all, leave alone concurrently as was ordered by the learned trial magistrate. Therefore, the custodial sentences shall remain suspended.

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

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FRED A. OCHIENG

JUDGE

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LYDIA A. ACHODE

JUDGE