



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 357 of 2007**

**EPHANTUS MUTAHI KAREGI ..... APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Ephantus Mutahi alias Nyamu the appellant herein and Elijah Mithamo Mutahi alias Kunyiha were jointly tried on a charge of robbery with violence contrary to section 296(2) of the Penal Code. In the end the appellant was convicted and sentenced to suffer death while his co-accused was acquitted. The appellant is now before this court seeking to upset both the conviction and sentence on appeal.

On appeal the appellant put forward the following grounds in his petition of appeal.

- 1. That the learned trial magistrate erred in both law and facts in convicting I the appellant (sic) that upon any my arrest that I was being (sic) arrested in possession of the firearm without him considering that I was never being in possession of any (sic) weapon at all and all the same the prosecution side failed to prove this.*
- 2. That further the learned trial magistrate erred in both law and facts when he convicted I the appellant in this case without him considering that the charge sheet in this case was defective as the weapon indicated (pistol) was never disclosed if the same was dangerous or offensive weapon.*
- 3. That learned trial magistrate finally erred in law and facts when he rejected my defence without him not explaining proper reasons for its rejection and this violated the law provision under sec. 169(1) of the CPC.*

When the appeal came up for hearing, the appellant was granted leave to file and rely on written submissions. Miss Ngalyuka, learned State Counsel opposed the appeal on the basis that the circumstantial evidence irresistibly linked the appellant with the robbery. The appellant was knocked down by a vehicle driven by P.W.10 whereupon a pistol was recovered a few metres from where the appellant lay with a fractured leg. The spent cartridges which were found at the scene of robbery matched with those recovered from the pistol.

We wish to set out in brief the case that was before the trial court. The prosecution's case was supported by the evidence of 11 witnesses. In the nights of 24/25 February 2004, Francis Njuki Ngatia, deceased arrived home at about midnight. The deceased flashed his wife, Rosemary Nyambura Njuki (P.W.2) to indicate to her to open the gate. As she went to open the gate P.W.2 said she noticed her husband drive away as gun shots rent the air. P.W.2 said she heard somebody say 'piga risasi' meaning "fire the bullet". she screamed as she retreated into her house where she telephoned the police. The police shortly arrived and upon checking on the car, they found the deceased lying unconscious. The deceased was rushed to hospital whereupon he was pronounced dead on arrival. CPL. Mugo (P.W.5) recovered 3 spent cartridges from the scene which were sent to the ballistic expert in Nairobi for analysis. P.c. Daniel Njuguna (P.W. 6) received the ballistic expert's report which indicated that the firearm used to kill Francis Ngatia had been used in other robberies within Ihwagi, Kiamachimbi, Karatina, Karindundu,

Othaya and Mukurweini. The firearm had been recovered following a robbery in Mukurweini in which the appellant had been arrested as a suspect. The firearm, a pistol make Ceska No. G0661 had been stolen from the house of David Ole Chege (P.W.1) on the nights of 29<sup>th</sup> and 30<sup>th</sup> March 2003. On the basis of this information P.W.6 charged the appellant with the offence of murder. P.W.6 told the trial court that P.W.2 had spotted the appellant's co-accused while he was being escorted to Nyeri law courts on another case to be the short man whom she saw during the robbery on the fateful night. The trial magistrate formed the opinion that the appellant had been found in possession of the Ceska Pistol which was traced to the ambush and death of Francis Ngatia. She also found that the spent cartridges recovered from the scene of crime were of the Ceska pistol. David Wachira Magacha (P.W.10) told the trial court that on 4/6/2004 he was ambushed by robbers while he was entering his gate at about 10.30 p.m. who robbed him of cash and mobile phones. He said he reversed his car in pursuit of the robbers who had fled. In the process P.W.10, said, he managed to knock down the appellant while his accomplice escaped. P.W.10 went to report at Mukurweini police station who in turn rushed to the scene of crime. The police found that appellant at the road with broken legs 30 metres away from the scene of the accident. A pistol was recovered at the scene.

When the appellant was placed on his defence he claimed he was framed up by P.W.10 who had knocked him down while he was walking back home from the nearby trading centre. He said P.W.10 wanted to avoid taking responsibility of the accident. He denied committing the robbery that led to the death of Francis Njuki Ngatia.

Having given the brief history of the case that was before the trial court, we now wish to consider the appeal. The particulars of the charge are that on 24<sup>th</sup> February 2004 at Karogoto in Nyeri District within Central Province jointly with others not before court while armed with a pistol robbed Francis Njuki Ngatia of an unknown amount of money and immediately before or immediately after the time of such robbery killed the said Francis Njuki Ngatia. It is the submission of the appellant that there was no cogent evidence that the Ceska Pistol was found in his possession. The appellant also argued that his defence was unfairly rejected.

We have agonized over the issues raised on appeal. There is no doubt that the late Francis Njuki Ngatia was robbed and died as a result of gun shot wounds. There is also no dispute that this case heavily relies on circumstantial evidence. It is the submission of the state that the pistol was found at the scene of the accident where the appellant lay injured. It is said the cartridges recovered at the scene where the late Francis Njuki Ngatia had been robbed and killed were those used in such a pistol. It is trite law that before a court can draw the inference of the accused's guilty from the circumstantial evidence it must be shown that there are no other co-existing circumstances which would weaken or destroy the inference. In this case we think the circumstantial evidence which connected the appellant with the robbery committed against the late Francis Njuki Ngatia, cannot sustain a conviction. First, it is possible that the spent cartridges which were recovered at the scene where the late Francis Njuki Ngatia was robbed could have been fired from another Ceska pistol other than the one recovered from the scene where the appellant was injured. Secondly, It is possible another person other than necessarily the appellant could have fired the spent cartridges.

In the final analysis we have come to the conclusion that the conviction cannot be sustained. Consequently the appeal is allowed. The conviction is quashed and the sentence set aside. The appellant is hereby set free forthwith unless lawfully held.

Dated and delivered this 13<sup>th</sup> day of January 2010.

**J.K. SERGON**  
**JUDGE**

**M.S.A. MAKHANDIA**  
**JUDGE**

In open court in the presence of Mr. Makura learned State Counsel and the appellant.

**J.K. SERGON**  
**JUDGE**

**M.S.A. MAKHANDIA**  
**JUDGE**